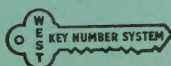


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SECOND SERIES

101 Cal.App.2d 140

PEOPLE v. ROCHIN.

Cr. 4452.

**District Court of Appeal, Second District,
Division 3, California.**

Dec. 12, 1950.

Rehearing Denied Dec. 22, 1950.

Hearing Denied Jan. 11, 1951.

See 225 P.2d 913.

Antonio Richard Rochin was convicted in the Superior Court of Los Angeles County, W. Turney Fox, J., for unlawful possession of morphine, and he appealed from the judgment of conviction and all orders and rulings of the court. The District Court of Appeal, Wood, J., held that morphine capsules illegally obtained from defendant's stomach were admissible.

Judgment of conviction and order denying motion for new trial affirmed, and purported appeal from all other orders dismissed.

1. Criminal law Ⓒ395

Cellophane wrapped capsules which contained morphine preparation and which were procured by conduct of deputy sheriffs in unlawfully breaking into and entering defendant's room and unlawfully assaulting and battering defendant and by conduct of a deputy sheriff and physician in unlawfully assaulting, battering, torturing and falsely imprisoning defendant at hospital and using pump to get capsules out of defendant's stomach were admissible in prosecution against defendant for unlawful possession of morphine preparation. Health and Safety Code, § 11500; Const. art. 1, §§ 1, 13, 19; U.S.C.A.Const. Amendments. 4, 14.

2. Criminal law Ⓒ394

Illegally obtained evidence is admissible in a criminal trial, but police officers and others are not thereby granted a license to indulge in lawless acts.

225 P.2d—1

Cal.Rep.225-226 P.2d—1

3. Assault and battery Ⓒ2

False Imprisonment Ⓒ2

Where deputy sheriffs unlawfully break into and enter a person's room and unlawfully assault and batter such person and one of the deputies and a physician unlawfully assault, batter, torture and falsely imprison such person at hospital and use pump to get morphine capsules out of such person's stomach, the remedy of such person for such conduct is an action for damages.

David C. Marcus, Los Angeles, for appellant.

William C. Ring, Los Angeles, as amicus curiae, on behalf of appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with violating section 11500 of the Health and Safety Code in that on July 1, 1949, he unlawfully had in his possession a preparation of morphine. In a trial without a jury he was convicted. He appeals from the judgment, all orders and rulings of the court.

On July 1, 1949, about 9 a. m., three deputy sheriffs entered defendant's bedroom after having forced the bedroom door open. They were not authorized by search warrant or at all to enter the room. Defendant and a Mrs. Hernandez were in the room. Two capsules, which were wrapped in cellophane, were on a small table therein. Jack Jones, one of the deputies, said to the defendant, "Whose stuff is this?" Defendant then grabbed the capsules and put them in his mouth. Jones testified that at that moment the three deputies jumped upon the defendant, grabbed him by the

throat, and began to squeeze his throat in an effort to eject the capsules from his mouth; that force was applied to his throat; that defendant "hollered a little bit"; that he (Jones) put his fingers in defendant's mouth; and they put handcuffs on defendant while he was in the room. Jones then took the defendant to the Angelus Emergency Hospital and into the operating room there. A doctor's assistant strapped the handcuffed defendant to the operating table. Dr. Mier, assumed by the officers to be a doctor of medicine, placed an empty pail by the defendant, placed "a tube down the defendant's throat," and released a white chemical solution into the tube and into defendant's stomach. The defendant vomited into the pail, and two capsules in cellophane floated in the pail. Jones took the capsules from the pail and delivered them to a chemist in the sheriff's office. The chemist testified that he examined the two capsules and shook what powdery substance that appeared to be within them into small amounts of chemical reagents that he was using to make the test; that the amount he shook out was very small and was not enough to weigh; that the amount was consumed in the analysis; that the substance which he shook out of the capsules was morphine or one of its close derivatives. The two capsules were shown to the chemist while he was a witness. He testified further that they appeared to be empty; there is a very small amount of very fine powdery residue in one of the capsules; there is a stain or residue of some sort in the other capsule; and the brownish powder in the capsules contains morphine.

Jones testified further that defendant said he had obtained these two capsules of heroin from a person on Sixth Street the night before the arrest, and that he had been using heroin for the past six months.

Defendant did not testify, but it was stipulated that if he were a witness he would testify that the two capsules were taken from him by use of a stomach pump and without his consent and against his will.

Appellant contends that the arrest, search, seizure and examination of defendant violated rights guaranteed to him by Amendments IV and XIV of the Constitution of the United States and by Article I, sections 1, 13, and 19 of the Constitution of California, and that the evidence procured thereby was inadmissible; and that the coercive stomach pumping of defendant to obtain evidence against him compelled him to be a witness against himself in violation of said Amendment XIV and said Article I, section 13. He argues that the decision in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, which was to the effect that illegally obtained evidence is admissible in a criminal trial in this state, should be overruled; and that the federal rule, which is to the effect that such evidence is not admissible, should prevail in the California courts.

[1] The questions herein, regarding the admissibility in California courts of illegally obtained evidence, have been determined adversely to appellant's contentions. *People v. Gonzales*, 20 Cal.2d 165, 169, 124 P. 2d 44; *People v. Kelley*, 22 Cal.2d 169, 173, 137 P.2d 1; *People v. Harmon*, 89 Cal.App. 2d 55, 58, 200 P.2d 32; *People v. Garcia*, 97 Cal.App.2d 733, 218 P.2d 837; *People v. One 1941 Mercury Sedan*, 74 Cal.App.2d 199, 202, 203, 168 P.2d 443; see *People v. Raffington*, 98 Cal.App.2d 455, 220 P.2d 967. In *People v. Gonzales*, supra, it was said, 20 Cal.2d at page 169, 124 P.2d at page 46: " * * * the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence." In *People v. Kelley*, supra, it was said, 22 Cal.2d at page 173, 137 P.2d at page 3: "It was concluded [in the *Gonzales* case] that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment." In *People v.*

One 1941 Mercury Sedan, supra, wherein marihuana was pumped from the stomach of an occupant of the automobile, it was said, 74 Cal.App.2d at pages 202 and 203, 168 P.2d at page 445: "Whatever our views may be as to the propriety of officers of the law using illegal means to enforce the law, the rule is now settled in this state, contrary to the rule prevailing in the federal courts and in some states, that where competent evidence is produced on the trial the courts will not permit an inquiry into its source or the means by which it was obtained. In other words, illegally obtained evidence is admissible on a criminal charge in this state." The contentions of appellant are not sustainable.

[2, 3] Although the statements made hereinabove are sufficient for the decision herein, it should be stated that the rules of evidence which we are following must not be regarded by police officers and others as a license to indulge in lawless acts. This court does not approve the conduct of deputy sheriff Jack Jones and deputies Smith and Shelton who were with him at defendant's home. Under the record here, they were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room. Under the record here, deputy Jack Jones and the alleged doctor of medicine, Mier, were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital. A remedy of defendant for such highhanded and reprehensible conduct is an action for damages. It would appear that the sheriff should review the qualifications of said deputies to be entrusted with the authority of public office. Also it would appear that the qualifications of said Mier as an ethical doctor of medicine should be reviewed.

The judgment, and the order denying defendant's motion for a new trial, are affirmed. The purported appeal from all other orders and rulings of the court is dismissed.

SHINN, P. J., concurs.

VALLEE, Justice.

I concur in everything said by Mr. Justice Wood. To me, the record in this case reveals a shocking series of violations of constitutional rights. I am in entire agreement with the views expressed by Mr. Justice Carter in his dissent in *People v. Gonzales*, 20 Cal.2d 165, 174, 124 P.2d 44. However, as a member of an intermediate reviewing court, I am bound by the decisions of the Supreme Court which, unfortunately, have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts. For that reason only, I concur in the judgment.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



101 Cal.App.2d 184

SEVIER v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N.

Civ. 14473.

District Court of Appeal, First District,
Division 2, California.

Dec. 18, 1950.

Helen Sevier, administratrix of the estate of Stanley Sevier, a missing person, brought proceedings against Bank of America National Trust and Savings Association, trustee for the estate of Ida Henderson Sevier, deceased, to recover money payable to the missing person under the terms of the trust. The Superior Court in and for the County of Alameda, Ralph E. Hoyt, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that the time limits fixed by the statute relating to the administration of the estates of missing persons were not unreasonable and that the statutory provision for notice was adequate.

Affirmed.

1. Absentees ⇐5

A state may provide for administration of estates of missing persons after proper

lapse of time, and for a final distribution which forecloses all rights of missing persons after allowing reasonable time to elapse after inception of proceedings. Probate Code, §§ 280-294.

2. Process ☞71

Power of state to resort to constructive service in judicial proceedings to settle fiduciary accounts does not depend upon whether proceeding is in rem or in personam, and courts have right to determine interest of all claimants, residents or non-residents, providing procedure accords full opportunity to appear and be heard. Probate Code, §§ 280-294.

3. Absentees ☞3

Under Probate Code sections relating to administration and distribution of estates of missing persons, provisions for final distribution and barring of missing person's rights by limitation after lapse of three years of administration, or after one year if missing person has been unheard of for 10 years, is not unreasonable. Probate Code, §§ 280-294.

4. Absentees ☞3

In Probate Code sections regarding administration of estates of missing persons and requiring publication of notice of hearing once each week for two months, first publication being at least three calendar months before date set for hearing and within twenty days after filing of petition, and for copies of notice to be sent by registered mail to heirs-at-law, next of kin, legatees and devisees and to last known address of missing person, provision for notice is adequate. Probate Code, §§ 280-294.

5. Constitutional law ☞189

In proceeding brought by administratrix for estate of missing person who was appointed in 1946 under statute adopted in 1935 which provided for administration of absentee's estate after person shall have been missing for seven years, statute could not be attacked as unconstitutionally retroactive, notwithstanding fact that absentee had disappeared in 1928, since it would be unnecessary to give statute retroactive ef-

fect to fully meet its terms. Probate Code, §§ 280-294.

6. Absentees ☞3

In proceedings brought by administratrix of estate of missing person against bank holding property in trust for missing person, bank could not object that statute providing for administration of estate of absentee made no express provision for protection of bank against claim of missing person should he appear, since delivery of money pursuant to judgment to administratrix appointed under valid statute would be complete defense to such claim. Probate Code, §§ 280-294.

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, Dreher, McCarthy & Erickson, San Francisco, for appellant.

Ray Grinstead, Sonoma, Athearn, Chandler, Hoffman & Angell, Philip H. Angell and Reginald G. Hearn, all of San Francisco, for respondent.

DOOLING, Justice.

This proceeding is concerned solely with the constitutionality of sections 280-294, Probate Code, providing a scheme for the administration and ultimate distribution of the estates of missing persons.

Stanley Sevier disappeared from his home in New York City, October 10, 1928 and has not been heard from since. Pursuant to the code provisions in question plaintiff Helen Sevier was appointed administratrix of his estate. The defendant Bank holds property in trust for the missing person and appeals from a judgment ordering it to pay to the plaintiff administratrix money payable to the missing person under the terms of said trust.

The statutory scheme for the administration of the estate of a missing person may be summarized as follows: All property of a person missing and unheard of for seven years "may be administered, as though such person were dead * * * subject to the conditions, restrictions and limitations hereinafter described." Prob. C. sec. 280.

The proceeding shall be entitled "In the matter of the estate of —, a missing person." Prob. C. sec. 281.

The proceedings are initiated by the filing of a petition "representing that his whereabouts has been for such period of time and still is unknown and that he left an estate which requires administration". The clerk "shall appoint a day for hearing such petition, not less than three months from the date of filing. Said petition may be for administration or probate of the last will * * *." Prob. C. sec. 282.

Notice of the hearing shall be published once each week for two months, the first publication being at least three calendar months before the day set for hearing and within twenty days after filing the petition copies of the notice shall be sent by registered mail to heirs-at-law, next of kin, legatees and devisees "and to the last known address of such missing person". Prob. C. sec. 283.

If satisfied by the evidence produced at the hearing that the person has been missing for seven years the court "must thereupon appoint some duly qualified person as administrator or executor". Prob. C. sec. 284.

Except to pay taxes, assessments, liens, insurance premiums, allowing claims for debts or to prevent depreciation of property on account of neglect or waste, or to specifically perform contracts of the missing person "no sale, mortgage or other disposition or distribution of the property of said missing person shall be had until the lapse of one year after the appointment and qualification of the executor or administrator." Prob. C. sec. 285.

No distribution to heirs, legatees or devisees shall be made within such one year period, nor until three years after the qualification of the executor or administrator unless the distributee or assignee give to the representative of the estate a surety company bond "in a penal sum not less than the value of the property distributed and for such additional amount, as the court may prescribe * * * conditioned for the return of the property or the value thereof to the representative of the estate"

in case it be adjudicated that the missing person was living since the commencement of the seven year period and to save the representative from damages and costs of suit brought by the missing person or anyone succeeding to his rights. Prob. C. sec. 286.

During the three year period after the representative qualifies the missing person may appear and establish his identity, Prob. C. secs. 287-288, and if his identity is established "an order shall be made vacating all of the proceedings for administration, except those providing for the payment of" any of the items enumerated in sec. 285; and "the residue of said estate, less fees, costs and expenses thus far incurred, shall be surrendered and delivered to said claimant." Prob. C. sec. 289.

Similarly any person claiming that the missing person died after the commencement of the seven year period, and that he is entitled to any of the property because of such death may appear and prove those facts and "the court shall make and enter such order as the circumstances require." Prob. C. sec. 290.

In case no person makes claim during the three year period after the qualification of the representative either to be the missing person or to have succeeded to his rights by reason of his death since the commencement of the seven year period "a conclusive presumption shall arise that the missing person died prior to the filing of the petition * * *; and the estate shall be finally distributed accordingly". Thereupon the liability of the representative, and his sureties to claimants is ended and the liability of distributees ended and their bonds canceled. If the period during which the person has been missing at the time the petition is filed "shall have exceeded ten years" then the estate may be finally distributed at the end of one year "without a bond being given, with like effect as hereinbefore provided for at the expiration of the three year period." Prob. C. sec. 291.

After the final distribution of the estate "the statute of limitations shall be deemed to have run against all claimants; and no action * * * shall be brought" by said missing person or persons claiming under

him or claiming any interest in the estate against the administrator or executor or any surety or any distributee "to recover any part or portion of said estate." Prob. C. sec. 292.

The procedure is made applicable to all persons missing for seven years "whether such absence commenced heretofore and has been completed, or is still running, or shall hereafter commence to run." Prob. C. sec. 293.

The administrator or executor shall proceed in the same general manner "as provided by this code for the administration and settlement of the estates of deceased persons, except as otherwise modified, limited or directed by the provisions of this act." Prob. C. sec. 294.

[1] The procedure above outlined avoids the infirmity of the procedure considered in *Scott v. McNeal*, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896, by providing an express scheme for the administration of the estates of missing persons. *Cunnius v. Reading School Dist.*, 198 U.S. 458, 472 et seq., 25 S.Ct. 721, 49 L.Ed. 1125. Indeed appellant does not, as it could not under the authorities, argue that the state may not provide for the administration of the estates of missing persons after a proper lapse of time, *Cunnius v. Reading School Dist.*, supra, nor for a final distribution which forecloses all rights of the missing person after allowing a reasonable time to elapse after the inception of the proceedings, *Blinn v. Nelson*, 222 U.S. 1, 32 S.Ct. 1, 56 L.Ed. 65. Nor do we understand appellant to claim that the notice provided for does not afford due process of law. *Cunnius v. Reading School Dist.*, supra; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652.

Rather appellant, arguing from the facts of *Blinn v. Nelson*, supra, and *Cunnius v. Reading School Dist.*, supra, seeks to convince us that since the statute does not entirely follow the pattern of either case it does not satisfy the due process requirements. In the *Cunnius* case the statute provided for a bond by the distributees to secure the rights of the missing person and his right to recover the property if he ever

reappeared. In the *Blinn* case the procedure was commenced under the statute by a court seizure of the property and after the lapse of a prescribed period if the missing person did not appear the property could be finally distributed and the missing person's rights to recover it forever barred.

[2] Arguing from the mechanics of the two statutes appellant insists that unless the property is seized before the administration commences such statutes must provide for the restoration of the property to the missing person whenever he reappears, after however long a period.

The argument seems to us to place too great emphasis on the purely mechanical. In the recent *Mullane* case, cited supra, the United States Supreme Court, at page 656 of 70 S.Ct., said: "Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely quasi *in rem*, or more vaguely still, 'in the nature of a proceeding *in rem*.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident,

provided its procedure accords full opportunity to appear and be heard."

[3, 4] Our statute combines some of the features of the statute considered in the *Cunnius* case with others found in the statute in the *Blinn* case. Its time limits are not unreasonable and its provision for notice is adequate. After the lapse of three years of administration (or of one if the missing person has been unheard of for ten years prior to commencing the proceedings) it provides for a final distribution and bars the missing person's rights by limitation. Justice Holmes said in the *Blinn* case, 222 U.S. at page 7, 32 S.Ct. at page 2, 56 L.Ed. 65: "If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years, and presumably is dead, it acts within its constitutional discretion."

We cannot say that three years after the lapse of seven or one year after the lapse of ten are unreasonable times for our legislature to fix to accomplish the same result.

Scott v. McNeal, supra, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896, is not in any way contrary to these conclusions. In that case the estate of a missing person was probated under a statute providing solely for the probate of decedent's estates. The distinction is made clear in the *Cunnius* case, 198 U.S. 474-476, 25 S.Ct. 726, 49 L.Ed. 1125, where distinguishing the *McNeal* case the court said:

"True it is that there are some general expressions found in the opinion [154 U.S. at page 50, 14 S.Ct. at page 1114, 38 L.Ed. 896], which, if separated from the context of the opinion, might lead to the conclusion that it was held that a state was absolutely without power to provide by a special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death. But these general expressions are necessarily controlled by the case which was before the court, and by the context of the opinion, which makes it clear that it was alone decided that under a law giving jurisdiction to probate courts

to administer the estates of deceased persons, even although a rebuttable presumption existed as to death after a certain time, that if such presumption was subsequently rebutted by the proof of the fact of life, that the court, whose authority depended upon death, was devoid of jurisdiction. * * *

"The error underlying the argument of the plaintiff in error consists in treating as one two distinct things,—the want of power in a state to administer the property of a person who is alive, under its general authority to provide for the settlement of the estates of deceased persons, and the power of the state to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject. * * * As it cannot be denied that, in substance, the Pennsylvania statute is a special proceeding for the administration of the estates of absentees, distinct from the general law of that state providing for the settlement of the estates of deceased persons, and as, by the express terms of the statute, jurisdiction was conferred upon the proper court to grant the administration, it follows that the supreme court of Pennsylvania did not deprive the plaintiff in error of due process of law within the intendment of the 14th Amendment."

[5] The claim that the statute is unconstitutional retroactive is not open in this case. The statute was adopted in 1935. The administratrix was appointed in 1946. Thus from the effective date of the statute the missing person was unheard of for eleven years before the court acted. Under these circumstances it is unnecessary to give the statute retroactive effect to fully meet its terms.

[6] Nor can appellant object that the statute makes no express provision to protect it against the claim of the missing person should he appear. The delivery of the money pursuant to the judgment to an administratrix appointed under a valid statute would be a complete defense to such a claim. "If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged." *Security Sav. Bank v. Califor-*

nia, 263 U.S. 282, 286, 44 S.Ct. 108, 110, 68 L.Ed. 301. Indeed in the *Cunnius* case, supra, it was held that the defendant school district by making payments to the administrator of the missing person was thereby discharged of liability to the missing person, when she reappeared. See the statement of facts 198 U.S. 461-462, 25 S.Ct. 722-723, 49 L.Ed. 1125.

Judgment affirmed.

NOURSE, P. J., concurs.



101 Cal.App.2d 168

PEOPLE v. HAMMEL.

Cr. 2220.

District Court of Appeal, Third District,
California.

Dec. 15, 1950.

Merwin Hammel and another were convicted in the Superior Court, San Joaquin County, George F. Buck, J., for robbery while armed with deadly weapons, and named defendant appealed. The District Court of Appeal, Adams, P. J., held that the evidence sufficiently corroborated accomplices' testimony against defendants to sustain conviction.

Judgment affirmed.

1. Criminal law ⇨1144(13)

On appeal from conviction of crime, evidence must be reviewed in light most favorable to respondent State.

2. Criminal law ⇨511(1)

Evidence sufficiently corroborated accomplices' testimony against defendants to sustain conviction of robbery while armed with deadly weapons. Pen. Code, § 1111.

3. Criminal law ⇨511(1)

In determining sufficiency of corroboration of accomplices' testimony to sustain conviction of crime, jury may consider

parties' relationship and entire conduct during and after crime. Pen. Code, § 1111.

4. Criminal law ⇨511(2)

Evidence corroborating accomplices' testimony need not be strong to sustain conviction, but is sufficient if it tends in some slight degree to implicate defendant in commission of crime charged. Pen. Code, § 1111.

5. Criminal law ⇨511(3)

Circumstantial evidence suffices to corroborate accomplices' testimony against defendant, if his connection with alleged crime reasonably may be inferred from corroborative evidence. Pen. Code, § 1111.

Blewett, Blewett & Macey, Stockton, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

An information was filed in San Joaquin County charging Merwin Hammel and Clifford Burgin with robbery of one John Lako on November 15, 1949, and, in a second count, with the robbery of one Carlton Gilgert on or about the same date, it being alleged that defendants were armed with deadly weapons, to wit, a shotgun and a revolver. After trial by a jury both defendants were found guilty of count one, the jury disagreeing as to count two. Frank Thompson and Walter Williams, who were charged with the same offense, pleaded guilty, and testified for the prosecution.

On this appeal it is contended by Hammel that his conviction is in contravention of section 1111 of the Penal Code, because based solely upon the testimony of accomplices, whose testimony was without corroboration.

The following facts appear. On November 15, 1949, Thompson, Williams, Burgin and Hammel entered the Linden Club bar, about 12 miles from Stockton. Lako, the bartender, testified that it was about 8:30 p.m., but other witnesses testified that it was nearer 6:30. Defendants drank a few

beers and left. Some fifteen or twenty minutes later Williams and Thompson, armed with a shotgun and a pistol, returned and committed the robbery of Lako. It is not contended by the prosecution that either Burgin or Hammel was present in the bar at the time of the actual robbery, but the testimony of the defendants who testified for the state connected them with it. They stated that they had been with them in the afternoon when it was planned; and Thompson said that Hammel had procured the weapons used by them.

Hammel admitted acquaintance and association with Thompson, Williams and Burgin, and that he had been with them the whole afternoon before the robbery and was with them when they first entered the Linden Club bar; but he testified that when they left it they all drove back to Stockton where he and Burgin remained, and that they did not go back to the Linden Club with Williams and Thompson.

As corroborative of the stories of Williams and Thompson, the prosecution states that the testimony of Daniel Stowe corroborates testimony that Hammel obtained the guns. Mr. Stowe, who ran a lunchroom and fountain in Stockton frequented by the four defendants, stated that he owned a pistol and a shotgun; that in October he lent the pistol to Burgin, and it was returned about a month later by Thompson; that he had lent the shotgun to Hammel several times during the fall, to go deer and rabbit hunting, but he could not say that Hammel had the gun on November 15th; that Hammel and Burgin borrowed his pistol in September or October, during the deer season.

As corroboration of the testimony of the accomplices the prosecution also relies upon testimony of William Kates, a deputy sheriff, who stated that Hammel admitted to him that during the day of November 15th Thompson and Williams had in his presence discussed the robbery at Linden. It is also argued by the prosecution that Hammel made statements that conflicted with

his testimony at the trial and tended to inculpate him, to wit, a prior denial by Hammel that he had gone to the Linden Club, and a subsequent one that he went there with the other three and had a beer; also that he admitted that when Thompson and Williams had discussed the robbery they said they would use a gun.

Other testimony that tends to support the conviction is that only fifteen or twenty minutes elapsed after the four defendants visited the bar, before Thompson and Williams robbed it, and that such time was insufficient for the party to have driven to Stockton, as Hammel claims they did, and for Thompson and Williams to have returned to the Linden Club. There was also testimony that while Williams and Thompson were committing the robbery someone hammered on the door apparently as a warning of some sort, and that the two then ran out.

[1-5] Reviewing the evidence in the light most favorable to the respondent, as we are required to do, *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519, we cannot say that there was insufficient corroboration of the testimony of the accomplices. In *People v. Griffin* (hearing in Supreme Court denied) we held that the entire conduct of the parties, their relationship, acts and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration; that corroborative evidence need not be strong, and is sufficient if it tends in some slight degree to implicate the defendant; and that circumstantial evidence suffices for the purpose of corroboration if the connection of the defendant with the alleged crime reasonably may be inferred from the corroborative evidence.

We think that the evidence in this case meets the foregoing tests. The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

101 Cal.App.2d 197

BRODER v. EPSTEIN et al.

Civ. 17701.

District Court of Appeal, Second District,
Division 3, California.

Dec. 18, 1950.

Action by Philip T. Broder against Jack E. Epstein, Henry Sweet, Henry Sweet doing business as Globe Jewelers, and others, to recover possession of personalty. The Superior Court, Los Angeles County, William P. Haughton, J., rendered a judgment for the plaintiff, and the defendant Herman Sweet, doing business as Globe Jewelers, appealed. The District Court of Appeal, Vallée, J., held that granting plaintiff's motion to strike out testimony of the defendant Epstein varying the terms of a written agreement between the defendant Epstein and the plaintiff was prejudicial error.

Judgment reversed.

1. Evidence ⇨424

Rule that parol evidence cannot be received to contradict or vary a written contract does not apply in action between party to contract and third party.

2. Evidence ⇨424

A stranger is at liberty to show that written instrument does not disclose full or true character of relations between contracting party, and when party to contract is contending with stranger, party is equally free to show true relation between himself and one with whom he contracted. Code Civ.Proc. § 1856.

3. Evidence ⇨424

In wholesaler's action to recover possession of jewelry from buyer to whom retailer had sold in violation of written agreement with wholesaler, testimony of retailer that wholesaler at time agreement was signed stated that retailer could sell some of the jewelry was admissible since buyer was not a representative of retailer or successor in interest to his right under the contract. Code Civ.Proc. § 1856.

4. Appeal and error ⇨1047(3)

Trial ⇨89

In wholesaler's action to recover jewelry from buyer to whom retailer sold

in violation of written agreement with wholesaler, granting of wholesaler's motion to strike out testimony of retailer as to conversation he had with wholesaler in which wholesaler stated that retailer could sell some of the jewelry was prejudicial error.

Herbert J. Beck, Los Angeles, Morton B. Harper, Beverly Hills, for appellant.

Greenbaum, Wolfe & Baker and Benjamin Wolfe, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant Herman Sweet from a judgment for plaintiff in an action to recover the possession of personal property.

Plaintiff is engaged in the wholesale jewelry business. On April 8, 1948, he delivered several articles of jewelry to defendant Epstein. Upon receipt of the jewelry, Epstein signed and delivered to plaintiff an instrument which named Epstein as consignee, listed the jewelry, stated its value and, in printing below the list, said, "I agree not to sell or offer for sale, exchange or barter," the merchandise. Epstein's signature appeared under the list and partially over the printed matter.

On the same day, Epstein sold and delivered the jewelry to defendant Sweet. It was not returned to plaintiff. The court found that the written instrument "is clear, certain and is not ambiguous in its terms, and sets forth the understanding and agreement between the plaintiff and the defendant Epstein"; that plaintiff delivered the jewelry to Epstein pursuant to the written instrument; that Epstein did not pay Broder for the property; and that Broder is the owner and entitled to possession. Epstein defaulted. Judgment was against Epstein and Sweet. Sweet appeals. There was a dispute below as to whether the provision against selling and other printed matter was a part of the contract, but in the view we take of the case it is unnecessary to consider that problem.

One of appellant's points is that the court erred in striking testimony of Epstein as to a conversation he had with plaintiff at the time he (Epstein) signed the agreement. The conversation was admitted over the objection of plaintiff. The substance of the conversation, as testified to by Epstein, was that he asked plaintiff if he could sell any of the jewelry, and plaintiff said, "Yes"; he told plaintiff he would not sign under the printed matter and plaintiff told him it did not make any difference as long as he returned the articles he did not sell; he told plaintiff that in the event he sold any he would report on the amount and return the rest. On motion of plaintiff, this testimony of Epstein was stricken. The court, in its findings and judgment, relied solely on the written instrument.

[1,2] The contract was between Broder and Epstein. The action is between Broder and Sweet. The learned trial judge, for the moment, seems to have been unmindful of the fact that Sweet was not a party to the contract. The rule that parol evidence cannot be received to contradict or vary a written contract does not apply in an action between a party to a contract and a third party. Bituminized Brick & Tile Co. v. Simons Brick Co., 183 Cal. 687, 693, 192 P. 528. Section 1856 of the Code of Civil Procedure says that when an agreement has been reduced to writing "there can be *between the parties and their representatives, or successors in interest*, no evidence of the terms of the agreement other than the contents of the writing". (Italics added.) Sweet was not a representative of Epstein or a successor in interest to Epstein's right under the contract. A stranger is at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties. And when a party to a contract is contending with a stranger, the former is equally free to show the true relation between himself and the one with whom he contracted. Luckie v. Diamond Coal Co., 41 Cal.App. 468, 478, 183 P. 178.

[3,4] Sweet contended below that Epstein had authority from plaintiff to sell

the jewelry. Plaintiff and Epstein were the only persons present at the conversation which took place at the time the contract was entered into. The granting of plaintiff's motion was therefore prejudicial error. We, of course, do not pass on the weight of Epstein's testimony; we merely decide that it was admissible.

This conclusion makes it unnecessary to consider other points presented by appellant.

Reversed.

SHINN, P. J., and WOOD, J., concur.



101 Cal.App.2d 193

BRENNAN v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL & VOCATIONAL STANDARDS et al.

Civ. 17488.

District Court of Appeal, Second District,
Division 3, California.

Dec. 18, 1950.

Rehearing Denied Jan. 4, 1951.

Hearing Denied Feb. 15, 1951.

Robert L. Brennan brought mandamus proceedings against the State Board of Medical Examiners of the Department of Professional and Vocational Standards of the State of California, and its members, for cancellation of order of board placing petitioner on probation for five years on ground that as a chiropodist he had violated the Business and Professions Code. The Superior Court of Los Angeles County, John J. Ford, J., rendered a judgment for the defendants, and the petitioner appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to establish any violation of the Business and Professions Code, and that therefore order of the board constituted an abuse of discretion, requiring the granting of peremptory writ of mandamus.

Judgment reversed.

1. Evidence ◊508

Question whether treatment administered by chiropodist who was placed on

probation violated the Business and Professions Code was a question in field of medicine beyond scope of common knowledge and called for expert testimony. Business and Professions Code, §§ 2000 et seq., 2139, 2378.

2. Evidence ⇨568(1)

In mandamus proceeding by chiroprapist to compel State Board of Medical Examiners to cancel order placing chiroprapist on probation, on ground that he violated the Business Professions Code, unsworn opinions of board members were not evidence before court. Business and Professions Code, §§ 2000 et seq., 2139, 2378.

3. Physicians and surgeons ⇨11(3)

Evidence was insufficient to sustain finding of State Board of Medical Examiners that chiroprapist had violated the Business and Professions Code by giving unauthorized medical treatment. Business and Professions Code, §§ 2000 et seq., 2139, 2378.

4. Mandamus ⇨87

Where order of the State Board of Medical Examiners placing chiroprapist on probation on ground that he had violated the Business and Professions Code constituted an abuse of discretion, chiroprapist was entitled to a peremptory writ to have order of board canceled. Business and Professions Code, §§ 2000 et seq., 2139, 2378.

Walter N. Anderson, Los Angeles, Robert P. Dockeray, Burbank, of counsel, for appellant.

Fred N. Howser, Atty. Gen., Bayard Rhone and Gilbert Harelson, Deputy Attys. Gen., for respondents.

SHINN, Presiding Justice.

Proceeding in mandamus to compel respondents, State Board of Medical Examiners and its members, to cancel the order of the board revoking petitioner's license to practice as a chiroprapist and placing him on probation for a five year period, during which time the revocation of his license was to be suspended. The petition was filed in the superior court; an alternative

writ was issued. The respondents filed an answer and the cause was set down for trial. Upon the trial, judgment was entered denying the peremptory writ. Petitioner appeals from that judgment.

Appellant, Dr. Robert L. Brennan, a licensed chiroprapist, was accused by the State Board of Medical Examiners and found guilty, as charged, of unprofessional conduct in that he had violated the provisions of sections 2139 and 2378 of the Business and Professions Code.

Section 2139, Business and Professions Code, reads as follows: "The certificate to practice chiropody authorizes the holder to practice chiropody. As used in this chapter: Chiropody means the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot. No chiroprapist shall do any amputation or use an anesthetic other than local." Section 2378 provides that unprofessional conduct is that which violates or attempts to violate directly or indirectly any provision of Chapter 5, Division 2, of the Business and Professions Code.

The only question presented on this appeal is whether there is evidence to sustain the finding of the trial court that the conduct of Dr. Brennan transgressed the limited certificate issued to him as a licensed chiroprapist and constituted unprofessional conduct within the meaning of the section. The trial court found that the oral treatment prescribed by appellant and the hypodermic injection administered by him was "not * * * for the treatment of the human foot nor the treatment of the muscles or the tendons of the leg governing the functions of the foot, as provided in section 2139 of the Business and Professions Code." It is our opinion that the record is devoid of evidence to support this finding.

The transcript of the proceedings before the Board of Medical Examiners, which was placed in evidence, shows that one Mrs. C. E. Tuttle, a woman 50 years of age, first visited appellant's office on January 19, 1948, and complained to him of

pains in her toes and the groin, stating that she was not "sick, except for my legs and feet." Appellant examined her, asked her a number of questions concerning her general condition, pregnancy, and menstrual periods. At this time, appellant took her blood pressure, gave her a treatment consisting of "stretching the leg," administered a hypodermic injection of adrenal cortex in the right hip, x-rayed her feet, and prescribed 50,000 Units of Vitamin A. When Mrs. Tuttle returned to appellant's office two days later he prescribed for her a proprietary remedy known as calcidin, the essential ingredient of which is iodide, and gave her a diet to improve her "poor muscle tone."

Appellant's witness, Harvey E. Billig, M. D., testified that the Board of Medical Examiners requires chiropractors to take review courses given by licensed medical doctors in order to qualify for renewal of their licenses and that he had been appellant's instructor in such a course. Dr. Billig stated that the proprietary, calcidin, was routine procedure which he had used successfully in the treatment of cold feet (which, incidentally, Mrs. Tuttle denied having complained of), and that he had so instructed the students taking courses from him; that during the course he had made reference to a substance known as adrenal cortex to be used to counteract an imperfect contraction of muscle fibre (a condition known to the laity as poor muscle tone); that he believed the use of both calcidin and adrenal cortex to be within the purview of the Chiropractor Act and permissible for use by chiropractors in correcting poor muscle tone in the legs and feet. Mrs. Tuttle, the only witness for the Board, testified that there had been some discussion between herself and the doctor with reference to the flabby condition of her neck and arms, her general nervous condition and whether her hair started to turn grey at the temples or had started to turn grey "all over." The testimony is conflicting with respect to whether there had been discussion concerning Mrs. Tuttle's apparent thyroid condition. Appellant testified that Mrs. Tuttle had come to him complaining of pains in her

toes and in the groin; that he had been taught to prescribe calcidin as treatment for cold feet; that he had been taught to administer hypodermic injections of adrenal cortex to improve the poor muscle tone of the feet and legs; that he prescribed Vitamin A for treatment of the feet; that he advised a high protein diet in that such a diet had "value in all weaknesses." The testimony of Dr. Billig and appellant's own testimony, which need not be recited further, was sufficient, if accepted as sound professional opinion, to prove that appellant's treatment of Mrs. Tuttle was not in violation of the sections of the Business and Professions Code in question.

[1,2] Notwithstanding the expert testimony produced by appellant that the treatment administered by him was for the human foot or the muscles or tendons of the leg governing the functions of the foot, there was no testimony to the contrary in the hearing before the Board or upon the trial. This was a question in the field of medicine beyond the scope of common knowledge. It called for expert testimony. Fine distinctions might be drawn between treatment of the foot which is permitted chiropractors and treatment for conditions arising elsewhere in the body of which distress in the foot is merely a manifestation. It was improper for the Board to decide the questions involved upon the basis of the opinions held by the several members of the Board. Neither the board nor the court could render a just decision except in reliance upon expert testimony. The Board members apparently relied upon their own opinions as evidence. They were not witnesses and the worth of their opinions could not be tested by cross examination. They were to decide factual issues and not merely to exercise discretion and judgment. Their decision was subject to review by the courts in which the evidence relied upon to support their determination would be subject to examination. Unstated and unsworn opinions of the Board members would not be before the court. They could not be considered for any purpose. In *English v. City of Long Beach*, 35 Cal.2d 155, 217 P.2d 22, 24, the court said: "A hearing requires that the party

be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. *La Prade v. Department of Water and Power*, 27 Cal.2d 47, 52, 162 P.2d 13; *Universal Consol. Oil Co. v. Byram*, 25 Cal. 2d 353, 153 P.2d 746." Even if the court had not given credence to the opinions of Dr. Billig or appellant there would still have been no evidence whatever in the record that appellant's treatment was not of the foot or the muscles or tendons governing the functions of the foot.

[3,4] We conclude, therefore, that there was no proof that Dr. Brennan violated section 2139 or section 2378, Business and Professions Code; that the findings and order of the Board constituted an abuse of discretion and that the peremptory writ prayed for should have been granted. *King v. Board of Medical Examiners*, 65 Cal.App.2d 644, 652, 151 P.2d 282.

The judgment is reversed. Judgment should be entered directing that a writ issue commanding the Board to annul its order and to take such further action as the Board may deem advisable.

WOOD and VALLEE, JJ., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.



101 Cal.App.2d 123

PEZZONI et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. No. 14418.

District Court of Appeal of California,
First District, Division Two.

Dec. 12, 1950.

Action by Dominic Pezzoni and Josephine Pezzoni against the City and County of San Francisco, etc., for injuries received by Josephine Pezzoni on a street car. The Superior Court of the State of California in and for the City and County of San Francisco, Lille T. Jacks, J., after a verdict for

defendant, granted plaintiffs' motion for a new trial, and defendant appealed. The District Court of Appeal, Dooling, J., held that whether errors in instructions were prejudicial was in the discretion of trial court, and that evidence supported its order for a new trial.

Order affirmed.

1. Carriers ⇨321(21)

In passenger's action for injuries sustained on street car, where passenger's evidence authorized instruction on *res ipsa loquitur*, giving of instruction that law presumed that motorman and conductor were using requisite degree of care in operation of street car, was error.

2. Negligence ⇨138(3)

In a *res ipsa loquitur* case, it is not proper to give an instruction on presumption of care.

3. Carriers ⇨321(19)

In passenger's action for injuries sustained on defendant's street car, instruction that even if accident could have been avoided by exercise of exceptional foresight, skill, or caution by defendant, no one could be held liable for injury resulting from it, and that before an accident can be said to be unavoidable, it must appear that occurrence was one which ordinary care and obedience to law would not have guarded against, set off ordinary care against exceptional foresight, skill and caution, and was erroneous.

4. Appeal and error ⇨933(4)

Where trial court granted plaintiffs' motion for a new trial, on ground that instructions given were prejudicial to plaintiff, Court of Appeal was required to assume in support of the order, that the trial court decided certain instructions were prejudicial to plaintiff.

5. New trial ⇨41(3)

Whether errors in instructions are sufficiently prejudicial to warrant the granting of a new trial is within discretion of trial court to determine. Const. art. 6, § 4½.

5. New trial ⇨41(3)

In passenger's action for injuries sustained on defendant's street car, granting of new trial by trial court on ground that instructions given were prejudicial to plain-

tiff, after a verdict for defendant, was not an abuse of discretion. Const. art. 6, § 4½.

The rationale of these holdings is explained in the Waite case, 56 Cal.App.2d at page 202, 132 P.2d at page 317:

Dion R. Holm, City Atty., Sylvain D. Leipsic, Deputy City Atty., William F. Bourne, Deputy City Atty., all of San Francisco, for appellant.

Belli, Ashe & Penney, San Francisco, for respondents.

"The application of the doctrine of *res ipsa loquitur* raises an inference of negligence against the defendant. It would be contradictory for the court also to instruct the jury there is a presumption the defendant acted with due care."

DOOLING, Justice.

Plaintiffs are husband and wife. The wife testified that she received injuries, on a street car operated by defendant, by being thrown against the iron guard rail in front of the conductor while waiting to give him her transfer. She testified: "the street car started up and stopped and jerked and threw me against the iron railing", "a sudden stop", "stopped with a sudden jerk".

The jury returned a verdict for defendant and following a timely motion the court granted a new trial "on the ground of errors of law occurring at the trial". Defendant appeals from this order.

In support of the order plaintiffs enumerate nine alleged errors in the instructions of the court. We need only consider two of them.

[1,2] It is conceded that the evidence supported instructions on *res ipsa loquitur*, *Mudrick v. Market Street Ry. Co.*, 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533, and the court gave such instructions. The court also instructed the jury that "the law presumes that the motorman and conductor * * * were using the requisite degree of care in the operation of such street car. This presumption is a species of proof * * * to which the defendant * * * (is) entitled, unless and until it is overcome by contradictory evidence." The jury was thus faced with the metaphysical responsibility of weighing a presumption of care against an inference of negligence. The courts have held that in a *res ipsa* case it is not proper to give an instruction on the presumption of care. *Waite v. Pacific Gas & Elec. Co.*, 56 Cal.App.2d 191, 132 P.2d 311; *Moeller v. Market Street Ry. Co.*, 27 Cal.App.2d 562, 81 P.2d 475; *Smith v. Hollander*, 85 Cal.App. 535, 259 P. 958.

[3,4] The court properly instructed the jury that defendant as a common carrier was bound to use the highest degree of care. It also in a series of instructions described defendant's duty as one to use ordinary care. Appellant argues that these instructions cannot have been prejudicial, but we must assume in support of the order of the trial court that it decided that they were prejudicial to plaintiffs. Particularly damaging was an instruction on inevitable accident in which the jury was told: "Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still no one may be held liable for the injury resulting from it. * * * before an accident can be said to be unavoidable it must appear * * * that the occurrence was one which ordinary care and obedience to the law would not have guarded against * * *." By thus setting off "ordinary care" against "exceptional foresight, skill and caution" the jury could only reasonably understand that defendant was only bound to use ordinary care to escape liability for its action. What the court gave with one hand in instructing that defendant was held to the highest degree of care it thus took away with the other by the last quoted instruction.

[5,6] Enough has been stated to support the order granting a new trial. Whether errors in instructions are prejudicial under Const. Art. VI, sec. 4½ lies in the discretion of the trial court to determine. *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 262, 143 P.2d 929; *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338. We cannot find on the record before us that the trial court abused its discretion in this regard.

Order affirmed.

NOURSE, P. J., concurs.

KOSTAL et ux. v. PULLEN et al.**Sac. 6154.****Supreme Court of California, in Bank.****Dec. 21, 1950.**

Action by Joe C. Kostal, Jr., and wife against Robert F. Pullen, an individual, doing business under the firm name and style of Larry's Auto Parts, and others to recover on a promissory note. The Superior Court, San Joaquin County, M. G. Woodward, J., entered an order denying defendant's motion for change of venue and defendant appealed. The Supreme Court, Shenk, J., held that defendant was entitled to have action transferred to county of defendant's residence in which obligation, if any, was incurred and that citation in notice of motion of code sections which on the uncontroverted facts required court to grant such transfer, was a sufficient compliance with rule requiring memorandum of points and authorities.

Order reversed with directions to grant motion.

Prior opinion 221 P.2d 200.

1. Venue **46**

Defendant was entitled to have action on a note transferred in advance of any other judicial action in the case to county of defendant's residence in which obligation, if any, was incurred. Code Civ.Proc. §§ 395, 396.

2. Venue **58**

Where on the uncontroverted facts stated in affidavit of merits the code sections cited in notice of motion for change of place of trial required the court to grant such transfer, such citation of code sections was a sufficient compliance with rule requiring a memorandum of points and authorities to be filed with notice of motion, and no further authority was necessary. Rules for Superior Courts, rule 3(a); Code Civ.Proc. §§ 395, 396.

SHENK, Justice.

The defendant has appealed from an order denying his motion for change of venue.

On April 12, 1949, the plaintiffs commenced the action in San Joaquin county to recover on a promissory note. They alleged in substance the defendant's execution and delivery to them of a note dated October 6, 1948, in the principal sum of \$1340 payable in monthly instalments of \$150 commencing October 20, 1948, with interest, on which but one instalment had been paid and on which there remained due and unpaid a balance of principal and interest in the sum of \$1201.58. The complaint did not show the place of execution or performance of the note.

On May 9th the defendant filed a demurrer on general and special grounds including the ground of uncertainty as to the place of execution and payment. Concurrently he filed a notice of motion for change of place of trial to the county of Los Angeles on the ground that he was a resident of that county, that the alleged obligation, if incurred at all, was incurred in that county, and that "the proper place of the trial of this action is in the said City of Los Angeles, County of Los Angeles * * * under and pursuant to the provisions of section 395 and 396 of the Code of Civil Procedure of the State of California." An affidavit of merits accompanied the notice which included averments that the defendant was a resident of Los Angeles county, and that the obligation if any was incurred in that county. As authority for the transfer the defendant relied on the Code sections mentioned in the notice of motion. No counter-affidavit was filed. On May 17, 1949, the day noticed for the making of the motion, the court denied the motion and sustained the demurrer with leave to amend. The defendant filed his notice of appeal on July 1st.

[1] On the uncontroverted facts disclosed by the defendant's affidavit he was entitled to the requested transfer, section 395, Code of Civil Procedure; *Lyons v. Brunswick-Balke etc. Co.*, 20 Cal.2d 579,

A. P. Coviello and John C. Miles, Los Angeles, for appellants.

Miller and Kroloff and Jack J. Miller, Stockton, for respondents.

127 P.2d 924, 141 A.L.R. 1173; *Mercantile Acceptance Corp. v. Willett*, 125 Cal.App. 778, 14 P.2d 121, unless, as contended by the plaintiffs, there was here such a failure to comply with the rule requiring a memorandum of points and authorities with the notice of motion as would justify the denial of the motion.

Rule 3(a) of the Rules for Superior Courts, 33 Cal.2d 1, 3, provides that on the filing of the notice of the motion the party shall also serve and file a memorandum of the points and authorities to be relied upon.

[2] Since on the uncontroverted facts the Code sections cited in the notice of motion required the court to grant the transfer, we conclude that the citation was a sufficient compliance with the rule. No further authority was necessary. The defendant was entitled to have the motion granted and to have the objections raised by his demurrer heard in the proper county. Under section 395 the transfer was required in advance of any other judicial action in the case. *McClung v. Watt*, 190 Cal. 155, 211 P. 17; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 60-61, 39 P. 209; *Ah Fong v. Sternes*, 79 Cal. 30, 33, 21 P. 381; *Heald v. Hendy*, 65 Cal. 321, 4 P. 27.

The foregoing result follows if the denial of the first motion was with prejudice. However, the order sustaining the demurrer for uncertainty might indicate that an opportunity was thereby afforded to the plaintiffs by amendment to allege facts which would controvert the averments of the defendant and require the retention of the trial in the county where the action was commenced. We may assume, without deciding, that the court could have denied the motion without prejudice for this purpose. The plaintiffs thereupon filed an amended complaint which set forth the note in full. The note disclosed that it was executed and was to be performed in Los Angeles county. The plaintiffs therefore not only failed to allege the facts which would establish venue in the county of their choice, but the amended pleading corroborated the defendant's showing. The defendant then renewed his motion by filing a second notice based on the affidavit

previously filed, together with a memorandum of points and authorities. On June 21st the court overruled the demurrer and denied the motion. The facts and authorities thus remained as on the first hearing, and the renewed motion should have been granted.

The order is reversed with directions to the trial court to grant the defendant's motion for a transfer.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



36 Cal.2d 531

In re KEARNS' ESTATE.

MALLARINO et al. v. HAMMERSMITH.

S. F. 17748.

Supreme Court of California.

Dec. 21, 1950.

Proceeding in the matter of the estate of George Anthony Kearns, deceased, by Marjorie Mallarino and another against Emma Traung Hammersmith for instructions to executrix with respect to interpretation of decedent's holographic will. The Superior Court, San Francisco County, T. I. Fitzpatrick, J., entered an order instructing executrix that will created no interest in favor of plaintiffs and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that, while will was insufficient in itself to create a trust or equitable charge in favor of plaintiffs, the uncertainty arising upon the face of will made evidence of the circumstances under which will was made admissible for the purpose of ascertaining testamentary intent.

Order reversed.

For prior opinion see 212 P.2d 258.

I. Wills $\S$ 672(3)

Will devising all testator's property to fiancée named as executrix and directing her to provide for named nieces as she saw fit did not create a trust or equitable charge unless testator intended to impose mandatory duties upon fiancée.

2. Wills ⚡601(1)

Where an absolute estate has been devised in one clause of a will, it will not be cut down or limited by subsequent words except such as indicate as clear an intention therefor as was shown by the words creating the estate. Probate Code, § 104.

3. Wills ⚡467

Testamentary expression "hereby direct" is ordinarily treated as mandatory, but it must not be read out of context, and will be treated as precatory if other provisions of will indicate testator intended to express only a wish, desire or recommendation.

See publication Words and Phrases, for other judicial constructions and definitions of "Hereby Direct".

4. Wills ⚡467

Where the person addressed is the executor, even language which might otherwise be considered as being merely precatory may be treated as mandatory.

5. Wills ⚡467

Where the person directed to carry out testator's wishes is both executor and legatee, the strict rule which imposes a mandatory duty on executor is not followed and the words are treated as being addressed to executor in his capacity as legatee.

6. Wills ⚡439

Words of will must be construed in conformity with intention of testator, and, particularly where will was not drawn by attorney, such intention should not be defeated by strict adherence to the technical sense of the words used.

7. Wills ⚡463

Words which are repugnant to the clear intention disclosed by other parts of will may be regarded as surplusage or restricted in application.

8. Wills ⚡439

The primary object in construing a will is to ascertain and give effect to intention of testator.

9. Wills ⚡672(2)

A testamentary bequest with directions to legatee to provide for benefit of others does not create a trust, if testator intended

thereby to leave the whole subject as a matter of discretion to the good will and pleasure of legatee and directions were intended as mere moral suggestions to aid such discretion but not absolutely control or govern it. Probate Code § 104.

10. Wills ⚡672(2)

That will gives legatee broad discretionary powers will not defeat a trust in the property bequeathed in favor of others, if it is clear that a trust was intended and its terms are sufficiently certain to permit their enforcement. Probate Code § 104.

11. Wills ⚡672(3)

Holographic will by which testator bequeathed all his property to fiancée, named as executrix, and in separately numbered clause directed executrix to provide for named nieces as she saw fit, was insufficient in itself to create a trust or equitable charge limiting the absolute bequest to fiancée, unless intent of testator to do so could be shown by extrinsic evidence. Probate Code §§ 104, 105.

12. Wills ⚡677

The uncertainty arising upon the fact of will bequeathing all testator's property to fiancée, named as executrix, as to application of separately numbered clause directing executrix to provide for named nieces as she saw fit rendered evidence of the circumstances under which will was made, including evidence as to size of estate, property involved in gift, circumstances of the parties, and their relation to each other and to the testator, admissible for the purpose of determining whether testator intended by such direction to create a trust or equitable charge in favor of nieces. Probate Code, §§ 104, 105.

13. Trial ⚡45(1)

Where trial court had declared that will was not ambiguous and that no extrinsic evidence would be received, no formal offer of such proof was necessary. Probate Code § 105.

Elmer P. Delany, William A. Sullivan, Martin J. Jarvis and Richard O. Graw, San Francisco, for appellants.

Marshall E. Leahy, John F. O'Dea, Philip S. Ehrlich and R. J. Hecht, all of San Francisco, for respondent.

GIBSON, Chief Justice.

This appeal is taken by Marjorie Mallarino and Lois Graham from an order of the probate court which instructed respondent executrix with respect to the interpretation of the holographic will of George A. Kearns, the material portions of which are as follows:

"1—I hereby bequeath to my beloved and devoted fiancé Emma Traung Hammersmith of the City and County of San Francisco, California, all my real and personal property and belongings that I possess or are due me of whatsoever nature.

"2—I hereby appoint my fiancé Emma Traung Hammersmith sole executor of my Estate and to perform such duties without bond.

"3—I hereby bequeath to my brother, William L. Kearns \$1.00 also to my niece Mrs. Marjorie Mallarino \$1.00 and my niece Mrs. Lois Graham \$1.00 and should any or either of them contest this will it shall avail them nothing.

"4—I hereby direct my Executor, Emma Traung Hammersmith to provide for my brother William L. Kearns, during his life and I depend entirely on her judgment, kindness, honesty and generosity to act as his provider in illness and in health.¹

"5—I hereby direct my Executor Emma Traung Hammersmith to provide for my nieces Mrs. Marjorie Mallarino and Mrs. Lois Graham as her judgment, kindness and honesty sees fit to do, and likewise to provide for any other kin or close friend which in her judgment warrants same."

At the hearing on the petition for instructions, after refusing to admit extrinsic evidence on the ground that the will is not ambiguous, the court instructed the executrix that clause 5 does not create any interest in favor of appellants.

Appellants contend that the provisions of clause 5 are mandatory rather than precatory

and create a trust or equitable charge for 'appellants' benefit. They also argue that the court erred in refusing to admit extrinsic evidence to aid in construing the will. Respondent contends that the will, without ambiguity, shows a clear intent to make an absolute bequest to her and to repose in her an uncontrolled discretion to use the property for her own benefit or to assist others in accordance with the testator's recommendations.

[1] In order to warrant a holding that either a trust or equitable charge was created it must appear that the testator intended to impose mandatory duties upon respondent. See *Estate of Price*, 138 Cal.App. 462, 464, 32 P.2d 994; 4 Page on Wills [3rd ed., 1941] 230; *Thompson on Wills* [3rd ed., 1947] 727; 26 Cal.Jur. 1041. It is obvious that clause 1 of the will, standing alone, would operate to bequeath the property to respondent absolutely. On the other hand clause 5 directs respondent to provide for appellants as she sees fit, and the first question to be answered is whether the words used therein limit the estate created in clause 1 and impose enforceable duties on respondent, or whether they merely place her under a moral obligation to provide for appellants.

[2] The authorities all agree that where, as here, an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words except such as indicate as clear an intention therefor as was shown by the words creating the estate. *Estate of Marti*, 132 Cal. 666, 672, 61 P. 964, 64 P. 1071. This rule is codified in section 104 of the Probate Code, which provides: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

[3] There can be no question that the intention expressed by the testator in clause

1. The brother, W. L. Kearns, died before the present proceeding was begun and no

instructions were sought concerning the provisions of clause 4.

5 is not on its face as clear and unequivocal as that shown by the absolute bequest in clause 1. Clause 5 contains language having both mandatory and precatory implications. The expression "I hereby direct" is ordinarily treated as mandatory, but it must not be read out of context, and if it appears from other provisions of a will that the testator intended by the use of the phrase to express only a wish, desire, or recommendation, those words will be treated as precatory rather than mandatory. *Estate of Farelly*, 214 Cal. 199, 204-205, 4 P.2d 948; *Estate of Hull*, 77 Cal.App. 792, 793, 247 P. 1093; *In re Jansen's Will*, 181 Wis. 83, 193 N.W. 972; 49 A.L.R. 5.

[4-7] In determining whether the intent was to impose a legally enforceable duty or a mere moral obligation, the courts have taken into consideration whether the direction or request is given to an executor or legatee. Where the person addressed is the executor even language which might otherwise be considered as being merely precatory has been treated as being mandatory. See *Estate of Lawrence*, 17 Cal.2d 1, 7, 108 P.2d 893; *Estate of Browne*, 175 Cal. 361, 362, 165 P. 960. On the other hand, under certain circumstances the expression "I direct" has been held to be merely precatory when addressed to a legatee. *Estate of Farelly*, 214 Cal. 199, 204, 4 P.2d 948; *Estate of Hull*, 77 Cal.App. 792, 793, 247 P. 1093; *In re Jansen's Will*, 181 Wis. 83, 193 N.W. 972; note, 49 A.L.R. 10, 60. Where the person directed to carry out the wishes of the testator is both executor and legatee, the courts in construing the effect of the language have refused to follow the strict rule which imposes a mandatory duty on the executor and have apparently treated the words as being addressed to him in his capacity as legatee. *Estate of Marti*, 132 Cal. 666, 61 P. 964, 64 P. 1071; *Estate of Miles*, 72 Cal.App.2d 336, 164 P.2d 546; see 70 A.L.R. 326, 328; cf. *Estate of Logan*, 29 Cal.App.2d 60, 84 P.2d 245; *Estate of Goldthwaite*, 140 Cal. App. 551, 35 P.2d 1050. In the present case, although clause 5 is directed to "my executor Emma Traung Hammersmith," she is both legatee and executrix, and the term

"executor" may not have been used in its technical sense to designate the capacity in which she was to act in exercising her discretion. Words must be construed in conformity with the intention of the testator, and especially where, as here, the will is not drawn by an attorney, that intention should not be defeated by strict adherence to the technical sense of the words used. If the words are repugnant to the clear intention disclosed by the other parts of the instrument, they may be regarded as surplusage or restricted in application. See *Estate of Akeley*, 35 Cal.2d 26, 215 P.2d 921; *Estate of Budd*, 166 Cal. 286, 296-297, 135 P. 1131.

The question is also presented whether, looking at the whole of clause 5, any implication of a command arising from the opening words is weakened by the remainder of the clause under which respondent is to provide for appellants "as her judgment, kindness and honesty sees fit to do." Respondent argues that the broad discretion given to her in clause 5 is inconsistent with an intent to create a trust or equitable charge and in support of her position relies upon the early case of *Lawrence v. Cooke*, 1887, 104 N.Y. 632, 11 N.E. 144. In that case the testator gave the residue of his estate to his daughter and in a separately numbered clause stated: "I enjoin upon her to make such provision for [my] grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." It was held that no trust was created.

Appellant, on the other hand, relies on *Colton v. Colton*, 127 U.S. 300, 8 S.Ct. 1164, 32 L.Ed. 138 a diversity of citizenship case arising in California, where it was held that a trust was created although the legatee was given broad discretionary power and the words addressed to her were less imperative than those used in *Lawrence v. Cooke*, *supra*. In the *Colton* case a gift to the wife of all of the testator's property was immediately followed by the provision: "I recommend to her the care and protec-

tion of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." The interpretation of wills, of course, is not a question upon which the federal courts control the state courts, and some California cases have said that since the words addressed to the legatee in the Colton will were only recommendatory in character, that decision is out of harmony with the modern rule and does not represent the view of the courts in this state. See *Estate of Loud*, 70 Cal.App.2d 399, 404-405, 161 P.2d 49; *Estate of Lee*, 104 Cal.App. 15, 17-18, 284 P. 948. The case has also been distinguished upon the ground that, as stressed in the opinion, the bequest there involved was immediately followed by the words which were held to create a trust. *Estate of Marti*, 132 Cal. 666, 670-671, 61 P. 964, 64 P. 1071. An important factor, however, which has apparently been overlooked in cases which criticize the Colton decision, is that the court there had before it extrinsic evidence of the circumstances under which the will was made and relied upon such evidence in construing the instrument and holding that a trust was intended.

[8] The cases sometimes reach contrary results in construing similar language, and it is difficult, if not impossible, to harmonize them, although they all agree that the primary object is to ascertain and give effect to the intention of the testator. The differences in result may in many instances be explained by the particular circumstances surrounding the execution of the will.

[9, 10] It appears to be settled in California that if the intention of the testator is to leave the whole subject as a matter of discretion to the good will and pleasure of the legatee, and if his directions are intended as mere moral suggestions to aid that discretion but not absolutely to control or govern it, the language cannot be held to create a trust. See *Kauffman v. Gries*, 141 Cal. 295, 300, 74 P. 846; *Estate of Mitchell*, 160 Cal. 618, 622, 117 P. 774; *Estate of Marti*, 132 Cal. 666, 669, 61 P. 964, 64 P. 1071. The fact, however, that a legatee is given broad discretionary powers will not

defeat a trust if it is clear that one is intended and the terms are sufficiently certain to permit their enforcement. See *Estate of Davis*, 13 Cal.App.2d 64, 56 P.2d 584; 25 Cal.Jur. 319.

[11, 12] It is apparent from the foregoing discussion that clause 5 of the will is not on its face equally as clear as the provision in clause 1, and accordingly, in view of section 104 of the Probate Code, it cannot be said that a trust or equitable charge has been created which would limit the absolute bequest to respondent unless the intent of the testator to do so can be shown by extrinsic evidence. Section 104 must be read with section 105 of the Probate Code which provides that "when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding * * * oral declarations" of the testator as to his intentions. As we have seen there is an uncertainty upon the face of the will as to the application of clause 5, which contains language having both mandatory and precatory implications, and evidence of the circumstances under which the will was made was therefore admissible. In cases involving a similar problem it has been said that the trier of fact may consider such matters as the size of the estate, the property involved in the gift, the circumstances of the parties, and their relation to each other and to the testator. See *Estate of Marti*, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; *Estate of Mitchell*, 160 Cal. 618, 623-624, 625-626, 117 P. 774; *Estate of Carothers*, 161 Cal. 588, 591-592, 119 P. 926.

[13] At the hearing on the petition for instructions the trial judge stated that the will was not ambiguous and that he did not wish to hear any extrinsic evidence. Accordingly, no witnesses were called, but a statement was made of the proof which appellants could produce if permitted to do so. Respondent asserts that some of the evidence which appellants state they could produce is not relevant and that some is incompetent under section 105 of the Probate

Code. We need not, however, discuss in detail the different items of proof because it is apparent from the record that respondent objected to the admission of any extrinsic evidence and that it was the purpose of the court to exclude all such evidence. Although the statement made by appellants did not amount to a formal offer of proof, none was necessary since the trial court had declared the will was unambiguous and had clearly intimated that no extrinsic evidence would be received. *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 757, 185 P.2d 597; *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604; *Tomaier v. Tomaier*, 23 Cal.2d 754, 760, 146 P.2d 905; *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 100, 142 P.2d 741.

The order is reversed.

SHENK, EDMONDS, CARTER, TRAY-NOR, SCHAUER, and SPENCE, JJ., con-cur.



36 Cal.2d 582

PORTER et al. v. BAKERSFIELD & KERN ELECTRIC RY. CO. et al.

SHREFFLER et al. v. BAKERSFIELD & KERN ELECTRIC RY. CO. et al.

No. L. A. 21573.

Supreme Court of California, in Bank.

Dec. 27, 1950.

Actions by Carol L. Porter, by Lee Porter, her guardian ad litem, and another, and by Marvin William Shreffler, by Roy G. Shreffler, his guardian ad litem, and another, against the Bakersfield & Kern Electric Railway Company, and others to recover damages for personal injuries received by two school children who were struck by city passenger bus shortly after alighting from a school bus. The actions were consolidated for trial. The Superior Court, Kern County, W. L. Bradshaw, J., entered separate judgments in favor of plaintiffs after jury verdicts and defendants appealed. The Supreme Court, Schauer, J., held that the evidence was sufficient to support findings of

negligence on part of the drivers of both buses.

Judgments affirmed.

Edmonds and Spence, JJ., dissented in part.

Prior opinion 217 P.2d 73.

1. Automobiles ⇨244(2)

In actions for injuries received by two school children who were struck by a passenger bus shortly after alighting from a school bus, evidence was sufficient to sustain implied finding of negligence on part of driver of passenger bus.

2. Automobiles ⇨165

The driver of a city passenger bus striking school children shortly after alighting from school bus must be free from negligence to rely on presumption that school bus driver would comply with safety regulations governing him and would not compel children to run around school bus into pathway of city bus.

3. Schools and school districts ⇨121

In actions for injuries received by two school children who were struck by city passenger bus shortly after alighting from school bus, evidence was sufficient to support finding of negligence on part of driver of school bus.

4. Appeal and error ⇨1064(1)

In action for injuries received by two school children who were struck by city passenger bus shortly after alighting from school bus, an instruction that school driver's violation of rule of State Board of Education concerning driver's duty to children crossing street after leaving bus was negligence as a matter of law was not prejudicial, in view of fact that instruction did not purport to cover proximate cause or other elements and did not direct or suggest any verdict and was one of a large number of instructions in which many other matters, including proximate cause and negligence, were fully covered. Vehicle Code, § 510.

5. Schools and school districts ⇨115

In actions against school bus driver for injuries received by two school children who were struck by city passenger bus shortly after alighting from school

bus, presentation of claim to school bus driver within 90 days after accident was sufficient compliance with statute requiring presentation of claim to employee, whose negligence was in question, within 90 days after accident, notwithstanding that claim was served after commencement of action. Government Code, § 1981.

Johnston, Baker & Palmer, Bakersfield, for Bakersfield & Kern Electric Ry. Co. and L. H. Hindman.

Borton, Petrini & Conron, Bakersfield, for appellants Standard Elementary School Dist. and C. E. Flynn.

Calvin H. Conron, Jr., Bakersfield, for respondents Carol L. Porter and Marvin William Shreffler.

SCHAUER, Justice.

Defendants appeal from judgments rendered against them on jury verdicts awarding damages for injuries received by two school children who were struck by a city passenger bus shortly after alighting from a school bus. A hearing was granted by this court, after decision by the District Court of Appeal, Fourth Appellate District, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Mr. Presiding Justice Barnard, correctly treats and disposes of the issues involved, and it is therefore, with certain further discussion, adopted as and for the opinion of this court. Such opinion (with appropriate deletions of introductory and conjunctive matter, and pertinent additions, all as indicated) is as follows:

"[* * *] The accident occurred about 3 p. m. on December 1, 1947, at the intersection of Woodrow and Yosemite Streets, in a residential district adjoining Bakersfield. The day was clear and the streets were dry. The two minor plaintiffs were being returned to the vicinity of their homes by the school bus which, traveling west on Woodrow, made its regular stop on the northeast corner of this intersection. Some 12 or 15 children, including the minor

plaintiffs, got off the bus which remained stopped for several minutes. The children had been instructed not to cross the street until a whistle was blown by the driver.

"While this group of children stood near the front of the bus, and possibly while some of them were still leaving it, the minor plaintiffs, who were both 8 years old, started to run in front of the school bus and in a southerly direction across Woodrow Street. They were the only two of this group who lived to the south of Woodrow. About that time the city bus, which was also proceeding west on Woodrow, passed the standing school bus and collided with the minor plaintiffs, causing the injuries in question. The driver of the city bus first saw the children when they were approximately 6 to 10 feet from his bus and came to a stop some 25 or 30 feet after applying his brakes. The evidence is conflicting as to the speed at which the city bus was traveling and as to whether these children started across the street before or after the driver of the school bus blew his whistle.

"In each of these actions the city bus company and the driver of its bus, and the school district and its bus driver, were joined as defendants and the actions were consolidated for trial. In each action, the jury returned a verdict in favor of the plaintiffs and against all defendants. Separate judgments were entered from which all defendants have appealed upon the same transcripts.

"On the appeal of the city bus company and its driver it is first contended that the sole cause of the accident was the carelessness of the school bus driver; that there was no evidence of undue speed or of other negligence on the part of the driver of the city bus; that this driver was confronted with an emergency caused by the driver of the school bus; and that the resulting conditions were such that a reasonably prudent driver could not have avoided the accident. It is argued that the driver of the school bus, without observing traffic conditions, blew his whistle and caused the children to run in front of the school bus and into the path of the city

bus; that it was impossible for the driver of the city bus to see the children until they had passed the front of the school bus; and that he could not stop in time to avoid the accident. It is further argued that although several witnesses testified that the city bus was traveling at a speed of 20, 25 and 30 miles an hour, respectively, this evidence is conclusively disproved by the physical fact that it stopped before it had completely crossed the intersection, and that the collision would have occurred regardless of any speed at which that bus had been going.

[1] "Not only is the evidence conflicting as to whether or not the driver of the school bus blew his whistle before the children started to cross the street, but a conflict appears with respect to negligence on the part of the driver of the city bus. He testified that he observed the school bus standing at this corner when he was about 150 feet to its rear; that he recognized it as a school bus and knew that small children would be leaving it; and that as he approached the intersection he did not see any children around it. However, several passengers on that bus testified that as they approached this intersection the driver was looking back and talking to a young lady about a new car he had bought, and that he looked forward just before he put on his brakes. While he testified that his speed was 10 miles per hour when he observed the children, there is evidence showing that this bus traveled at least 36 feet from that point although the statutory stopping distance is 9.3 feet at 10 miles per hour. Moreover, his view to the north was obstructed and other witnesses testified that the speed of that bus was from 20 to 30 miles per hour. The entire question was one of fact, and the evidence is sufficient to sustain the implied finding of negligence on the part of this driver.

[2] "It is further contended that the city bus driver had a right to believe that the driver of the school bus would comply with the safety regulations governing him and would not 'compel' the pupils to run around the school bus and into the pathway of the city bus. He was not entitled

to rely on this presumption unless he himself were free from negligence. (Doyle v. Loyd [1941], 45 Cal.App.2d 493 [114 P.2d 398]; Fietz v. Hubbard [1943], 59 Cal.App.2d 124 [138 P.2d 315].)

"On the appeal of the school district and its bus driver it is first contended that the accident was caused solely by the negligence of the driver of the city bus, and that any negligence of the driver of the school bus could not have contributed to the accident since it would have occurred regardless of what he did. It is argued that these children ran into the street before the driver of the school bus blew his whistle; that when he saw them they were almost even with the left side of the school bus, and it was too late for him to have prevented the accident; that in his excitement he then blew his whistle to warn the children of their danger; and that his valiant effort to prevent the accident could not be considered as having caused it.

[3] "The school bus driver testified that as he pulled up and stopped he looked both ways and saw no traffic at all on the street; that he did not look again; that his rear-view mirror was one which would have enabled him to see for some 300 feet to the rear; and that he first saw the city bus when it was opposite him and about 5 or 6 feet from the two children. He further testified that when he saw the children they were about even with the left side of his bus and the city bus about 6 or 8 feet from them; and that he blew his whistle 'in the excitement of trying to prevent the accident' and for the purpose of 'trying to attract the attention of the kids.' Not only was there evidence, by three witnesses, that this driver blew his whistle before the two children started to cross the street, but he admitted that after looking as he approached for a stop he did not again look for traffic, although he was stopped for several minutes, and that he did not see the city bus until it was almost past his own bus. Aside from the main conflict in the evidence in this regard, and assuming that this bus driver did not blow his whistle before the children started to cross the street, it could hardly be held,

as a matter of law, that he exercised ordinary care under the circumstances, to say nothing of the special care required of such a bus driver. The question was one of fact and the evidence, with the reasonable inferences therefrom, is sufficient to support a finding of negligence on the part of the driver of the school bus.

"It is next contended that the court committed reversible error by giving one instruction relating to a rule of the State Board of Education, as then in effect. The portion of this instruction which is material here reads as follows:

"Whenever a school bus stops at a point * * * to discharge pupils who must cross the street or highway in order to reach their destination, * * * the driver of the bus shall not permit the pupils to cross the street or highway until they may safely do so, and shall, if necessary, escort such passengers across the street or highway.

"A violation of the foregoing rule is negligence as a matter of law."

"It is argued that the jury was thus instructed that a violation of this rule is negligence as a matter of law, without being further instructed that the surrounding circumstances must also be considered to determine whether or not it was excused or justified, and without being told that the violation must be a proximate cause of the injuries received; that this instruction took from the jury the entire question as to whether this driver's violation of the rule, by blowing his whistle as a warning after the emergency existed, might be excused or justified under the circumstances; and that its prejudicial nature clearly appears from the rules set forth in *Satterlee v. Orange Glenn School Dist.* [1947], 29 Cal.2d 581 [177 P.2d 279], and followed in *Combs v. Los Angeles Railway Corp.* [1947], 29 Cal.2d 606 [177 P.2d 293].

"In the *Satterlee* case, the court considered an offered instruction telling the jury that the violation of a certain statute was negligence, and that its verdict must be for the defendant if it found that the plaintiff had violated it and that such act proximately contributed in the slightest

degree to the accident. The court pointed out that 'An act or failure to act below the statutory standard is negligence *per se*, or negligence as a matter of law'; that in applying this rule each violation of this kind must be considered in connection with the surrounding circumstances; that in an emergency or unusual condition circumstances may be shown to excuse the violation; and that ordinarily the excuse relied on presents a question of fact for the jury. It was then held that the refused instruction did not afford the jury an opportunity to pass upon the question as to whether the circumstances were sufficient to excuse or justify that violation. This was true in that case because the offered instruction directed a verdict if it was found that a violation occurred which contributed at all to the accident.

"While the instruction here in question stated that a violation of the rule given is negligence as a matter of law, it did not purport to cover proximate cause or other elements, and did not direct or suggest any verdict. It was one of a large number of instructions in which many other matters, including proximate cause and negligence, were fully covered. In the second instruction given the jury was told not to single out any single instruction and ignore the others, but to consider all the instructions as a whole and to regard each in the light of all the others. In another, the jury was told that, 'In deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence' and that 'An act negligent under one set of conditions might not be so under another.' In another, 'In determining whether negligence, or proximate cause—has been proved—you should consider all the evidence bearing either way upon the question, regardless of who produced it.'

"In another instruction the jury was told that a person suddenly confronted with imminent danger to himself or to others is not required to use the same judgment or prudence that would be required in calmer moments, that his duty is to exercise only

the care that an ordinarily prudent person would exercise in the same situation, and that this is all that the law requires of him. In another, the basic speed law was given in the language of section 510 of the Vehicle Code, although that section was not mentioned. The next instruction stated that conduct in violation of the section of the Vehicle Code, 'just read to you' constitutes negligence *per se*. It then stated that this means that such conduct creates a presumption that the person so doing was negligent, that this presumption is not conclusive, and that it may be overcome by other evidence showing that under all the circumstances such conduct was excusable and was such as might reasonably be expected from a person of ordinary prudence. This instruction was followed by one on speed at an obstructed intersection, by one on unavoidable accidents, and then by the instruction here attacked. Thereafter, 15 other instructions were given.¹

[4] "Under these circumstances, we are unable to hold that the instruction in question could have had the effect of taking

from the jury the consideration of the question as to whether or not any violation of this rule by the driver of the school bus was excusable or justified, or that it was prejudicial. While the jury had a right to consider that element it was left to other instructions, and the criticized instruction did not purport to cover all of the elements necessary to a recovery. Other elements were fully covered in other instructions, including the rules and requirements in cases of sudden peril or imminent danger, and the rule that while a violation of a statute constitutes negligence *per se* this is merely presumptive and not conclusive, and may be overcome by other evidence showing that under all the circumstances such a violation was excusable. At the outset the jury was told not to rely on any one instruction and ignore the others, but to consider them as a whole and to regard each in the light of all the others. It rather clearly appears that both of these bus drivers were negligent. All of the issues were submitted to the jury and were substantially covered by the instructions given, and it cannot reasonably be believed that such error as

1. In addition to instructions already mentioned, the following appear in the jury charges:

"Should the plaintiff succeed in proving negligence which was a proximate cause of the injury on the part of one defendant only, then I instruct you that as to the other defendant, the plaintiff has failed in his burden of proof and that said defendant is entitled to your verdict * * *

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies * * *

"* * * If you find that any party to this action was, or all were, negligent, you will follow the court's instructions in determining whether or not liability should attach, and do so without regard to how you might grade or compare the negligence involved, if permitted so to do * * *.

"In law we recognize what is termed

an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it * * *.

"If, adhering to the court's instructions, you should find that any party to this action is entitled to a verdict against the other party, it then will be your duty to award the party so entitled such amount of damages as will compensate him and her reasonably for all detriment suffered by him and her and of which the other party's negligence, as found by you, was a proximate cause—whether such detriment could have been anticipated or not.

"Should your decision be to award such party damages, in the arriving at the amount of the award, you shall determine the items of claimed detriment which I now am about to mention, provided that you find it to have been suffered by him or her, and as a proximate result of the other party's negligence."

appears in the instruction complained of could have affected the result.

"It is finally contended that the judgments against the driver of the school bus must be reversed since no claim was served upon him prior to the filing of these actions, and within the time limited by section 1981 of the Government Code. The accident happened on December 1, 1947. Each plaintiff filed a claim with the secretary of the school district on February 16, 1948. While these claims were not then served on the school bus driver, copies thereof were attached as exhibits to the complaints in these actions and were served on him within 90 days after the accident occurred.

[5] "The case of *Artukovich v. Astendorf* [1942], 21 Cal.2d 329 [131 P.2d 831] and *Redlands High School Dist. v. Superior Court* [1942], 20 Cal.2d 348 [125 P.2d 490], are cited in support of the contention that the failure to file such a claim before bringing suit is fatal to the cause of action. The first of these cases involved a section of the Political Code which required the presentation of a claim to the board of supervisors before any action could be brought. The other case, involving a section of the School Code, contains nothing which is controlling here. While section 1981 of the Government Code requires the presentation of a claim to the employee whose negligence is in question within 90 days after the accident, it contains no requirement that this shall be done before the action is commenced. (See *Ansell v. City of San Diego* [1950], 35 Cal.2d 76 [216 P.2d 455].) Under the circumstances it must be held that there was a substantial compliance with the requirement of this code section."

The school bus driver now relies also upon certain language in *Veriddo v. Renaud* (1950), 35 Cal.2d 263, 217 P.2d 647 (decided subsequent to the filing of the above quoted opinion of the District Court of Appeal), to the effect that "if compliance with * * * provisions [of Government Code section 1981] is not a prerequisite to suit against * * * [the public employees named therein], then the section appears to be wholly meaningless * *."

However, no claim whatever was filed in the *Veriddo* case, and the specific point there decided was that section 1981 applied to claims against public officers and employees. It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court. So understood, the quoted statement obviously does not constitute a holding that compliance with the claim provisions is a prerequisite to the filing of suit, as distinguished from the *maintenance* thereof.

The judgments are affirmed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the judgment as to the school district and the railway company, but believe that the court has now construed section 1981 of the Government Code to the serious disadvantage of employees of public bodies and inconsistently with the prior construction of the statute.

I joined in the decision in the *Veriddo* case because I agree that the Government Code requires a filing of the claim as a "prerequisite to suit", as was stated in the opinion. The ordinary meaning of "prerequisite to suit" is something which must be done before commencement of the action. The court now holds that a plaintiff has complied with the statute if he filed his claim within ninety days of the accident, although suit may have been commenced upon the day that the accident occurred.

This construction is contrary to one of the legislative purposes as stated in the *Veriddo* case. It was there said that "* * the Legislature has extended to public officers and employees, who incur liability in the performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated in Chapter 6." 35 Cal.2d at page 265, 217 P.2d 647, 648. And in *Ansell v. City of San Diego*, 35 Cal.2d 76, 78, 216 P.2d 455, 456, one of the purposes was stated to be

"* * * to provide for the defense of suits for damages against officers, and to authorize the insurance of officers at public expense * * *."

An employee cannot demand legal defense by the public body employing him until a claim is filed. According to the present decision, the employee will be under the burden of providing his own defense until such time as a claim may be filed. Manifestly, such a rule does not extend to the employee the full protection to which this court has held he is entitled. For these reasons, to effectuate the purposes of section 1981 of the Government Code, as previously construed, I would reverse the judgment against C. E. Flynn.

SPENCE, J., concurs.



101 Cal.App.2d 205

MITCHELL v. PRESTON.

Civ. 14512.

District Court of Appeal, First District,
Division 2, California.

Dec. 19, 1950.

Helen G. Mitchell brought action against Del Preston for damages to dwelling house as result of alleged defective workmanship in reconstructing portion of the foundation. A judgment for defendant was entered by Superior Court in and for the County of Marin, Stanley Murray, J., and the plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence supported finding that defects which appeared in plaintiff's house after defendant had reconstructed portion of the foundation were not due to defendant's faulty workmanship.

Judgment affirmed.

I. Contracts ⇨322(4)

Evidence supported finding that defects which appeared in plaintiff's house after defendant reconstructed portion of the

foundation under oral contract were not due to defendant's faulty workmanship.

2. New trial ⇨102(1)

A motion for a new trial will be denied where evidence might have been produced by exercise of reasonable diligence, or where moving party has not shown due diligence in discovering and producing it, or where no reason is shown by evidence might not, with reasonable diligence, have been discovered and produced.

3. New trial ⇨102(3)

In action for damages to dwelling house as result of alleged defective workmanship in reconstruction of portion of the foundation, refusal of plaintiff's motion for new trial on ground of newly discovered evidence consisting of testimony of city building inspector who had inspected house was not abuse of discretion, where plaintiff knew of the inspection but did not inquire about its result before the trial.

Norman A. Eisner, San Francisco, for appellant.

No appearance on behalf of the respondent on the appeal.

DOOLING, Justice.

Defendant, a building contractor, entered into an oral contract with plaintiff to reconstruct a portion of the foundations of a dwelling house belonging to plaintiff, to excavate a portion of the basement area, and to make other alterations and repairs. The plans pursuant to which the work was done were prepared for plaintiff by a man who as not an architect. The plaintiff so testified: "he was not an architect * * * I learned after I had employed and paid him." What his qualifications, if any, were was not disclosed.

After the work was completed cracks appeared in the plaster of the interior walls, doors and windows jammed and plaintiff employed another to reconstruct portions of the foundation. She sued defendant for damages alleging that defendant "performed said alterations in so unskilled and negligent manner that * * * the foundation wall settled" causing the

damages enumerated. The findings of the trial court expressly negated these allegations and judgment went for defendant.

On appeal it is argued that the judgment is without support in the evidence. The evidence is in flat conflict as to the condition of the building before the alterations. Defendant's foreman testified to extensive cracks in the plaster which led defendant to suggest to plaintiff that much of it should be replaced, and that some of the doors were sticking before the work commenced. Plaintiff and her witnesses contradicted this. Plaintiff produced an architect who testified in chief: "There were many cracks throughout the house * * * and it was evident they occurred since the painting was done * * * it is quite possible some of it was caused as a result of the foundation work." Of a portion of the new foundation work he testified: "Actually, it is about the best you can do under those circumstances * * * I think it is very poor construction."

"Q. From your examination, would you say that the structure on top of the concrete wall sank as the result of that? A. I think it is highly possible."

He further testified that he had had additional work done on the foundation and: "There still seems to be some cracking going on and I think it would be reasonable to expect it * * *. When you rearrange the entire system of a house like that, you can expect cracks to occur over a long period of years sometimes. * * * I think however if it is true this plaster was in good shape to begin with, then it was probably an inadequate job originally."

[1] The burden was on plaintiff to prove that the defects which appeared in the house were due to defendant's faulty workmanship. With this equivocal testimony on the part of her own expert we cannot hold that the trial judge abused his discretion in deciding that this burden had not been met.

[2,3] Plaintiff moved for a new trial on the ground of newly discovered evi-

dence. The evidence proposed to be produced was that of the city building inspector. In an effort to show the necessary diligence and excuse for not presenting this evidence on the trial plaintiff's affidavit stated: that she received a letter from the building inspector after the date of entry of judgment giving the results of his inspection; "that sometime prior to the writing of said letter" (date unspecified) the building inspector had inspected the premises and that "your affiant was informed that in the event said inspection revealed any defects in the construction * * * she would be advised thereof by said Building Inspector; that * * * no report was made to your affiant that said inspection revealed any defects * * *."

In a counter affidavit the building inspector stated that his inspection was made at plaintiff's request in January, 1949 (the trial was the following August) and that the records of such inspection were on file and available to plaintiff on August 22, 1949, the date of the trial; and that no request was made by plaintiff to produce them at the trial.

"(The) motion (for new trial) will be denied where the evidence might have been produced by the exercise of reasonable diligence, or where the moving party has not shown due diligence in discovering and producing it, or where no reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced." 20 Cal.Jur., New Trial, sec. 59, p. 85; *Slemons v. Paterson*, 14 Cal.2d 612, 616, 96 P.2d 125; *Kirschbaum v. McCarthy*, 5 Cal.2d 191, 198, 54 P.2d 8.

The trial judge cannot be charged with an abuse of discretion if he decided that a reasonably diligent litigant knowing of the inspection which she had requested would have inquired about its result before the trial.

Judgment affirmed.

NOURSE, P. J., concurs.

101 Cal.App.2d 275

HEIFETZ et al. v. BELL et al.

Civ. 17965.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Philip Heifetz and another sued Joe Bell and others to recover for alleged fraud on the part of defendants arising out of plaintiffs' purchase of a parking lot business owned by Bell and sold through his agents, the codefendants, who comprised a real estate brokerage firm. The Superior Court, Los Angeles County, Wilbur Curtis, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the evidence established that the brokerage firm's representation that the owner would not sell the business for less than \$2500 was not a false representation.

Affirmed.

1. Fraud ⇨58(2)

In action to recover for alleged fraud brought by buyers of parking lot business against seller and his agents, evidence established that statement made by brokerage firm to effect that seller would not sell business for less than \$2,500, was not a false representation.

2. Fraud ⇨17

Where brokers were not asked for any information relative to their commission for sale of parking lot business, they were under no duty of disclosure.

3. Fraud ⇨58(4)

In action brought by buyers against seller and brokerage firm to recover for alleged fraud on part of defendants arising out of plaintiffs' purchase of parking lot business, evidence sustained trial court's finding that plaintiffs had not purchased business in reliance upon alleged representations of defendants.

4. Fraud ⇨24

Where party relies on his own investigation and inspection of property, regardless of seller's representations, he cannot claim to have been misled by such statements.

5. Appeal and error ⇨1071(1)

Trial court's findings containing negative pregnant are not to be approved as to their form, but a reversal on that account will not be ordered.

6. Appeal and error ⇨931(1), 1008(1)

Findings are to be construed liberally with view of supporting rather than defeating judgment, and where it is plain that trial court's intent was to find material facts against appellant, trial court's decision will not be set aside.

7. Appeal and error ⇨1170(10)

In fraud action, where it was clear from findings as whole and review of entire record that trial court intended to find adversely on each of appellants' allegations relative to material fraudulent representations, any error present by virtue of negative pregnant contained in trial court's findings was not such error as to have prejudiced appellants or resulted in miscarriage of justice. Const. art. 6, § 4½.

8. Appeal and error ⇨1008(1)

Where record indicates that fair trial was had and decision reasonably indicates true findings and conclusions of trial court and that issues have been clearly cast and fairly determined, judgment will not be upset.

Benjamin F. Kosdon and Daly B. Robnett and Benjamin F. Kosdon, all of Los Angeles, for appellants.

Franklin D. Laven, Los Angeles, for respondents.

MOORE, Presiding Justice.

The judgment herein denied appellants relief in their action to recover for alleged fraud on the part of respondents arising out of appellants' purchase of a parking lot business owned by Bell and sold through his agents, his codefendants who comprised a real estate brokerage firm.

Bell had given an exclusive listing of the business to his codefendants with the provision that he must realize \$1,000 net from the sale and that any amount received above that sum would belong to the brokers. App

pellants purchased the business through the brokerage for \$2,500 on the representation that the owner would not sell for less. After operating the lot without substantial profit for several months appellants sought to rescind the transaction and later instituted this suit, basing their action upon the theory of fraud arising from the last mentioned representation along with others in regard to the income and volume of business done by the establishment. The trial court found the representation that "the owner would not sell for less" was made to appellants, but concluded that no material false representation had been made and that appellants had not, in any case, relied upon respondents' statements in entering into the transaction.

[1,2] The first contention is that actual fraud was found by the trial court by reason of its finding that defendant brokers had stated that Bell would not sell the business for less than \$2500.00 even though Bell had actually listed the property for \$1,000.00. In support thereof appellants cite *Anderson v. George L. Barney Co.*, 1 Cal.App.2d 340, 36 P.2d 717, and *Thompson v. Stoakes*, 46 Cal.App.2d 285, 115 P.2d 830. However, that such a statement was not a false representation is supported by the evidence. Inasmuch as the brokers had the exclusive right of sale and were privileged to set any figure above \$1,000, their representation as to the price was nothing more or less than that the business could not be had for less. There is no evidence that the brokers were asked for any information relative to their commission. Consequently respondents were under no duty of disclosure. They dealt at arm's length. Nor is there any contention that there was any agency relationship between the brokers and the vendee. *Thompson v. Stoakes*, *supra*, was an action by a vendor of property to recover secret profits from brokers, acting as her agents in an exchange transaction. The decision in favor of the vendor was predicated specifically on the agent's violation of duty of full disclosure under the fiduciary relationship present. *Anderson v. George L. Barney Company*, *supra*, was based upon the same theory.

Both are distinguished from the facts here involved.

[3,4] Appellants also urge that there is no evidence to support the finding that they did not purchase the business in reliance upon the alleged representations of respondents. That appellants are in error in making such contention they will observe when reminded of the evidence that they were experienced parking lot operators; that before making the purchase appellant Heifetz made an independent investigation of the neighborhood; viewed the lot in question; checked the number of vehicles parked there; noted its possible capacity, and also made computations as to the probable revenue from the business. In view of such evidence, the court was privileged to disbelieve appellant Heifetz' testimony that he relied on any representations of the respondents as to these factors. Indeed, it would be unreasonable to believe that men so experienced as were appellants in this field of business would pay heed while making such an investment to the self-serving declarations of the real estate broker. It is a well settled rule that where a party relies on his own investigation and inspection of property, regardless of the vendor's representations, he cannot claim to have been misled by such statements. *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 71, 62 P.2d 1397; *Smith v. Brown*, 59 Cal.App.2d 836, 838, 140 P.2d 86; *Cameron v. Cameron*, 88 Cal.App.2d 585, 593, 199 P.2d 443; *Gifford v. Roberts*, 81 Cal.App.2d 712, 718, 184 P.2d 942; *King v. Miller*, 97 Cal.App.2d 702, 218 P.2d 554.

[5-8] It is fervently contended that because the finding of nonreliance, and other findings contain negative pregnant they imply the truth of allegations they purport to controvert. While such findings are not to be approved as to their form a reversal on that account will not be ordered. The doctrine still obtains that findings are to be accorded a liberal construction with a view of supporting rather than defeating a judgment, and where it is plain that the intent was to find the material facts against appellant, the trial court's decision will not be set aside. *Johnrow v. Thomas*, 31 Cal.

2d 202, 208, 187 P.2d 681; *McAuliffe v. McAuliffe*, 53 Cal.App. 352, 355, 199 P. 1071; *Ballagh v. Williams*, 50 Cal.App.2d 10, 14, 122 P.2d 343. It is clear from the findings as a whole and a review of the entire record that it was intended to find adversely on each of appellants' allegations relative to any material fraudulent representations. If there be error present, it is not such as to have prejudiced appellants or resulted in a miscarriage of justice. Section 4½, Article VI of the Constitution was enacted for the purpose of preventing reversals in just such situations as are presented here. Where the record indicates that a fair trial was had and the decision reasonably indicates the true findings and conclusions of the court and that the issues have been clearly cast and fairly determined, the judgment will not be upset.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



101 Cal.App.2d 278

KUZMICKI v. NELSON et al.

Civ. 18105.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950

Action by Frances Kuzmicki against Charles Nelson, individually and doing business under the fictitious firm name and style of Nelson Specialties of California, Charles H. Nelson, Charles Nelson Specialties Co., Inc., a corporation, for money had and received. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered an order denying corporate defendant's motion to vacate a writ of attachment levied against it and corporate defendant appealed. The District Court of Appeal, Moore, P. J., held that where corporate defendant had become incorporated after debt by individual defend-

ant had matured, in absence of affirmative assumption of individual defendant's debt by corporate defendant, writ of attachment could be levied against corporate defendant.

Order reversed.

1. Fraudulent conveyances ⇨181(1)

Title of property fraudulently transferred continues to be vested in purported transferor in so far as rights of latter's creditors are concerned.

2. Fraudulent conveyances ⇨228

A creditor holding a matured claim may disregard a fraudulent conveyance and levy upon property conveyed as belonging to original debtor. Civ.Code, § 3439.09.

3. Fraudulent conveyances ⇨182(1)

The transferee of a debtor's property is not liable to latter's creditor on any account except in event transferee should dispose of things conveyed to him.

4. Fraudulent conveyances ⇨228

Where individual defendant had become indebted to plaintiff's assignor for moneys had and received prior to filing of action, and corporate defendant had become incorporated after debt to plaintiff's assignor had matured, in absence of an affirmative assumption of individual defendant's debt by corporate defendant, plaintiffs could not secure a writ of attachment against corporate defendant, even though it was alleged that individual defendant transferred his contracts to corporate defendant without consideration. Civ.Code, § 3439.09.

5. Fraudulent conveyances ⇨228

Fact that a creditor may legally sue recipient of property fraudulently transferred to him does not entitle a creditor to attach chattel or chose in action so conveyed as property of transferee.

6. Attachment ⇨245

While an affidavit determines amount for which an attachment is to be levied, affidavit is not sole basis for the writ, in that court must scrutinize pleadings filed in testing basic facts of plaintiff's claim, on motion to vacate.

Jacob Chaitkin, Pasadena, for appellant.

A. J. Blackman, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant, Charles Nelson Specialties Co., Inc., demands a reversal of an order denying its motion to vacate a writ of attachment theretofore levied. The grounds for its motion were (1) the insufficiency of the affidavit; (2) plaintiff has no cause of action upon contract against appellant.

Chronology

On July 13, 1949, respondent filed her complaint against "Charles Nelson, individually and doing business under the fictitious firm name and style of Nelson Specialties of California and John Doe," alleging indebtedness for "money had and received." On the same day she filed her amended complaint against the same defendants with the additional allegations of the assignment of the claim to her by Sonelco, a corporation, and her ownership thereof. On August 23 Nelson and others incorporated appellant. September 20 respondent filed her second amended complaint adding appellant as a defendant, along with Doe One, Doe Two, Doe Three, Doe Four and Doe Five. She therein alleged that Charles Nelson and the five Does are partners of Charles Nelson doing business under the fictitious firm name and style of Nelson Specialties of California and that they had become indebted to Sonelco for money had and received and in a second count that at the time Nelson and the partnership became indebted to Sonelco, Nelson "and said partnership owned certain valuable contracts * * * with certain general contractors," and that about September 1, 1949, with the intention of placing them beyond the reach of his creditors, Nelson, without consideration, assigned the contracts to appellant, a "newly formed" corporation of which Nelson is president and holder of one-half of its issued stock; that appellant received such assignment with knowledge of Nelson's fraudulent intent and thereby rendered Nelson and his partnership insolvent.

On January 17, 1950, respondent amended her last pleading by substituting for Doe One, the name of appellant which she had discovered to be the true name of Doe One. At the same time she sued out a third alias writ of attachment and filed with the clerk her "Statement to Clerk" in which she declared her intention to instruct the sheriff to levy upon the account receivable of appellant with American Seating Company in Los Angeles. Two days later appellant filed its Notice of Motion to Vacate the attachment accompanied by the affidavit of its attorney averring the date of appellant's incorporation, the amendment to the second amended complaint substituting appellant for "Doe One," a defendant named in the last mentioned pleading notwithstanding the fact that appellant had been designated as a defendant in such pleading.

[1-3] The writ should have been vacated. Title of property fraudulently transferred continues to be vested in the purported transferor in so far as the rights of the latter's creditors are concerned. A creditor holding a matured claim may disregard a fraudulent conveyance and levy upon the property conveyed as belonging to the original debtor. Civ.Code, sec. 3439.09; First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 371, 55 P. 980; Della v. Home Bank of Porterville, 105 Cal.App. 106, 109, 286 P. 1064; 37 C.J.S., Fraudulent Conveyances, §§ 307, 309, p. 1138. The transferee of a debtor's property is not liable to the latter's creditor on any account except in the event the transferee should dispose of the things conveyed to him. Pedro v. Soares, 18 Cal.App.2d 600, 604, 64 P.2d 776, 779. By the proceeding resorted to the debt of the garnishee is practically determined to be due appellant instead of to Nelson. Thus by the *ipse dixit* of respondent in making appellant a defendant the corporation was forestalled of protecting its rights.

[4] Nelson had become indebted to Sonelco for moneys had and received long prior to the filing of the action. Respondent alleges that Nelson transferred his contracts to appellant, his own "newly formed"

corporation, without consideration. She argues that she "had a right to disregard the conveyance and attach the property conveyed (Civil Code, sec. 3439.09) * * in contemplation of law title remained in the fraudulent transferor." She concluded, however, that the law had been satisfied by directing the writ to be levied upon "all property of such defendants."

[5] The law that a creditor may sue the recipient of property fraudulently transferred to him does not entitle a creditor to attach the chattel or chose in action so conveyed as the property of the transferee. *Pedro v. Soares*, supra, cited by respondent, is not authority for such procedure. The plaintiffs in that action with an established claim against Soares sued the defendants alleging (1) that they had conspired to cheat him; (2) that defendant Gonçalves held a fund resulting from the sale of cattle which had been mortgaged by Soares to Pedro and fraudulently transferred to Gonçalves. The court there held that "the attempted sale must be treated as though it had never taken place * * *." See 37 C.J.S., *Fraudulent Conveyances*, §§ 307, 309, pp. 1138, 1141. The *ex parte* amendment of the pleading alleging that the corporation had theretofore been designated Doe One and averring that it was indebted to Sonelco in the amount the original complaint claimed was due her from Nelson is a feeble attempt to achieve by fiction what should be attempted only by legal logic. Appellant became incorporated months after the debt to Sonelco matured. Therefore, it is impossible for it to have become a debtor of Sonelco for moneys had and received, except by an affirmative assumption of Nelson's debt which does not appear. *Yosemite Growers Co-op Association v. Case-Swayne Company*, 73 Cal.App.2d 806, 810, 167 P.2d 541.

[6] Respondent contends that the affidavit for attachment is the sole basis for the writ and that no other document need be consulted in determining the validity thereof. This is not wholly correct. It is true that the affidavit determines the amount for which the attachment is to be levied. This is all that is held in *Baldwin v. Napa & Sonoma Wine Co.*, 137 Cal. 646,

70 P. 732, cited by respondent. But in testing the basic facts of the plaintiff's claim, the court cannot avoid a scrutiny of the pleadings filed.

Order reversed.

McCOMB and WILSON, JJ., concur.



101 Cal.App.2d 253

ROMERO et al. v. EUSTACE.

Civ. 17743.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Malpractice action by Geraldine Romero and Edward J. Romero against Florence M. Eustace. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered judgment for defendant, and the plaintiffs appealed. The District Court of Appeal, Wilson, J., held that evidence whether osteopath negligently used caustic and dangerous chemical in irrigation of bladder of patient suing osteopath for malpractice was for trier of fact.

Judgment affirmed.

1. Appeal and error ⇐994(3)

The rule that amount of credit to be given to positive testimony of witness is solely a question for trial court is not applicable in a case in which the testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as in effect to constitute no evidence at all.

2. Evidence ⇐588

Before evidence can be disregarded as inherently improbable, there must exist a physical impossibility of the evidence to be true or its falsity must be apparent without resort to inferences or deductions.

3. Appeal and error ⇐1011(1)

Where there is substantial evidence, although conflicting, that sustains the judg-

ment, an appellate court will not substitute its evaluation of the evidence or its opinion as to credibility of witnesses for that of the trial court, even though to some triers of fact the evidence would have seemed so improbable, impossible and unbelievable that a judgment contrary to that being considered on appeal would have inevitably followed.

4. Appeal and error ⇨931(1)

Where the evidence was not improbable or impossible of belief, the appellate court would review evidence in light most favorable to respondent and resolve all conflicts in respondent's favor.

5. Physicians and surgeons ⇨18(9)

Evidence whether osteopath negligently used caustic and dangerous chemicals in irrigation of bladder of patient suing osteopath for malpractice was for trier of fact.

Stephen Monteleone, Los Angeles, for appellants.

Reed & Kirtland and Robert E. Moore, Jr., all of Los Angeles, for respondent.

WILSON, Justice.

[1,2] The rule that the amount of credit to be given to the positive testimony of a witness is solely a question for the trial court is not applicable in a case in which the testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as in effect to constitute no evidence at all. *Bennett v. Chandler*, 52 Cal.App.2d 255, 261, 126 P.2d 173; *De Arellanes v. Arellanes*, 151 Cal. 443, 448, 90 P. 1059. Plaintiffs invoke this rule as one of the grounds of their appeal from the judgment in favor of defendant in their action against her for malpractice. The other ground is the insufficiency of the evidence to sustain the findings and judgment. In order that the court may be justified in disregarding evidence as being inherently improbable and unbelievable there must exist a physical impossibility of its being true or its falsity must be apparent without resort to inferences or deductions. *Peterson v. Peterson*, 74 Cal.App.2d 312, 318, 168

P.2d 474; *Poe v. Lawrence*, 60 Cal.App.2d 125, 132, 140 P.2d 136.

[3,4] When there is substantial evidence, although conflicting, that sustains the judgment an appellate court will not substitute its evaluation of the evidence or its opinion as to the credibility of the witnesses for that of the trial court. *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 779, 163 P.2d 756; *Estate of Pohlmann*, 89 Cal.App.2d 563, 567, 568, 201 P.2d 446. This rule will obtain even though to some triers of fact the evidence in the instant case would have seemed so improbable, impossible and unbelievable that a judgment contrary to that now on appeal would have inevitably followed. Although some of the evidence is extremely unsatisfactory it is not of the character that warrants a reviewing court to reject it by reason of its improbability or of its physical impossibility. Since from the record we cannot say the evidence is improbable or impossible of belief, we must follow the rule so frequently announced that we must view the evidence in the light most favorable to respondent and resolve all conflicts in her favor.

The action is for damages for personal injuries alleged to have resulted to plaintiff Geraldine Romero from the purported careless and negligent use and application by defendant of caustic and dangerous chemicals in the irrigation of Mrs. Romero's bladder—a solution which the ordinary physician and surgeon practicing in the city of Los Angeles, in the exercise of ordinary care, would not have applied to living human tissue.

Mrs. Romero became acquainted with defendant, a doctor of osteopathy, prior to September, 1947. She told defendant she was continuously tired, not able to sleep, had to get up several times during the night, and had had difficulty with her bladder and had been receiving bladder irrigations for more than a year. Defendant consulted a urologist, Dr. Scouten, after which she gave bladder irrigations to Mrs. Romero consisting of a solution of silver nitrate and metaphen in oil. The treatments continued during September and Oc-

tober of 1947. On January 12, 1948, while Mrs. Romero was in defendant's office to obtain a prescription for her husband she, at the suggestion of defendant, made an appointment for the following day at which time defendant said she would try a different medication. After discussing the use of Lugol's solution with Dr. Scouten defendant, on January 13, instilled in Mrs. Romero's bladder a silver nitrate solution and metaphen in oil. After the catheter was removed defendant attached a wad of cotton the size of a pea to an applicator, dipped it in Lugol's solution which she had previously poured in a glass, and inserted it in the opening of the urethra. Upon application of the solution Mrs. Romero went into a spasm, appeared to have fainted momentarily and was suffering from such excruciating pains that defendant gave her two hypodermics for relief. When Mrs. Romero returned to defendant's office for treatment she had to be assisted because of the severe pain she was suffering.

On January 29 plaintiff was taken to Dr. Winer, a urologist; he took her history, examined and treated her; he found her to be in severe pain; she was unable to hold her urine; there was a tenderness along the urethra which was swollen and edematous; there was also a tenderness in the trigonal region; urinalysis showed shreds of tissue, gross blood, and was positive for both streptococcus and staphylococcus. Dr. Winer made an initial diagnosis of cystitis due to a severe chemical, and a superimposed pyogenic infection due to staphylococcus and streptococcus. His opinion was based on the history which plaintiff gave of the bladder instillation that put her into a collapse and from the sloughing of the interior lining of the bladder. The doctor was of the opinion it was of a chemical origin.

It is plaintiff's theory, as shown by the record and by the argument on appeal, that her infection was not caused by the instillation of silver nitrate and metaphen in oil into her bladder but the argument centers around the use of the solution that was applied to her urethra, the inference being that defendant did not use Lugol's solution

but did apply a caustic substance. Since Mrs. Romero had been treated several times by defendant, who had instilled silver nitrate and metaphen in oil in the bladder, and since on the occasion in question plaintiff did not feel any pain until the solution was applied externally, it is her theory that a true Lugol solution was not used.

Defendant testified she obtained a new bottle of Lugol's solution from a drug store on the morning she used it on Mrs. Romero. This testimony is verified by the druggist's invoice. The identical bottle was kept by defendant until after the institution of the instant action, when it was analyzed by a chemist and found to be Lugol's solution.

A medical witness, while testifying, drank some of the solution and stated it did not burn him. Two medical witnesses who examined Mrs. Romero and had her history gave their opinions as to what caused her pain at the time of the treatment. One said she had cystitis, the other said interstitial cystitis. Both testified in answer to a hypothetical question that in their opinion Mrs. Romero's excruciating pain was the result of cystitis and not the result of a chemical burn of the internal tissue of her bladder. The absence of evidence of instillation into Mrs. Romero's bladder of Lugol's solution, or whatever solution defendant used with the applicator, and positive evidence that such solution was applied only to the external opening of the urethra, is sufficient to sustain a finding, express or implied, that external use of such solution would not have resulted in the condition which Dr. Winer found in the interior of the bladder.

[5] Whether or not defendant applied Lugol's solution externally or internally, whether such solution as was used was so caustic as to create the condition found in the bladder, whether the repeated use of silver nitrate, which the medical witnesses agreed is standard treatment, contributed to Mrs. Romero's condition were questions for the trial court to determine from the evidence. The redness of Mrs. Romero's thighs and buttocks may have been caused, so the record shows, by the iodine in Lu-

gol's solution, or possibly by the admixture of that solution and the contents of the bladder which were expelled. Since the medical experts' evidence did not harmonize in all particulars and the court has made its findings based on conflicting evidence, and since we do not find the evidence to be inherently improbable or impossible, we cannot substitute our judgment concerning the credibility of the witnesses or the weight of the evidence for that of the trial judge.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



101 Cal.App.2d 129

SPARKS et al. v. SPARKS et al.

Civ. 17912.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1950.

Henry A. Sparks and another sued Gordon T. Sparks and wife to quiet title to realty covered by deeds from plaintiffs to defendants, obtain a judgment declaring the deeds void, and compel an accounting of defendants' income from and expenditures for upkeep of the property conveyed. From an interlocutory judgment of the Superior Court, Los Angeles County, J. T. B. Warne, J., directing an accounting, and a final judgment for plaintiffs on a referee's findings, defendants appealed. The District Court of Appeal, Wilson, J., held that the evidence established that plaintiffs reposed special confidence in defendants and that defendants took advantage of such fact to procure execution of the deeds.

Judgments affirmed.

1. Pleading $\S$ 129(2)

In action for judgment declaring plaintiffs' deeds to defendants void, plaintiffs' failure to file affidavit denying genuineness and due execution of second deed and re-

ceipt, set forth in full in defendants' answer, constituted admission merely that such documents were signed by plaintiffs and delivered to defendants and did not preclude plaintiffs from controverting instruments by evidence of fraud, mistake, undue influence, want of consideration, unfairness, or failure fully to comprehend them, and by any other defense open in action based on such instruments. Code Civ.Proc. $\S$ 448.

2. Deeds $\S$ 72(1), 211(4)

What constitutes undue influence, which is species of constructive fraud, and sufficient proof thereof to establish invalidity of deed, depends on facts and circumstances of particular case.

3. Contracts $\S$ 99(1)

Special confidence will be inferred, not only from existence of relations of husband and wife, parent and child, counsel and client, etc., but in numerous cases where facts proved will warrant such inference.

4. Deeds $\S$ 70(6)

A grantor, having trust and confidence in integrity and fidelity of grantee, who takes advantage of grantor, will be afforded relief by court.

5. Deeds $\S$ 196(2)

A grantee, holding confidential relationship toward grantor, will be presumed to have taken undue advantage of grantor, in absence of showing that grantor had independent advice and acted, not only of his own volition, but with full comprehension of results of his action in executing deed.

6. Contracts $\S$ 99(1)

Persons standing in confidential relation toward others will not be permitted to retain benefits conferred on them by such others, unless they show to court's satisfaction that persons conferring benefits were independently advised with reference to transaction.

7. Contracts $\S$ 99(1)

One holding confidential relation toward another will not be permitted to take advantage of relation in favor of himself or to deal on his own terms with such other, and in every such transaction, law will

presume that person holding influence exercised it unduly to his own advantage.

8. Deeds ⇨211(3)

In action for judgment declaring plaintiffs' deeds to defendants void, evidence established that plaintiffs reposed special confidence in defendants and that defendants took advantage thereof, so as to entitle plaintiffs to relief prayed.

9. Deeds ⇨72(4)

A transaction in which father and son conveyed realty to another son and his wife, without independent advice or comprehension of deeds signed by them or results of their execution thereof on grantees' insistence through wife's persuasion, should command close scrutiny of equity court.

10. Appeal and error ⇨1009(3)

Whether transaction in which father and son conveyed realty to another son and his wife was fair, and whether grantors were imposed on by grantees, in whom grantors reposed trust, were questions for chancellor's conscience in grantors' action for judgment declaring deeds void, and decree will not be disturbed on appeal, if supported by any evidence in record, though conflicting or contradictory evidence may support opposing conclusion.

11. Deeds ⇨70(5)

Gross inadequacy of consideration for conveyance of realty, combined with grantors' dependence on and trust and confidence in grantees, is sufficient to sustain declaration of fraud rendering deeds void.

12. Cancellation of Instruments ⇨24(2)

The Superior Court did not err in setting aside deeds from father and son to another son and his wife because of grantees' undue influence, without refund of or offer to refund consideration paid, where father received nothing for first deed executed during grantor son's minority, amount of cashier's check, endorsed to grantors by grantee wife, was deposited in such son's bank account until paid to him after he attained majority, nothing was paid to or received by grantors for execution of second deed soon after grantor son attained majority, and money in such account was withdrawn and handed to him on grantee

wife's false insistence that he could not receive it until he signed second deed.

13. Infants ⇨26, 31(2)

A deed, executed by minor, was void ab initio, and he owed no legal duty, on his disaffirmance of deed after attaining majority, to restore to grantees consideration received therefor. Civ.Code, §§ 33, 35.

14. Infants ⇨58(1)

A person dealing with infant acts at his peril, as law gives minors right to avoid their contracts in order to protect them against their own improvidence and others' designs and machinations.

15. Declaratory judgment ⇨345

In action by father and son for judgment declaring their deeds to another son and his wife void, evidence that plaintiffs were entitled to possession of realty conveyed at all times after receiving title thereto by exchange of deeds before death of father's wife, that father continued to reside on premises after his wife's death and resided there at time of trial, and that plaintiff son resided thereon until he enlisted in Navy and for considerable time after his discharge therefrom, warranted trial court's finding that plaintiffs had always been in possession of property and were entitled to possession thereof.

16. Declaratory judgment ⇨345

In action by father and son for judgment declaring their deeds to another son and his wife void, evidence warranted trial court's finding that father and his wife, since deceased, previously conveyed realty involved to plaintiffs, though father and wife actually conveyed property to defendants, who in turn conveyed it to plaintiffs, for purpose of transferring title from original owners to plaintiffs.

17. Courts ⇨104

Points in appellants' brief which they concede are merely repetitious restatements of matters argued at length in previous portions of briefs, need not be separately answered by appellate court.

18. Judgment ⇨251(1)

In action for judgment declaring two deeds from plaintiffs to defendants void, where plaintiffs' counsel moved at close

of evidence to amend amended complaint to conform with proof by including paragraph of original complaint containing sufficient pertinent allegations respecting second deed court granted motion and stated that amendment was proper because all parties introduced evidence respecting execution of such deed without objection, and case was tried on theory that validity of second deed was before court, judgment for plaintiffs was not erroneous as going beyond pleadings because first amended complaint was based on first deed and contained no allegations concerning second deed.

Joseph Scott, J. Howard Ziemann, G. L. McFarland, all of Los Angeles, for appellants.

Walter C. Harbert, Los Angeles, for respondents.

WILSON, Justice.

This action is not, as contended by defendants, for the rescission of deeds to real property signed by plaintiffs pursuant to which defendants assert title, but is (1) to quiet title to the property covered by the deeds, (2) to obtain a judgment of declaratory relief declaring that the deeds are null and void, and (3) for an accounting of the income received by defendants from the property and the expenditures made for its upkeep.

Findings of fact and conclusions of law were made in favor of plaintiffs upon which an interlocutory judgment was entered that the deeds in question are null and void and of no force and effect; that defendants have no interest in the property covered by the deeds, and that an accounting be had before a referee to determine the income received by defendants from the property, and the necessary disbursements made by them for upkeep and improvements. A referee was appointed and after his report had been filed findings were made that defendants were not indebted to plaintiffs and again finding that the deeds were null and void and that defendants have no interest in the property. Final judgment was entered in accord with the findings. Defend-

ants have appealed from the interlocutory judgment directing an accounting and from the final judgment.

Plaintiffs Henry and Glen are father and son. Defendant Gordon is another son of Henry, and defendant Carmelita is defendant Gordon's wife. Henry and his wife Mary purchased the property in 1922 and built thereon three houses. They lived on the property during the remainder of their married life. Title to the property was originally in the names of Henry and Mary as joint tenants. Approximately two months before Mary's death Gordon and his wife Carmelita came to live upon the premises, then occupied by Henry, Mary and their son Glen nine years of age. Shortly prior to Mary's death she and Henry joined in a deed conveying the property to Gordon and Carmelita without consideration. On the same day the grantees in that deed conveyed the property to Henry and Glen as joint tenants. This procedure was adopted for the purpose of placing the title in joint tenancy in Henry and Glen.

After Mary's death Gordon and Carmelita continued to reside upon the premises, Carmelita caring for the household and assisting in the rearing of Glen. Prior to Mary's death she had handled all the financial transactions for the family; Henry turned over his salary to her, permitted her to collect the rents from the property, and depended upon her to make all payments on the existing mortgage as well as household bills. After Mary's death Carmelita assumed those duties. From 1935 until 1947 and to a certain extent thereafter Carmelita collected all rents upon the premises, bought the food, paid the bills and prepared the meals, Henry turning over to her approximately one half of his salary semi-monthly as his contribution toward the household expenses and the payment of the mortgage. Henry trusted and relied upon Carmelita and neither asked for nor received an accounting of any of the moneys collected or paid out by her.

In March, 1943, Glen, who was then 17 years of age, enlisted in the United States Navy. Gordon and Carmelita informed Henry that he should execute some papers so as to permit them to manage the property,

make the payments and collect the rents, because Glen was going into the service and Carmelita wanted authority to manage the place. No discussion was had with reference to the value of the property, the balance remaining unpaid on the mortgage, the amount of rents, nor the amounts required to be paid on the mortgage. The rents received were more than sufficient to make the mortgage payments and to pay the current taxes. At the request of Gordon and Carmelita Glen came from San Diego to Los Angeles to sign the papers. He was not told what the papers were that he was to sign. The four parties met in an office where Carmelita had been employed and Henry and Glen executed the deed of April, 1943, conveying the property to Gordon and Carmelita. A receipt had been previously prepared by Carmelita acknowledging payment of \$500 in full consideration for the execution of the deed. Carmelita had in her possession a cashier's check for \$500 which she endorsed payable to Glen and Henry. Neither Glen nor Henry read or understood the documents they signed. Henry was under the impression that they were for the purpose of permitting Gordon and Carmelita to manage the property for him. Neither Glen nor Henry received anything when the deed and receipt were signed.

Carmelita retained the cashier's check after she had endorsed it and in May, 1943, a bank account was opened in the name of Glen Roy Sparks, a minor, with Henry A. Sparks as trustee, and the cashier's check was deposited in that account. Carmelita took Henry to the bank for the purpose of opening the account.

After signing the papers Glen returned to his duties in the Navy and Henry, then 72 years of age, continued to live upon the property and to turn over half of his salary to Carmelita.

In March, 1947, Glen, who then knew of the deposit of \$500 in his name, called Carmelita and said he needed some money. She told him it would be necessary for him to sign some papers before he could get it. Glen came from San Francisco and in March, 1947, went to the bank in the com-

pany of Carmelita and Henry where he and Henry executed a second deed and receipt. Glen was given the \$500 and Henry received \$17.50 interest that had accrued upon the deposit. Carmelita told Glen it was necessary for him to sign the papers before he could get any money. This occurrence was five days after Glen had reached the age of 21 years. Henry joined in the second deed at Carmelita's request and there appears to have been no explanation as to why he was requested to sign it. Neither Glen nor Henry read any of the papers which they signed on the second occasion and executed them on the assurance of Carmelita that they were necessary in order that Glen obtain the money. Neither of them was advised or knew they were signing a deed conveying their interest in the property.

Shortly after the execution of the second deed Carmelita told Henry she would not cook for him any longer and he would have to pay rent to her for the back shed which he had been occupying for a number of years. When Glen was informed of this fact he consulted an attorney and for the first time was advised that all interest of himself and his father had been conveyed to Gordon and Carmelita and that they claimed ownership of the property.

At all times from 1935 until the execution of the second deed in 1947 Carmelita collected the rents from the property, received one half of Henry's salary and paid all household bills and expenses incurred with reference to the real property.

[1] The deed and the receipt signed by plaintiffs on March 22, 1947, are pleaded in haec verba in defendants' answer to the amended complaint. Defendants contend that since the documents are set forth in full in the answer and plaintiffs failed to file an affidavit denying the genuineness and due execution thereof they are precluded from attacking them in any manner.

In making this contention defendants overlook the fact that by reason of section 448 of the Code of Civil Procedure only the "genuineness and due execution" of the instruments are deemed admitted. By failing to file an affidavit plaintiffs merely

admit that they signed the documents and that they were delivered to defendants. They were at liberty to controvert the instruments by evidence of fraud, mistake, undue influence, want of consideration, that they were void because not fairly made or fully comprehended, and by any other defense that would be open if the instruments were the basis of an action. *Miller v. McLaglen*, 82 Cal.App.2d 219, 224-225, 186 P.2d 48, and cases cited.

The evidence established that Henry was over 72 years of age, knew nothing about the conduct of business transactions, had depended on his wife during her lifetime to make collections and expenditures, and after her death had depended upon Carmelita therefor, and that Glen had reached his majority only five days before he signed the deed. Upon ample, competent evidence the court found that neither of the plaintiffs received any consideration for the deed; that plaintiffs were unfamiliar with real estate transactions and had no knowledge of the effect of the execution by them of the deed; that Gordon and Carmelita knew such fact and that in executing the deed plaintiffs relied upon the trust, faith, confidence and relationship which had existed between plaintiffs on the one hand and defendants on the other.

[2-5] Defendants maintain there is no evidence to support the finding that they unduly influenced or prevailed upon plaintiffs to execute the deeds in question. What constitutes undue influence and what constitutes sufficient proof thereof depend upon the facts and circumstances of each particular case. It "is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded." *Longmire v. Kruger*, 80 Cal.App. 230, 239, 251 P. 692, 696. There are certain relations from the existence of which the law will infer special confidence, not only those of husband and wife, parent and child, counsel and client, etc., but in numerous cases where the facts proved will warrant the inference. Brad-

ley Co. v. Bradley, 37 Cal.App. 263, 267, 173 P. 1011. A confidential relation in fact should be the test. Where a grantor has trust and confidence in the integrity and fidelity of the grantee and the latter takes advantage of the grantor relief will be afforded. *Steinberger v. Steinberger*, 60 Cal. App.2d 116, 122, 140 P.2d 31. One who holds a confidential relationship will be presumed to have taken undue advantage of his trusting friend unless it shall appear that the latter had independent advice and acted not only of his own volition but with full comprehension of the results of his action. *Cox v. Schnerr*, 172 Cal. 371, 379, 156 P. 509.

[6, 7] Persons standing in a confidential relation toward others will not be permitted to retain benefits which the others have conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred were independently advised with reference to the transaction. *Burrows v. Burrows*, 136 Cal.App. 323, 329, 28 P.2d 1072. No one who holds a confidential relation toward another will be permitted to take advantage of that relation in favor of himself or deal with the other upon terms of his own making. In every such transaction the law will presume that the person who held an influence over the other exercised it unduly to his own advantage. *Khoury v. Barham*, 85 Cal.App. 2d 202, 212, 192 P.2d 823.

[8] It is uncontroverted that neither of the plaintiffs had any advice whatever concerning the execution of the documents which they signed; that they did not act of their own volition but upon the insistence of defendants through the persuasion of Carmelita that their signatures on the papers were necessary in order that Glen might obtain the money from the bank. The evidence is also clear that plaintiffs did not have any comprehension of the meaning of the documents they signed or of the results which would follow their execution of them.

The evidence heretofore related as to Carmelita's taking over the management of the household affairs, collection of rents and payment of necessary expenses, to-

gether with plaintiffs' lack of knowledge of business affairs, establishes the existence of special confidence reposed by plaintiffs in defendants and the fact that the latter took advantage thereof.

[9-11] A transaction such as is shown by the evidence in this action should command the close scrutiny of a court of equity. Whether the transaction was fair or unfair and whether a party has been imposed upon by those in whom he has reposed a trust are questions for the conscience of the chancellor and his decree will not be disturbed if the record contains any evidence to support his conclusion even though conflicting or contradictory evidence may support an opposing conclusion. *Pomeroy v. Collins*, 198 Cal. 46, 70, 243, P. 657; *Johnston v. Field*, 200 Cal. 644, 646, 254 P. 269. Gross inadequacy of consideration combined with the condition of dependence, trust and confidence is sufficient to sustain a declaration of fraud. *Gatje v. Armstrong*, 145 Cal. 370, 373, 78 P. 872.

[12-14] Plaintiffs contend that the court erred in setting aside the deeds without a refund or an offer of refund of the consideration paid. The evidence is uncontradicted that plaintiff Henry received nothing whatever for the deed of 1943 and that the check for \$500 was deposited in Glen's bank account where it remained until after his coming of legal age, and the money was then paid to him.

Insofar as Glen is concerned, he was a minor under the age of 18 years at the time he executed the first deed and it is therefore void *ab initio* and he owed no legal duty upon disaffirmance to restore the consideration received by him. Civ.Code, secs. 33, 35¹; *Niemann v. Deverich*, 98

Cal.App.2d 787, 221 P.2d 178, 182; *Lee v. Hibernia S. & L. Soc.*, 177 Cal. 656, 659, 171 P. 677; *Maier v. Harbor Center L. Co.*, 41 Cal.App. 79, 81, 182 P. 345. A person dealing with an infant does so at his peril. The law shields minors from their lack of judgment and experience and confers upon them the right to avoid their contracts in order that they may be protected against their own improvidence and the designs and machinations of other people, thus discouraging adults from contracting with them. *Niemann v. Deverich*, supra.

Admittedly there was no consideration for the deed of 1947. Nothing whatever was paid to or received by either one of the plaintiffs in return for its execution. The money which was in Glen's bank account and which had been placed there as the purported consideration for the deed of 1943 and which he was under no obligation to return was withdrawn from the bank and handed to him upon Carmelita's insistence that he could not receive the money until he had signed the second deed—a statement which she knew to be untrue. The money was his and had been since 1943, and he was entitled to receive it without any condition whatsoever.

[15] Defendants next attack the finding to the effect that plaintiffs have always been in possession and entitled to the possession of the property. Whether or not they were in actual possession is of little moment since under the evidence and the findings they were entitled to possess it at all times after they received title to the property by the exchange of deeds prior to the death of Mary Sparks. Furthermore, from the date of the latter's death Henry continued to reside upon the premises and resided there at the time of the trial. Glen

1. Section 33 reads: "A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control."

Section 35 reads: "In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor

himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent."

remained with his father until he enlisted in the Navy and after his discharge returned to the property where he resided for a considerable length of time. The court did not err in making the finding of which defendants complain.

[16] Entirely devoid of merit is defendants' contention that the court erred in finding that Henry and Mary conveyed the property to Henry and Glen. The evidence has been recounted as to the conveyance by Henry and Mary to Gordon and Carmelita and in turn their conveyance to Henry and Glen. Such deeds were executed for the purpose of transferring title from Henry and his wife to Henry and his son Glen, and the intervention of the deed from Carmelita and Gordon does not alter the ultimate fact.

Defendants' next contention is that there is no evidence to support the finding that defendants received no consideration for the deed of April 28, "1935." Since there was no deed of that date it is an obvious typographical error in the finding, and the date intended was April 28, "1943." Inasmuch as the joint tenancy deeds above referred to were executed in 1935 it is patent that in preparing the findings there was a clerical error in the date, and the question needs no further consideration.

Defendants' contention that the record fails to reveal any evidence to support the finding that plaintiffs did not intend to sell and did not sell their interest in the property and did not know until March, 1948, that defendants claimed title to the property, has been fully covered in the foregoing statement of facts and discussion.

[17] Points numbered 8 to 17, inclusive, in defendants' brief, that the evidence is insufficient to sustain certain findings therein mentioned, need not be separately answered since defendants concede that they are but repetitious restatements of

matters argued at length in previous portions of the briefs. All those contentions have been fully covered by this opinion.

[18] Finally, defendants maintain that the judgment goes beyond the pleadings in that the amended complaint upon which the trial was had was based on the deed of 1943 and did not contain any allegation concerning the deed of March, 1947. Defendants make the statement in their brief that plaintiffs asked and obtained leave to amend their amended complaint to correspond to proof but that no such amendment was ever made. On the contrary, the record shows that at the close of the evidence plaintiffs' counsel made a motion to amend the amended complaint to conform with the proof by including therein a paragraph of the original complaint which contained sufficient and pertinent allegations with reference to the deed of 1947, and that the court granted the motion and permitted the amendment. The court stated that the amendment was proper for the reason that evidence had been introduced by both plaintiffs and defendants without objection from either side with respect to the execution of the deed of 1947. Since the case was tried upon the theory that the validity of the latter deed was before the court and evidence was introduced thereon without objection, the allowance of the amendment was not error and the point would not have been available to defendants even though no amendment had been made. *Grimes v. Nicholson*, 71 Cal.App.2d 538, 543, 162 P.2d 934; *Priebe v. Sinclair*, 90 Cal.App.2d 79, 87, 202 P.2d 577; *McClure v. Donovan*, 33 Cal.2d 717, 730-731, 205 P.2d 17.

The interlocutory judgment ordering an accounting and the final judgment are affirmed.

MOORE, P. J., and McCOMB, J., concur.

ROSE v. PORTER et al.**ROSE et al. v. METALIZING CORP. OF AMERICA et al.****NEWSOM v. PORTER et al.****NEWSOM et al. v. METALIZING CORP. OF AMERICA et al.**

Civ. 17640, 17641.

District Court of Appeal, Second District,
Division 2, California.

Dec. 21, 1950.

Rehearing Denied Jan. 8, 1951.

John Rose and John F. Newsom brought actions against Leroy Porter, Carl Bauer, the Metalizing Corporation of America, a corporation, and the Metalizing Company of America, Inc., a copartnership, to recover for injuries sustained as result of an automobile accident, and Leroy Porter and Mary Lee Porter filed a cross-complaint against John Rose. The Superior Court, Harold B. Jeffery, J., rendered judgments against the defendants, and the Metalizing Corporation of America, a corporation, and the Metalizing Company of America, Inc., a copartnership, appealed. The District Court of Appeal, Moore, P. J., held that appellants' automobile was not being driven with consent of appellants at time of accident, and that therefore they were not liable for injuries resulting from accident.

Judgments reversed with instructions to dismiss the actions as to the appellants.

1. Automobiles ⇨197(1)

Privilege of a permittee to have stranger drive automobile entrusted to permittee implies eager watchfulness and supervision of permittee over newly found chauffeur.

2. Appeal and error ⇨1010(1)

Though it is a question of fact for determination of trial court whether permission was given by owner of automobile to driver, so as to make owner liable for damages negligently caused by driver, yet such finding must be based on substantial evidence.

3. Automobiles ⇨192(1)

If permissive use of automobile is prescribed in area or in time or purpose, use of automobile beyond such time, area, or purpose is not with owner's permission.

4. Automobiles ⇨192(1)

Where automobile was taken to garage and proprietor of garage was instructed to give automobile road check to determine cause of overheating, and at 8:15 in the evening proprietor, intending to make check, drove automobile to baseball park and thereafter to a saloon, drove into a drive-in for a cup of coffee where he met a third person whom he persuaded to drive the automobile, and while third person was driving the automobile and while proprietor was asleep third person through his negligence was involved in accident, owner of automobile was not liable for damages resulting from accident on ground that third person was driving with owner's consent.

Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr., and Otto M. Kaus, all of Los Angeles, for appellants.

DeForrest Home and Joseph Shane, Los Angeles, for respondents.

MOORE, Presiding Justice.

The two actions for damages arising out of personal injuries suffered in the same accident were consolidated for trial. Findings were made in each case and separate judgments were entered against identical defendants. The appeals were consolidated on one record. In view of appellant's stipulation that the evidence is sufficient to warrant the judgment against defendant Porter this discussion will be directed to a consideration of the demands of appellant, Metalizing Company of America, in whose name the offending car was registered.¹ The sole question for decision, therefore, is whether appellant as owner of the convertible coupe is liable for the damage it caused while in the possession of defendant Bauer and being driven by defendant Porter. The significance of appellant's claim of exemption from liability will appear as the movements of its machine are unfolded.

Defendant Bauer's home is in North Hollywood which in general lies about seven miles northwest of the business center of Hollywood. He operated a garage on

1. It was stipulated that the two named appellants are "one and the same".

Beverly Boulevard (which extends westward through the city of Los Angeles) and is located about two miles south of Hollywood Boulevard.

The convertible was kept in the possession of one Kunkler, an officer of appellant. He had in his employ a chauffeur, Prince Langon. During the nine months prior to the accident it was Prince's practice under Kunkler's orders to bring the coupe to Bauer's garage for adjustments. Bauer had repaired its mechanical parts about three weeks prior to its fatal visit when Prince told him that he had been driving it "to the ranch and it had been overheating * * * that I should road check the car * * * to find out what was causing it to overheat." Having worked on the machine very little during the day, Bauer left his garage about 8:15 p.m., drove the convertible to Gilmore ball park, drank two bottles of beer and drove south to Culver City. There he visited a saloon and consumed three drinks of whiskey. Thence he proceeded west to Sepulveda Boulevard on which he traveled five or six miles south. He was then about 14 miles from his garage. His declared purpose was to drive the car over a long distance that it might become overheated. He testified that he had no reason for going into strange places so remote from his garage other than to give the automobile a longer test; that he did not use it for personal business or call on anyone. He finally entered a drive-in, at an intersection on top of a hill at about 12 o'clock midnight for a cup of coffee and to obtain the directions to Washington Boulevard. He there encountered defendant Porter who with a young lady sat in an automobile alongside the convertible. After answering his inquiries, Porter volunteered to drive the night wanderer back to the boulevard. Porter and his companion occupied the driver's seat and backed out of the driveway. Bauer was fatigued, "half-asleep," and had no recollection of any part of the roadway or of the events occurring as Porter drove to the point of the accident where the respondents were both injured by reason of Porter's negligence.

Prior to June 14th Prince had left the coupe for the purpose of ascertaining the

cause of its overheating, Bauer had examined and corrected all the appurtenances whose impairments cause a motor to overheat. When he drove the highways south of Culver City it was to ascertain whether such a drive would overheat the motor since a stationary car will not set in motion "all things which cause overheating."

While Bauer testified that Prince told him to give the car a road test, the chauffeur denied that he had done so and testified that he did not even give Bauer permission to take the machine to his own home; that he had no authority to allow anyone to drive it. Bauer testified that as he drove west from Culver City and among the hills on Sepulveda Boulevard he felt the influence of the liquors he had consumed. Evidently his words did not adequately describe his intoxicated condition when he reached the drive-in for he fell asleep as soon as Porter relieved him of the responsibility of operating the car. At the trial Bauer was unable to testify as to the result of his road test and could not remember whether the vehicle overheated or not. There was no sound reason for his jaunt to Culver City and the Sepulveda area. If he could not remedy the overheating and required a drive to test the car, either of his familiar routes homeward over Cahuenga pass or through Laurel Canyon would have supplied the hills to climb and excellent roadways for a test.

[1] From no testimony save his own does it appear that Bauer was instructed by Prince Langon to drive the machine to the Gilmore Park or to Culver City or anywhere to test it for heating. No reasonable construction of the situation of the parties and the statements made implies that Bauer was directed or permitted to drive the car to a ball game or to drink two bottles of beer before proceeding to give it a road test. But if by any stretch of the imagination it could be reasonably held that Bauer was warranted in driving the vehicle any distance to test it, can it possibly be concluded that he had permission to drive it to a ball game; to indulge in tipling; to proceed seven miles to a saloon in Culver City; to imbibe three drinks of whiskey and to go on to the hills along Sepulveda Boulevard which are no less than twelve miles from

the ball park? Certainly, it could not reasonably be contended that the parties contemplated road testing the vehicle during the post-midnight hours in strange communities over unfamiliar roads and while under the influence of intoxicants. Bauer had no permission to take a stranger into the car, resign his position as operator and go to sleep while being conveyed to a familiar boulevard. The privilege of a permittee to have a stranger drive the automobile entrusted to him, *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788, implies the eager watchfulness of and supervision of the permittee over the newly found chauffeur.

[2, 3] Whether Kunkler as possessor and agent of appellant by any word or act or by any conduct of his chauffeur granted Bauer permission to drive the convertible over the distance and time above described is a fact equal in importance to that of ownership. While it is a question of fact for determination of the trial court whether permission was given by the owner of a vehicle to its operator, *Krum v. Malloy*, 22 Cal.2d 132, 136, 137 P.2d 18, yet such finding must be based upon substantial evidence. No such proof is to be found in this record. If a permissive use is prescribed in area or in time or purpose, a use beyond such time, area or purpose is not with the owner's permission. *Barcus v. Campbell*, 90 Cal. App.2d 768, 772, 204 P.2d 65; *Henrietta v. Evans*, 10 Cal.2d 526, 528, 75 P.2d 1051. To hold appellant liable for the acts of Bauer and his benefactor who was serving Bauer only would be tantamount to a declaration that the owner is guarantor of the careful operation of his automobile even though it be in the hands of a thief.

[4] The case of *Engstrom v. Auburn Automobile Sales Corporation*, 11 Cal.2d 64, 77 P.2d 1059, presents a factual situation closely akin to that here involved. The corporation loaned its car to a prospective purchaser who had already witnessed a demonstration. He asked permission to drive it to a hotel about three miles distant to show it to his family. He agreed to return it within two hours. He kept it 25 hours, during which an accident occurred.

The injured party was denied recovery against the corporation because the operator driving the car without the consent of the owner was in no better position by virtue of the limited permission to drive it than that of a thief. The fact that at the time of an accident the offending automobile was being driven by a person who was not the owner is not sufficient to establish that the driving was with the owner's permission. *Di Rebaylio v. Herndon*, 6 Cal.App.2d 567, 569, 44 P.2d 581.

The judgments against appellant are reversed with instructions to dismiss the actions as to the partnership and the corporation.

McCOMB and WILSON, JJ., concur.



101 Cal.App.2d 171

ANDERSON v. NEWKIRCH.

Civ. 14320.

District Court of Appeal, First District,
Division 1, California.

Dec. 18, 1950.

Marian Anderson brought action against Carl Newkirch under the automobile guest statute to recover for injuries sustained by plaintiff when automobile in which he was riding, and which was driven by defendant, ran into rear of parked automobile at night on bridge while defendant was driving about 45 miles an hour. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., rendered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that whether defendant was guilty of wilful misconduct within meaning of automobile guest statute, so as to render him liable, was for jury.

Judgment affirmed.

1. Automobiles 181(1)

Word "misconduct" as used in automobile guest statute relieving driver from

liability for injuries of guest except in case of willful "misconduct" denotes the doing of that which should not be done or the failing to do that which should be done. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Misconduct".

2. Automobiles ⇨181(1)

Word "willful" as used in automobile guest statute relieving driver from liability for injuries of guest except in case of "willful" misconduct, denotes intentional action or inaction, either with knowledge, express or implied, of probable consequences or with wanton and reckless disregard of possible consequences. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful".

3. Automobiles ⇨181(1)

Automobile guest statute imposes on driver duty of not intentionally doing that which should not be done or intentionally failing to do that which should be done, with knowledge, express or implied, that injury to guest will probably result, or with wanton and reckless disregard of possibility that injury to guest may result. Vehicle Code, § 403.

4. Automobiles ⇨245(24)

Question whether motorist who drove about 45 miles an hour at night on bridge on which there was considerable traffic, and who was continually driving very close to the rear of other automobiles without stopping, was guilty of "willful misconduct" within meaning of automobile guest statute so as to render him liable for injuries sustained by guest when he ran into rear of parked automobile, was for jury. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Misconduct".

5. Automobiles ⇨181(7)

Though violation by motorist of a prima facie speed limit does not establish willful conduct within meaning of automobile guest statute, nor even mere negligence, as a matter of law, evidence thereof is a factor

proper for consideration with other pertinent factors in determining issue of willful misconduct on part of motorist. Vehicle Code, § 403.

6. Automobiles ⇨243(7)

In action under automobile guest statute against driver of automobile by guest to recover for injuries sustained by guest when automobile ran into rear of parked automobile on bridge, admission of testimony that bridge was sign-posted for a prima facie speed limit of 30 miles an hour, was not error. Vehicle Code, §§ 403, 510, 513.

7. Automobiles ⇨243(7)

In action under the automobile guest statute against driver of automobile by guest to recover for injuries sustained by guest when automobile ran into rear of parked automobile on bridge, it was not error to admit over objection of driver, on cross-examination of driver, his testimony concerning his knowledge of speed limit on bridge and knowledge of probability of an accident if he exceeded that speed limit under conditions existing at time of accident. Vehicle Code, § 403; Code Civ.Proc. § 2055.

Joseph T. O'Connor, Harold H. Cohn, San Francisco, for appellant.

Michael L. Haun, Philander Brooks Beadle, San Francisco (Patrick Joseph O'Reilly, San Francisco, of counsel), for respondent.

FRED B. WOOD, Justice.

Defendant appeals from the judgment entered upon a verdict rendered against him in an action for damages for personal injuries sustained by plaintiff while riding as a nonpaying guest in an automobile driven by defendant.

Appellant assigns as error: (1) The evidence is insufficient to support the implied finding of wilful misconduct, (2) the admission of evidence of the so-called "speed limit" on the San Francisco-Oakland Bay Bridge, where the accident occurred, and (3) the overruling of objections to various questions asked of defendant upon cross-examination.

On the question of the sufficiency of the evidence in a case such as this, the inquiry starts with a consideration of the respective rights and duties of the parties, the guest and the driver. The applicable statute declares that, "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the * * * wilful misconduct of said driver." Vehicle Code, § 403; emphasis added.

[1,2] We observe in this statute two elements: Proximate cause, as in a negligence action; "wilful misconduct," a standard of care peculiar to this type of action. "Misconduct" denotes doing that which should not be done or failing to do that which should be done. "Wilful" denotes intentional action or inaction, either with knowledge, express or implied, of probable consequences or with wanton and reckless disregard of possible consequences.

[3] It follows that this statute imposes upon the driver of an automobile, toward such a guest, the duty of not intentionally doing that which should not be done or intentionally failing to do that which should be done, with knowledge, express or implied, that injury to his guest will probably result or with wanton and reckless disregard of the possibility that injury to his guest may result. See *Cope v. Davison*, 30 Cal.2d 193, 198, 180 P.2d 873, 171 A.L.R. 667.

The question, then, is: Does the evidence support the implied finding of the jury that appellant violated this duty, as driver, toward respondent, his guest, and that her injury proximately resulted therefrom?

The accident occurred shortly after midnight on December 21, 1946. Appellant was operating his automobile on the San Francisco-Oakland Bay Bridge and respondent was riding with him as a guest. They were returning from a trip to Mo-

desto, having left San Francisco at approximately nine o'clock of the morning of December 20. Appellant did all of the driving. After leaving Modesto they stopped at Niles for dinner, then drove to appellant's home in Oakland, where they addressed Christmas cards until 11:45 in the evening, went to the Oakland post office, mailed the cards shortly before midnight, and then commenced the trip across the bridge. Respondent testified that she estimated appellant's speed on the bridge, just prior to the accident, at from 60 to 65 miles per hour; he testified his speed was between 40 and 45 miles per hour. The accident occurred when appellant's car collided with the rear end of an automobile which was stopped on the bridge, in the outside lane next to the curb. He testified that he first saw the stopped car when about 200 feet away, but could not tell what it was; as he approached he saw it was a car, could not see tail lights on it and could not tell whether it was moving or not; and when about 50 feet away he realized the car was stalled, applied the brakes and started moving to his left; that his car after the impact went forward not more than six or seven feet and pushed the other car forward between 10 and 15 feet. The driver of the stopped car testified that it was stopped from two to five minutes before the collision, he having parked it next to the curb because of a flat tire; that the tail light on the left rear fender was burning, as was the light over the license plate in the center of the rear; that he was about 120 to 200 feet to the rear of his car when he saw appellant's car go by, having gone to the rear to signal oncoming cars; that he could not estimate appellant's speed other than as "fairly fast"; that the collision was from eight-tenths to nine-tenths head-on; that he heard the squeak of the brakes of appellant's car and observed that appellant started to turn out when appellant's car was about 15 feet from the parked car; that his was a 1939 Ford in good condition, just having been overhauled; that he had applied the hand brakes of his car and it was in low gear at the time of the accident; that his car was pushed forward about 15

feet by the force of the impact and was a total loss; and that traffic on the bridge at the time was moderate or medium.

Appellant testified that at the time of the collision he was traveling about 25 miles an hour; that there was considerable traffic coming from San Francisco and that there was quite a glare from the headlights of those cars.

Respondent testified that while traveling to Modesto appellant at times drove over 60 miles an hour; that he would approach cars closely and not attempt to stop until close behind them; this made her nervous and once during the course of the drive she called to his attention the way in which he would approach cars and not attempt to stop until he was very close to them; that she constantly was putting her feet on the floor as though she were putting on the brakes, and after she had done this a number of times he asked her if she was nervous, to which she replied, "I don't see why you don't start to stop before you approach the cars so closely," to which he responded, "Well, if one knows his car that's all right"; that on the way from Modesto to Niles he drove 60 to 65 and at one time 70 miles per hour, and that on the way from Niles to Oakland he once traveled 75 miles an hour; that at the time of the collision she was sitting sideways, to avoid looking at the road because his manner of driving made her nervous.

Appellant testified without objection, on cross-examination, by respondent under section 2055 of the Code of Civil Procedure, that at the time of the accident he knew the speed limit on the bridge, knew it was dangerous to drive anywhere in excess of the speed limit, was familiar with traffic conditions on the bridge, the lanes on the bridge are quite narrow, people cut from one lane to another, it was dangerous to exceed the speed limit under the conditions and at the time of the accident, that if he exceeded the speed limit there would be a probability of a collision with another automobile. In response to the question, "Well, now, Mr. Newkirch, you did know at that time and place that if there was a collision while your automobile was traveling

in excess of the speed limit fixed by law, you knew that there was a likelihood of serious injury to your passenger, did you not?" he testified, without objection, "I certainly know that if I drove at an excessive rate of speed there would be more danger of an accident than any other way"; followed by the question, "Of course, then, the answer to my question I just asked you is 'yes,' is it not?" and answer, "Yes, if it has any bearing on the case, yes, I knew that."

The jury also had before it the testimony, later given on cross-examination, under section 2055, which appellant claims was erroneously admitted. To avoid repetition when considering the propriety of the court's rulings, we indicate parenthetically what objections, if any, were interposed. Asked what was the speed limit to his knowledge at the time of the accident, he said "Forty-five miles an hour" (objection: immaterial, and calls for opinion and conclusion of the witness on a matter of law); asked if he did not know at the time of this accident that the speed limit on the bridge was not 45 miles an hour but was 35 miles an hour, he responded, "I am not sure whether it was forty-five or thirty-five; wartime speed was thirty-five, I know that" (objection: immaterial, and assuming something not in evidence); asked if yesterday he stated that to exceed the speed limit in driving across that bridge would be likely to result in a collision, he answered, "Yes, the probabilities were, yes" (objection: assumes something not in evidence). Asked if he knew, as he drove across the bridge immediately preceding the accident, to exceed the speed limit would probably result in a collision, he responded, "I would under certain conditions like in congested areas, say it might cause an accident" (objection: calling for opinion and conclusion of the witness as to an ultimate fact to go to the jury); asked if it would probably cause an accident, he answered "Possible" (no objection); asked if he knew that if an accident did result under the conditions described, namely, his exceeding the speed limit, that traveling at that speed there would probably be injuries to himself or his passenger, he responded, "No, no" (no

objection); asked if he thought there could be a collision of automobiles at that speed and injury to his passenger would not be probable, he said, "Collision, yes. But that is not saying you are going to have a collision because you are driving 45 miles an hour"—"No reason you are going to have to expect a collision every time you cross that bridge at 45 miles an hour" (no objection); asked if he had not just said he would expect one to be probable, he responded, "Not to be probable—possible" (no objection); followed by the question, "You just said so," to which he replied, "Yes, there is a probability" (no objection).

An officer of the state highway patrol testified that there were signs on the bridge indicating the prima facie speed limit; there were signs on the Fifth Street ramp eastbound and on the San Francisco anchorage eastbound (immediately easterly of the ramp which enters the bridge from Fremont Street), and an eastbound sign approximately 300 yards east of Treasure Island; that the westbound signs were located at the foot of the incline heading west, and a sign at the Yerba Buena anchorage headed west; each sign was about two and a half feet square; they were white signs with black lettering and the new signs are black with white lettering; the signs read, "Speed Limit 35 Miles Per Hour." (To all of this testimony concerning signs, appellant objected: it is incompetent, irrelevant and immaterial; the only speed limit is that provided by section 510 of the Vehicle Code, that which is reasonably proper, having due regard to traffic, and that to permit testimony as to any speed limit is error.)

[4] It would appear that from this evidence the jury reasonably might find that the injury proximately resulted from the wilful misconduct of the driver: driving at nearly twice the prima facie speed limit, at night, on a bridge where the lanes are quite narrow and people cut from one lane to another, with considerable traffic coming toward the driver and quite a glare from the headlights of those cars; a driver who frequently exceeds the prima facie speed limit and when approaching another car

does not start to stop his car until very close, despite the fact that the hazard thereby involved is brought to his attention by the conduct and protests of his guest; coupled with the driver's own testimony that he knew the prima facie speed limit, that he was familiar with traffic conditions on the bridge, knew it was dangerous to exceed the speed limit under the conditions and at the time of the accident and that there would be a probability of a collision with another automobile, and that if there were such a collision there was a likelihood of serious injury to his passenger.

This is not a case in which it may be said as a matter of law that the injury resulted, or that it did not result, from wilful misconduct of the driver. It is not a case of excessive speed unaccompanied by circumstances indicating wanton disregard of the safety of a guest, hence unlike *Robertson v. Brown*, 37 Cal.App.2d 189, 99 P.2d 288. It is not the case of a mere failure to perform a statutory duty unaccompanied by circumstances disclosing either express or implied knowledge that probable injury to a guest in the car would result, as was the case in *Porter v. Hofman*, 12 Cal.2d 445, 85 P.2d 447; nor is it the case of a car driven within the prima facie speed limit but too close to a car ahead to stop in time to avoid a collision when the car ahead stopped suddenly without warning, which in *Horn v. Volko*, 13 Cal.App.2d 582, 57 P.2d 175, was deemed mere negligence.

The instant case is more like that of *Wright v. Sellers*, 25 Cal.App.2d 603, 78 P.2d 209, in which the court found the evidence sufficient to support the implied finding of wilful misconduct upon which the verdict for plaintiff depended. The facts which furnished that support were "that defendant drove his automobile at a speed of almost seventy miles an hour into a curve, when the shoulders of the road on each side of an eighteen-foot pavement were wet and soft, justified the conclusion of the jury that he either knew or should have known that a serious accident and injury to his guest would be probable results." 25 Cal.App.2d at page 611, 78 P.2d

at page 214. Similarly, in *Van Fleet v. Heyler*, 51 Cal.App.2d 719, 125 P.2d 586, evidence that the accident occurred at night, while the moon was hidden by clouds; that the pavement was only 20 feet wide, it had soft shoulders and a wavy, sometimes rough, surface; that a considerable amount of traffic passed over the road; that just a few minutes before the accident defendant had a definite warning that the road was not entirely empty, and that other travelers did not all carry lights, when he came suddenly on an unlighted wagon and had to make an abrupt turn to avoid it, in spite of which he accelerated his speed and maintained or increased it to nearly twice the prima facie limit, presented facts for determination of the jury on the issue of wilful misconduct. Of similar import is *Hastings v. Serleto*, 61 Cal. App.2d 672, 143 P.2d 956, in which it appeared that the driver was traveling at a rapid rate of speed over a narrow, winding, mountain road, through a steep-walled dark canyon, was aware that he was approaching a double curve, that there were trees on both sides of the road close to its edge, and that there were other vehicles on the road.

In support of his claim that the court erred in admitting testimony that the bridge was sign-posted for a prima facie speed limit of 35 miles, appellant claims the only speed limit is that prescribed by section 510 of the Vehicle Code, that "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property"; that to permit evidence of a specific speed limit is to confuse the jury and nullify section 510; that section 513 of the code declares that proof of speed in excess of a prima facie limit does not establish negligence as a matter of law, it being necessary to establish as a fact that the operation of a vehicle at such excessive speed constituted negligence; and that *Anderson v. Mothers-*

head, 19 Cal.App.2d 97, 64 P.2d 995, held it error for a trial court to instruct on the prima facie speed limit expressed in section 511 of the code.

[5, 6] This point is not well taken. Although a prima facie speed limit does not establish wilful misconduct, nor even mere negligence, as a matter of law, it is a factor proper for consideration with other pertinent factors, in determining the issue of wilful misconduct. *Van Fleet v. Heyler*, supra, 51 Cal.App.2d 719, 727, 125 P.2d 586; see also *Johnson v. Williams*, 100 Cal. App.2d 294, 223 P.2d 266. *Anderson v. Mothershead*, supra, does not support appellant's contention. It involved, and declared erroneous, an instruction which told the jury that driving in excess of the prima facie speed limit is negligence unless defendant establish by competent evidence that such speed was not in violation of the basic speed law. That, certainly, was not a holding that evidence of a specific speed limit, under proper instructions, is error.

[7] It was not error to admit, over appellant's objection, his testimony concerning his knowledge of the speed limit on the bridge and his knowledge of the probability of an accident if he exceeded that speed limit under the conditions which existed at the time of this accident. That was quite pertinent to appellant's mental attitude and knowledge of the probable consequences of his conduct, confined as it was to his state of mind prior to and contemporaneously with the accident. *Cope v. Davison*, supra, 30 Cal.2d 193, 200-202, 180 P.2d 873, 171 A.L.R. 667; *Hastings v. Serleto*, supra, 61 Cal.App.2d 672, 690, 143 P.2d 956. Incidentally, at the trial appellant objected to but a portion of the questions to which he now objects, and earlier during the trial had answered without objection questions which were the same in all material respects as those which he now claims were improperly propounded.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

101 Cal.App.2d 423

SALINAS NAT. BANK v. COOK et al.

Civ. 14452.

District Court of Appeal, First District,
Division 1, California.

Dec. 27, 1950.

Action to foreclose deed of trust by Salinas National Bank, a corporation, against Willis Cook, Ellen Cook and others. Ellen Cook died and Thomas F. Kilmartin, administrator with the will annexed of the estate of Ellen Abbott, also known as Ellen Cook, deceased, was sued as John Doe. The Superior Court in and for the County of San Benito, A. M. Runnells, J., entered a judgment of foreclosure, and Thomas F. Kilmartin, as administrator, appealed on the judgment roll alone. The District Court of Appeal, Bray, J., held that, where defendant died during progress of action to foreclose deed of trust and administrator of defendant's estate was made a defendant, the administrator's failure to allege presentation to estate of claim for attorney's fees, cost of title report and court costs must be raised in trial court and could not be raised for the first time on appeal from foreclosure judgment allowing plaintiff attorney's fees, cost of title report and costs of suit.

Judgment affirmed.

Appeal and error — 193(5)

Where defendant died during progress of action to foreclose deed of trust and administrator of defendant's estate was made a defendant, the administrator's failure to allege presentation to estate of claim for attorney's fees, cost of title report and court costs must be raised in trial court and could not be raised for the first time on appeal from foreclosure judgment allowing plaintiff attorney's fees, cost of title report and costs of suit. Probate Code, §§ 709, 716.

James F. Boccardo, San Jose, Robert R. Cimino, San Jose, of counsel, for appellant.

Royal E. Handlos, San Francisco, A. E. Warth, Salinas, for respondent.

BRAY, Justice.

From a judgment of foreclosure of a deed of trust, defendant Kilmartin as ad-

ministrator of the estate of Ellen Abbott, also known as Ellen Cook, deceased, sued herein as John Doe, appeals on the judgment roll alone. While the notice of appeal includes an appeal from the entire judgment, defendant's brief and stipulation at argument limits the appeal to that portion of the judgment allowing plaintiff attorneys' fees, cost of title report and costs of suit.

Question Presented.

Can failure to allege presentation to the estate of claim for attorneys' fees, cost of title report and court costs be raised for the first time on appeal?

Facts.

On May 5, 1948, plaintiff sued to foreclose a certain deed of trust executed in 1945 by Willis Cook and Ellen Cook. Ellen Cook was a named defendant. On July 12, 1948, she died. Thereafter defendant Kilmartin as administrator was served as a John Doe. He filed a general denial of the allegations of the complaint. The deed of trust provided, in case of default, for attorneys' fees, cost of title report and costs of suit. After a trial the court rendered a judgment of foreclosure for the principal and interest of the note which the deed of trust secured, plus \$7500 attorneys' fees, \$163.20 cost of title report, \$25.65 interest on costs advanced by plaintiff, and \$24 costs of suit. The defendant Willis Cook (who did not appeal) alone was made liable for any deficiency judgment.

Failure to Make Contention in Trial Court.

After the death of Ellen Cook the complaint was amended alleging her death and the appointment of defendant Kilmartin as administrator. It was not alleged, nor was any proof offered, to show that any claim was ever presented to the estate. There is no finding of the filing of such claim.

Section 709 of the Probate Code provides: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authen-

ticated as required in other cases; and no recovery shall be had in the action unless proof is made of such filing or presentation."

Section 716 of the Probate Code provides: "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but *no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid.*" (Emphasis added.)

Defendant contends that as the filing or presentation of a claim for attorneys' fees and costs was not alleged, the complaint failed to allege a cause of action, and that as such filing or presentation was neither alleged nor proved, the court's finding that plaintiff was entitled to attorneys' fees and costs was unsupported. Plaintiff contends that as this question was not raised in the trial court, it cannot be raised here.

Preston v. Knapp, 85 Cal. 559, 24 P. 811, is determinative of the question. There an action was brought against Sewell Knapp in his lifetime, for goods sold and delivered. As here, during the progress of the litigation Knapp died. His executrix was substituted as defendant. The complaint was not amended to aver that a claim had been presented to the executrix. The case differs from ours, in that at the trial the executrix admitted that a claim had been presented to her and that she had refused to act upon it. On appeal from a judgment in favor of the plaintiff the executrix contended that as the complaint had not been amended to allege the presentation of the claim to the executor and her rejection of it, there was not support for the judgment. (The same contention is made here.) The court held, 85 Cal. at page 561, 24 P. at page 811: "But, as no such objection was made in the court below, and as defendant expressly admitted on the trial that the claim had been present-

ed to the executrix in due time, and that she had refused to act upon it, and made no objection on the ground that it was not presented in due form, it is too late to make the objection that the presentation and rejection of the claim were not alleged in the complaint, for the first time, on this appeal. Hentsch v. Porter, 10 Cal. 555; Coleman v. Woodworth, 28 Cal. [567], 568; Bank of Stockton v. Howland, 42 Cal. [129], 130; Drake v. Foster, 52 Cal. 225. The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to the commencement of suits upon them, is to save to estates of deceased persons the costs and expenses of useless suits,—suits to recover what would have been allowed and paid by the executor or administrator without suit. The merits of such claims do not depend in any degree upon their presentation and rejection before suit. The defense that a claim had not been presented and rejected before suit does not question either the validity or the maturity of the claim, but simply challenges the remedy by suit, on the ground that another remedy provided by law has priority, and should be exhausted before commencement of suit. In other words, that the demand, or some part thereof, should be disputed and rejected, in the mode prescribed by law, before the commencement of suit. For these reasons it has been decided in the cases above cited that the defense to a claim against an estate that it had not been presented to and rejected by the executor or administrator before commencement of suit upon it is of the nature of a defense in abatement, which is presumed to be waived if not expressly made in the court of original jurisdiction, and that it will not be first heard and considered on appeal."

While in the Preston case there actually was proof in the trial court of the presentation of the claim, such fact does not change the rule that failure to allege or prove such presentation must be raised in the trial court. Thus in Hentsch v. Porter, 10 Cal. 555, upon which the rule in the Preston case is partly based, there was no proof in the trial court, as the judgment was a

default one. On appeal it was contended (as here) that the failure of the complaint to allege the presentation of a claim could be raised at any time. The court held that the non-presentation of the claim is "nothing more than a matter of abatement", 10 Cal. at page 560, and hence cannot be raised for the first time on appeal. *Coleman v. Woodworth*, 28 Cal. 567, *Bank of Stockton v. Howland*, 42 Cal. 129, and *Drake v. Foster*, 52 Cal. 225, all mentioned in the Preston case and all supporting the rule, were all cases in which, in addition to no allegation of presentation of a claim, there was no proof of such presentation.

Burke v. Maguire, 154 Cal. 456, 98 P. 21, 24, states that the cases establishing the rule "have not been questioned." *Schwartz v. Edmunds*, 20 Cal.App.2d 530, 67 P.2d 351, cited by defendant, is not in point for the reason that no contention was made there that the failure to allege and prove the presentation of a claim to the estate was being made for the first time on appeal. We have examined the briefs in that case. Apparently the entire question was presented to the trial court. At least, there is not the slightest indication that it was not. The opinion states that no claim was filed. Moreover, there the respondent conceded without discussion, that the judgment might be modified by striking the attorneys' fees and costs of title report therefrom. In our case, had the question been raised in the trial court, such would have to be the order here.

Sections 709 and 716 of the Probate Code require the filing of a claim against the estate of the decedent, and had the question been raised in the trial court, no recovery of the attorneys' fees and the title report and court costs could have been had without alleging and proving the filing of such claim. The failure to meet this requirement is one which must be raised in the trial court. Failure to raise it constitutes a waiver of the defense.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

REED et al. v. PACIFIC INDEMNITY CO.

No. 14459.

District Court of Appeal, First District,
Division 2, California.

Dec. 14, 1950.

Rehearing Denied Jan. 13, 1951.

Hearing Denied Feb. 8, 1951.

R. G. Reed, also known as and called Robert G. Reed and M. H. Reed, brought an action against the Pacific Indemnity Company, a corporation, for a declaratory judgment as to plaintiff's rights under a comprehensive liability policy issued by defendant. The Superior Court in and for the County of Alameda, Thomas J. Ledwich, J., held that the policy provided pro rata insurance, and defendant appealed. The District Court of Appeal, Schottky, J. Pro Tem, held that the evidence sustained the trial court's finding that the conditions of the policy had not been breached by the insured to the prejudice of the insurer.

Affirmed.

1. Appeal and error ⇨931(1)

On appeal by insurer from declaratory judgment as to insurer's liability under comprehensive liability policy, all factual conflicts would be resolved in favor of respondent-insured.

2. Insurance ⇨146(3)

Exceptions in contract of insurance which purport to limit risk assumed by insurer in general provisions thereof are to be construed most strongly against insurer and in favor of insured and if susceptible of two meanings, one most favorable to insured is to be adopted.

3. Insurance ⇨146(3)

Contract of insurance must be given reasonable construction that will best carry out objects for which contract was entered into, namely, that of securing indemnity to insured for losses to which insurance related.

4. Insurance ⇨512½

Where comprehensive liability policy provided that insurance under policy should be excess insurance if it was disclosed that other insurance was in effect on effective

date of policy and if premium for policy was modified upon basis of such other insurance, reasonable construction of proviso was that unless and until premium for comprehensive policy was modified on basis of other insurance, coverage under comprehensive policy remained pro rata insurance.

5. Insurance Ⓒ512½

Comprehensive liability policy containing express provision that coverage furnished by policy was to be excess insurance when it was disclosed that other insurance was in effect on effective date of policy afforded pro rata insurance, notwithstanding fact that insurer learned of other insurance on truck subsequent to time of accident involving truck, where insurer had charged insured with additional premium for truck subsequent to accident and insurer's subsequent tender of premium refund had been refused by insured.

6. Declaratory judgment Ⓒ368

Insurance Ⓒ514½, 539(5)

Whether insured has complied with "notice to company" or "assistance & co-operation" provision of his policy is question of fact, and before breach of such provision precludes recovery under policy by insured, it must appear the insurer had suffered prejudice.

7. Declaratory judgment Ⓒ347

In action by insured against insurer for declaratory judgment as to rights under comprehensive liability policy, evidence sustained trial court's findings that conditions of policy relating to giving notice were not breached by insured to prejudice of insurer.

8. Declaratory judgment Ⓒ344

Evidence Ⓒ158(27)

In action by insured against insurer for declaratory judgment as to rights under comprehensive liability policy, trial court properly sustained objection to questions asked, with regard to whether insured had intended to pay two premiums for same coverage, on grounds that questions were irrelevant and that policies spoke for themselves.

Partridge & O'Connell, San Francisco, John P. Whitney, San Francisco, of counsel, for appellant.

Nicholas Zoller, San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiffs, doing business under the name of Reed Meat Packing Co. commenced an action for declaratory relief against defendants Pacific Indemnity Company and The London & Lancashire Indemnity Company. Plaintiffs alleged that they were the owners of a Chevrolet truck involved in automobile accident on November 17, 1947 with resulting damage claims and suits against them for personal injuries and property damage. They also alleged that at the time of the accident each defendant was their insurer under a policy of liability insurance with applicable limits of liability in the same amounts. Plaintiffs alleged further that after the accidents they reported same to each of the defendants and that after plaintiffs had been served with complaints and summons in said suits they requested each of said defendants to defend said actions on behalf of plaintiffs but that defendant Pacific Indemnity Company has refused to defend any of said suits. It was also alleged that the defendant London & Lancashire Indemnity Company of Americas was joined as a defendant as a necessary party and plaintiffs sought a declaration of their rights under the policies and a determination whether the said defendants are required to defend said suits and in the event an adverse judgment is rendered against plaintiffs in said suits what portion of said judgments either of said defendants is required to pay.

The findings of fact made by the court after a trial of several days were to the general effect that the allegations of the complaint were true and judgment was entered declaring substantially that each of the defendants was "a primary and concurrent insurer of said plaintiff;" that each was obligated to pay on behalf of plaintiffs one-half of any sums which plaintiffs shall become obligated to pay on account of the claims against them arising out of the

accident, not exceeding one-half of the applicable limit of liability; and that each was obligated "to defend in name and on behalf of plaintiffs herein each and every suit against said plaintiffs arising out of said accident."

Defendant, London & Lancashire Indemnity Company did not appeal, and this appeal is by defendant Pacific Indemnity Company from said judgment.

Appellant urges the following grounds for a reversal of the judgment:

1. The court erred in finding and declaring that the Pacific policy afforded pro rata insurance and not excess insurance.
2. The court erred in holding that the condition of the Pacific Policy relating to notice and forwarding of process were not breached by respondents to the prejudice of Pacific.
3. Evidence of respondents' intent not to insure the Chevrolet truck with Pacific was relevant and was improperly excluded.

[1] Before discussing these contentions we shall give a brief summary of the factual situation as shown by the record, resolving, as we must, all conflicts in favor of respondents.

Appellant is a corporation engaged in an insurance business. On June 10, 1947, it issued its "Comprehensive Liability Policy" for a period of one year from June 10, 1947 to June 10, 1948. It had issued a similar policy the previous year to respondents. In its policy, appellant agreed to pay on behalf of respondents all sums which respondents should become obligated to pay by reason of law for damages, because, first, of bodily injury sustained by any person or persons from any cause, and, second, of injury to property caused by accident and arising out of the use of an automobile, with bodily injury limits of \$50,000, for one person, and \$100,000 for more than one person, and a property damage limit of \$5,000, for each accident.

At the issuance date of the policy, respondents were required to pay appellant a provisional deposit premium, and the policy provided for periodical audits, thereafter, by appellant to ascertain any increase

in hazards, because of respondents' operations, which audits looked to an additional premium from respondents. At the termination of its policy, appellant was entitled to compute its earned premium and include in such computation all increases in hazards to which the policy applied in accordance with the company's rules, rates, rating plans, premium and minimum premium applicable to this insurance; and if such computation exceeded the estimated advance premium paid because of an increase in a hazard during the policy period, respondents were required to immediately pay the excess to appellant; and if less, appellant was required to return to respondents the unearned portion of the deposit premium. One of the hazards covered by this policy and included in the rates used in determining such deposit premium was the coverage of automobiles.

This policy required respondents to maintain for each hazard, records of the information necessary for premium computation, and at any time during the policy period, and within one year after the final termination of its policy, appellant was entitled to examine respondents' hazard records for the computation of its earned premium. This policy did not contain any provision that required respondents to notify appellant of a hazard change, but respondents were required to maintain hazard records for appellant's audits.

On October 31, 1946, respondents purchased a Chevrolet truck which purchase was properly entered in respondents' records for the automobile hazard.

On November 8, 1946, at the request of Tate & Corvi, insurance brokers, the London & Lancashire Indemnity Company of America (hereinafter called London), issued its Automobile Liability Policy to Respondents, whereby it insured such truck and agreed to pay on behalf of respondents all sums which respondents should become legally obligated to pay by reason of the liability imposed upon respondents by law, for damages because of the same bodily injuries and property damage described in appellant's policy, but caused by accident and arising out of the use of such truck,

with bodily injury limits of \$50,000, for one person and \$100,000, for each accident and a property damage limit of \$5,000.

Appellant's Comprehensive Liability Policy and London's Auto Liability Policy each contained "Other Insurance" provisions, which provisions were, to the following extent, identical:

"If the Insured has other insurance on a loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; * * *."

However the "Other Insurance" provision of appellant's policy, Condition 13 thereof, further stated: "provided, however, that the insurance under this policy shall be excess insurance with respect * * * (2) to loss against which the named insured has other insurance disclosed to the company as in effect on the effective date of this policy and upon the basis of which the premium for the insurance under this policy is modified but in such event the insurance under this policy shall apply only in the amount of which the applicable limit of liability stated in the declaration exceeds the applicable limit of liability of such other insurance."

Without inspecting or auditing respondents' hazard records, appellant issued its comprehensive Liability Policy to respondents for the period from June 10, 1947 to June 10, 1948, upon the same terms and conditions as its former policy and for which respondents paid a deposit premium.

Subsequently, London issued its Renewal Certificate renewing its Automobile Liability Policy for the period from November 8, 1947 to November 8, 1948, for such truck.

On November 10, 1947, in the City of Oakland, while being driven by an employee in the course of respondents' business, such truck was involved in an accident in which bodily injuries are alleged to have been sustained by ten (10) people, which have resulted in seven (7) actions at law against respondents, for such personal injuries, and property damage to six (6) motor vehicles,

one (1) electric pole and one (1) building, which have resulted in five (5) actions at law against respondents for such property damage.

Immediately following the accident, Tate & Corvi orally notified insurance investigators Brown Brothers, of such accident and Brown Brothers received authority from London to investigate such accident on respondents' behalf.

Brown Brothers assigned its investigator, John Rose, to investigate such accident. On the day of the accident, Rose interviewed the driver of respondents' truck and obtained a written statement from him of his version of the accident. Thereafter, Rose made a complete and full investigation of the accident, obtaining names of witnesses, signed statements of witnesses, photographs, and description of injuries, which he delivered to London in a written report.

On November 21, 1947, at the request of respondents, Rose first, telephoned appellant's Oakland office and informed a Miss Arth of the accident and respondents' policy with appellant, and gave her the names of the parties, the date, time and place of the accident, and, second, on the same day, in confirmation of such telephone conversation, Rose wrote a letter to appellant's Oakland office, Attention: Miss Arth, setting out the names of respondents, their Comprehensive Policy number and the time and place of the accident.

Upon receipt of such letter on November 22, 1947, Cameron MacAulay, who was in charge of appellant's Oakland office, as supervisor of its claims department, in Alameda County, telephoned Rose acknowledging receipt of such letter, and Rose repeated the same information he had given Miss Arth, and informed MacAulay that he had given his full report to London, and MacAulay should contact London for any more details.

Following receipt of the letter of November 21, 1947, and his telephone call to Rose, MacAulay decided the accident was not properly reported and that appellant was not interested in the loss and, therefore, instructed no one to institute any investigation.

Thereafter, periodic telephone conversations were held between B. C. Derry, claims superintendent for London, Daryl Jenkinson, assistant claims superintendent for London, and MacAulay, as to whether either appellant or London were primary or excess insurers of respondents and what contributions would be made by appellant and London in the investigation, defense or settlement of the claims arising out of the accident.

Seven actions were commenced against respondents for personal injury, and five for property damage, for sums totalling in excess of \$200,000. In each of such actions, the complaint alleged that the proximate cause of the accident was the negligent and careless operation of such truck by respondents' driver. In May, 1948, MacAulay learned of the various parties in these actions and the prayer of their complaints.

In August, 1948, appellant examined London's complete file of the investigation of the accident which contained the respondents' driver's signed statement, signed witness statements, medical examination of claimants, relevant photographs and copies of summons and complaints in each of said actions filed against respondents.

At all times since it learned of this accident, appellant has refused to investigate, defend or participate in the settlement of any of the claims made against respondents. Each of said claims is still pending and no settlement has been made with any claimant.

On September 17, 1948, respondents commenced their action in declaratory relief against appellant and London to ascertain their coverage under each insurance policy.

On November 30, 1948, appellant inspected and audited respondents' books to determine its earned premium for the year June 10, 1947 to June 10, 1948. Thereafter, appellant computed its earned premium and charged respondents an additional premium of \$101.63 of which \$54.96 represented a premium charge for such truck.

On December 15, 1948, appellant mailed respondents a statement in writing which showed respondents indebted to appellant

for such sum of \$101.63 for such additional earned premium. On February 15, 1949, respondents paid appellant such balance of \$101.63. On March 2, 1949, appellant tendered to respondents the sum of \$54.96 as a modification of its earned premium based on London's auto policy covering such truck, and respondent refused to accept such tender.

We shall first discuss appellant's contention that the court erred in declaring that its policy afforded pro rata insurance instead of excess insurance.

Appellant states that if said condition 13 had ended where the semi-colon divided it there could be no sound challenge to the declaration by the court that the Pacific policy afforded pro rata insurance and not excess insurance. But, argues appellant, "if, according to the plain meaning of the proviso, the insured had other insurance against a loss which Pacific insured against, and if it was disclosed that such other insurance was in effect on the effective date of the Pacific policy, and if the premium for the Pacific policy was modified upon the basis of such other insurance, then the Pacific policy afforded excess insurance and not pro rata insurance." Appellant contends that all of the foregoing conditions are present in the instant case.

As was said in *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766 at page 769, 214 P.2d 392, at page 395:

[2-5] "A contract of insurance, like any other contract, is to be construed so as to give effect to the intention of the parties at the time of contracting so far as it is ascertainable. Civ. Code, sec. 1636. Where the language is susceptible of two constructions, it should be construed most strongly in favor of the insured. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123; *Island v. Fireman's Fund Indemnity Co.*, 30 Cal.2d 541, 548, 184 P.2d 153, 173 A.L.R. 896. A contract of insurance must be given such construction, if fairly warranted, as will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates. *Fageol Truck*

& Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 751, 117 P.2d 669. Indemnification of the insured should be effected rather than defeated. "To that end the law makes every rational intentment in order to give full protection to the interests of the insured." *Glickman v. New York Life Ins. Co.*, 16 Cal.2d 626, 635, 107 P.2d 252, 256, 131 A.L.R. 1292.

"Exceptions in a contract of insurance which purport to limit the risk assumed by the insurer in the general provisions thereof are to be construed most strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one most favorable to the insured is to be adopted. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123; *Bayley v. Employers' Liability Assur. Corp.*, 125 Cal. 345, 352, 58 P. 7. The insurer is bound to use such language as to make the exceptions and provisions of the contract clear to the ordinary mind; and in case it fails to do so, any uncertainty or reasonable doubt is to be resolved against it. *Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co.*, 158 Cal. 367, 370, 111 P. 4."

We are unable to agree with appellant that all of the provisions of said proviso were present. It is conceded by appellant that it did not learn of the London policy until after the accident of November 10, 1947. The record shows that on November 30, 1948, appellant audited respondents' records, and thereupon charged respondents an additional premium for said Chevrolet truck, which premium was paid by respondents, although several weeks later appellant tendered back to respondents the premium covering said truck which refund respondents refused to accept. The language of said proviso must be considered as a whole, and must be given a reasonable construction that "will best carry out the object for which the contract was entered into, namely that of securing indemnity to the insured for the losses to which the insurance relates."

We believe that a reasonable construction of said proviso is that unless and until the premium for the comprehensive policy

is modified on the basis of the other insurance, the coverage under the comprehensive policy remains *pro rata* insurance. There is no provision in appellant's policy which required respondents to notify appellant of the issuance of the London policy, but respondents had a right to secure a separate and additional policy when they purchased the Chevrolet truck and there was no reason for them to notify appellant unless they wished to have the premium modified. If appellant had exercised its right to audit respondents' books and had learned of the London policy and had, prior to the accident, modified the premiums on the basis of said policy, it could then be held that under said proviso of Condition 13 of its policy the coverage of the Chevrolet truck was excess insurance.

We are convinced that the trial court correctly concluded that the coverage afforded respondents by appellant's policy was *pro rata* insurance.

Appellant next contends that the trial court erred in holding that the conditions of the appellant's policy were not breached by respondents to the prejudice of appellant.

The trial court found that: "On or about November 20, 1947, and as soon as practicable after such accident, written notice was given on behalf of plaintiffs to each of said defendants of such accident. And that defendant Pacific Indemnity Company suffered no prejudice because said notice did give all the information specified in condition No. 9 of its said policy, that defendant Pacific Indemnity Company immediately thereafter refused to investigate or defend on behalf of plaintiffs herein such accident on the grounds that defendant Pacific Indemnity Company was not liable under its policy, and (b) Thereafter each of said actions was commenced against plaintiffs herein and plaintiffs herein caused notice of each thereof to be given to defendant Pacific Indemnity Company, and (c) that plaintiffs herein have been served with summons and complaints in each of such suits, and (d) that such summons and complaints were delivered to London & Lancashire Indemnity Company, and (e) that

knowledge of such suits was brought to the attention of Pacific Indemnity Company, but defendant Pacific Indemnity Company has refused to defend any of said suits and would have refused to defend or investigate each of such lawsuits had plaintiffs herein forwarded such copies of the complaints and summons to it."

[6] It appears to be settled law in California that whether an insured has complied with the "Notice to Company" or "Assistance & Cooperation" provisions of his policy is a question of fact, and that before the breach of such provisions precludes a recovery under the policy by the insured, it must appear that the insurer has suffered prejudice. In the recent case of *Gibson v. Colonial Ins. Co.*, 92 Cal.App. 2d 33, 206 P.2d 387, in which a hearing was denied by the Supreme Court, the court held that, "Where a policy of liability insurance provides that as a condition precedent to the insurer's obligation the insured shall notify it of any accident covered by such policy 'immediately' or 'as soon as practicable,' the notice required is only such as is prompt and reasonable under the circumstances, and the question whether the insurer's obligation is excused by delay in such notice depends on whether the insurer has been substantially prejudiced by such delay, which in turn depends on the facts of the particular case, and prejudice will not be presumed as a matter of law from a delay of seven and one-half months." The court said, 92 Cal.App.2d at page 34, 206 P.2d at page 388:

"The legal principles which must govern our decision were stated in *Abrams v. American Fidelity & Cas. Co.*, 32 Cal.2d 233 [195 P.2d 797]. In that case, as in the present one, an injured plaintiff was seeking to enforce the contract liability of the insurer after his judgment against the insured went unsatisfied. The policy required the insured to give 'immediate written notice' of any accident covered by the policy. Upon the assumption that 'immediate' notice meant notice within a reasonable time, the Supreme Court held [32 Cal.2d at page 237, 195 P.2d at page 799] that

here was not so great that the trial court was precluded from finding as a fact, as the court did, that defendant was not prejudiced thereby; i. e., the court was not required to conclude as a matter of law that prejudice resulted.' The defendant in that case placed reliance upon several cases, including *Purefoy v. Pacific Automobile Indemnity Exchange*, 5 Cal.2d 81 [53 P.2d 155], in which substantial and unexplained delays in giving notice of accident were held to give rise to a presumption of prejudice. In distinguishing these cases, which are also relied upon by appellant here, the court expressly refuted the proposition 'that such a presumption or inference is a conclusive one which cannot be overcome by evidence that no actual prejudice occurred,' and laid down the rule that '[t]he ultimate conclusion in each case must depend on its own facts.' The evidence in the *Abrams* case was held sufficient to support a finding that the delay in giving notice did not prejudice the insurer in defending the action against the insured, and a judgment for plaintiff was affirmed.

"Defendant contends that the *Abrams* decision is not controlling here, and that the issue of prejudice should not have been left to the jury. Its argument is that irrespective of any question of prejudice, the insured's delay of seven and one-half months in giving notice bars recovery, since as a matter of law, such a delay constituted a direct and substantial breach of the condition precedent that notice be given 'as soon as practicable.' The record, so defendant maintains, shows without contradiction that *Columbia's* officers were informed of the accident upon the day it occurred, but contains nothing by way of explanation to excuse or justify the lengthy delay in notifying defendant thereof. Conceding these facts, we nevertheless are of the opinion that defendant's contention cannot be sustained. The statement in *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 752 [7 P.2d 999, 85 A.L.R. 13], that 'the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was

substantially prejudiced thereby,' has been regarded as a controlling principle in numerous actions where breach of a cooperation clause or notice provision has been asserted as a defense. It has never been overruled, although, upon occasion, it may have been overlooked (Cf., *Coolidge v. Standard Accident Ins. Co.*, 114 Cal.App. 716, 722 [300 P. 885]), and in the *Purefoy* case, *supra*, the Supreme Court suggested that the soundness of the statement might be open for reexamination in a proper case. The subsequent decision in the *Abrams* case, however, must be regarded as approving the rule stated in the *Hynding* case."

We have hereinbefore set forth the nature and extent of notice received by appellant insurance company. It is apparent that appellant was notified of the happening of the accident and the details thereof and also of the filing of the suits, all within a reasonable time, but that appellant chose to rely upon its claim that it was not liable under its policy and refused either to investigate or defend on behalf of respondents.

[7] We are convinced that both the evidence and the law support the finding of the trial court that the conditions of appellant's policy were not breached by respondents to the prejudice of appellant.

[8] The final contention of appellant is that the court improperly excluded evidence of respondents' intent not to insure the Chevrolet truck with appellant company.

Appellant states that "there was ample evidence to support an inference that the respondents intended to have the Chevrolet truck insured against liability specifically and exclusively with London." It points to evidence that neither the acquisition of the Chevrolet nor the existence of the London policy was disclosed to appellant or uncovered by audit until after the truck was

involved in the accident of November 10, 1947; that when the truck was involved in an accident on June 27, 1947, respondents reported it to London and London paid a property damage claim; and that respondents first reported the accident here involved to London and also forwarded the summons and complaints received to London.

Appellant then points out that at the trial, it asked the following questions directed to respondent Robert G. Reed:

"Q. Was it your intention, when you ordered this insurance from Mr. Corvi, to order two policies?"

"Q. Was it your purpose, Mr. Reed, to pay two premiums, one to Pacific Indemnity, and the other to London & Lancashire for the same coverage?"

"Q. Was it your purpose, Mr. Reed, to pay two premiums for liability and property damage coverage on this one Chevrolet automobile?"

Respondents' counsel objected to each of said questions upon the grounds that they were irrelevant and that the policies speak for themselves. The court sustained the objections, stating: "* * * it seems to me that when he bought and paid for the insurance, that is what he did, and that is the end of it. Now, what his purpose was, because it also involves a question what is the policy? I do not think is material."

We believe that the ruling was proper, but, in any event, in view of the record in the case, we do not see how appellant could have been prejudiced by the ruling.

In view of the foregoing we believe that the judgment should be and same is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

**NORRIS et al. v. SAN MATEO
COUNTY TITLE CO. et al.**

No. 14438.

District Court of Appeal First District,
District 2, California.

Dec. 14, 1950.

Rehearing Denied Jan. 13, 1951.

Hearing Granted Feb. 1, 1951.*

Action for money had and received by Homer A. Norris and others against the San Mateo County Title Company, a corporation, and others to recover sum alleged to have been received by defendant for use of plaintiff, vendors in a realty transaction in which certain of the defendants as vendees defaulted. The Superior Court in and for the County of San Mateo, Edmund Scott, J., granted the plaintiffs' motions for summary judgment and the defendants appealed. The District Court of Appeal, held that prior action between same parties wherein plaintiffs sought recovery of damages for failure of defendants to carry out purchase agreement and in which recovery was denied and wherein defendant's defense of fraud was found by court to be untrue was not a bar to recovery by plaintiffs of deposit money which was forfeited on defendant's failure to carry out agreement.

Judgment affirmed.

1. Judgment ⇨185

In considering a motion for a summary judgment affidavits presented thereon must be considered most favorably to party against whom judgment is sought and facts alleged in his affidavits must be accepted as true.

2. Judgment ⇨185

A summary judgment is improper if supporting affidavits are insufficient for any reason, even if opposing affidavits raise no issue of fact, or if there is no opposing affidavit.

3. Vendor and purchaser ⇨330

Where vendor brings action for breach of contract to purchase realty, although vendor does not ask for liquidated damages, court can allow damages according to proper measure.

4. Vendor and purchaser ⇨185

Where time is made essential and payment by purchaser is to be made not later

than a specified date, forfeiture resulting from not making such payment is complete on that date and may not be undone by any subsequent act of purchaser.

5. Judgment ⇨72

Where in previous action by vendors against purchasers to recover damages for breach of realty purchase agreement, defense of fraud on part of vendors' agents was pleaded by purchasers and found to be untrue, issue was concluded by former judgment and purchasers' failure to complete purchase stood as an unexcused default and only inference possible from pleadings in vendors' action to recover amount of deposit from escrow holder was that default was wilful and pleaded excuse did not preclude rendition of summary judgment for vendors.

6. Escrows ⇨9

Where purchasers notified vendors that they would not comply with terms of deposit receipt and would not complete purchase and would not pay other than amount of deposit already paid, deposit money in hands of escrow holder belonged to vendors when they wished to claim it and their subsequent damage suit against purchasers which was unsuccessful and afforded them no remedy had no effect on money which had already vested in vendors on the forfeiture.

7. Election of remedies ⇨3(1)

The remedies of retention of purchaser's deposit after breach of realty purchase agreement and suit by vendor for damages are alternative remedies, but are not inconsistent remedies.

8. Election of remedies ⇨3(1)

Where law affords distinct but not inconsistent remedies, an election to follow one does not operate as a waiver of other.

9. Damages ⇨81

Where purchaser wilfully defaults, forfeiture of purchase price deposit to vendor is not precluded by statute providing that contracts fixing liquidated damages for a breach of an obligation are to that extent void. Civ.Code §§ 1670, 1671.

* Subsequent opinion 231 P.2d 493.

10. Damages —81

Vendor's right to retain amount of deposit made on purchase price by purchaser when purchaser defaults is based on a forfeiture and not a damage theory. Civ.Code, §§ 1670, 1671, 3275.

11. Damages —81

Where purchasers contracted to buy vendors' property for \$20,000 and defaulted and resale price was \$17,000, vendors received less than benefit of their bargain after recovery of \$2000 deposit on purchase price, so there was no unjust enrichment, even though previous actions determined vendors suffered no damage from breach.

P. H. McCarthy, Jr., F. Nason O'Hara, and Herbert S. Johnson, all of San Francisco, for appellants.

Norman S. Menifee, Redwood City, for respondents.

PER CURIAM.

This is an appeal from an order granting plaintiffs' motions for summary judgment and from judgment entered thereon in an action for money had and received brought by the vendors (the plaintiffs Norris) of a parcel of real property in San Mateo County against the vendees and escrow holder (defendant San Mateo County Title Company) to recover the sum of \$2000 alleged by defendants to have been received by defendants to the use of the plaintiffs. Defendants Ribarsky answered with a general denial and a separate affirmative defense of a prior adjudication. The title company filed no answer.

The affidavit of plaintiffs in support of the motion for summary judgment made by one of the plaintiffs, William M. Chance, Jr., avers that he could testify that he and plaintiff Keeler were licensed real estate brokers and copartners doing business under the name of Peninsula Realty Company; that plaintiffs Norris were prior to March 17, 1947, the owners of certain real property in Belmont, San Mateo County; that on January 26, 1947, defendants Ribarsky executed and delivered to plaintiffs Keeler

and Chance, a certain written deposit receipt whereby said defendants agreed to purchase the Norris property for a total purchase price of \$20,000, and deposited with plaintiffs Keeler and Chance, the sum of \$2000 as and for a deposit for the purchase of said real property, and then and there agreed in writing to pay the remainder of said purchase price within 45 days from date of said deposit receipt. Affiant averred further that on January 26, 1947, plaintiffs Norris accepted in writing the aforesaid deposit receipt and agreed in writing to sell the property described therein on the terms and conditions stated in said deposit receipt, and agreed to pay to plaintiffs Keeler and Chance as commission "the sum of (5%) of sale price, or one-half the deposit in case same is forfeited by purchaser provided the same shall not exceed the full amount of the commission;" that the said deposit receipt further provided as follows:

"In case said purchaser shall fail to pay the remainder of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the Seller be retained as liquidated damages."

The affidavit set forth that on or about March 12, 1947, pursuant to authorization of defendants Ribarsky, affiant deposited the said sum of \$2000 with defendant San Mateo Title Company together with a Deed duly executed by plaintiffs Norris and escrow instructions in conformity with the deposit receipt; that plaintiffs Norris fully complied with all terms and conditions of said deposit receipt which applied to them; that on or about March 15, 1947, defendants Ribarsky notified plaintiffs that defendants would not comply with the terms of said deposit receipt, would not complete the purchase, and would not pay any further sum than the \$2000 on account of the purchase price; that the said sum remains on deposit with defendant San Mateo County Title Company, that plaintiffs Norris are entitled to the whole of said sum, and that plaintiffs Keeler and Chance, doing business as the Peninsula Realty Company, are entitled to be paid one-half of said sum.

The affidavit of Emil J. Ribarsky in opposition to the motion for Summary Judgment averred that he could testify that the Peninsula Realty Company, on or about January 26, 1947, through its agents, servants and employees, as an inducement to defendants, represented that they would sell affiant's real property within 45 days thereof in consideration of affiant signing and executing a written deposit receipt whereby said defendants Ribarsky agreed to purchase plaintiffs Norris' real property for the sum of \$20,000, and in consideration of the promise of plaintiff Peninsula Realty Company tendered a deposit of \$2000 which was accepted by the agents, servants and employees of plaintiff realty company; that during the aforesaid 45 days subsequent to January 26, 1947, said realty company wholly failed to perform their promise to sell the property of defendants Ribarsky, and as a result defendants were damaged in the sum of \$2000. Affiant further deposed that he was one of the defendants in action No. 43043 of the Superior Court of San Mateo County, that the parties in the present action are the same parties as in the aforesaid action; that the subject matter is the same in both actions; that the judgment rendered in the prior action exonerated defendants Ribarsky from any liability to plaintiffs; that said prior judgment has not been set aside, modified or reversed, but remains in full force.

It was stipulated at the hearing of the Motion for Summary Judgment, that the record in the prior action should be considered by the trial judge together with the affidavits.

The same judge who heard the previous suit for damages brought by the plaintiffs Norris against the Ribarskys, heard the motion for summary judgment. His minute order stated that it was granted on the authority of *Martinelli v. Hogrefe*, 123 Cal.App. 438, 11 P.2d 412. The judgment decreed that "plaintiffs Homer A. Norris and Alice Norris, his wife, Peggie C. Keeler and William M. Chance, Jr., individually and as copartners doing business under the firm name and style of Peninsula Realty Company, do have and recover of the defendants, San Mateo County Title Com-

pany, a corporation, Emil J. Ribarsky and Bernice F. Ribarsky, the sum of \$2,000.00, together with their costs of suit * * *."

The complaint in the prior action was filed by Homer and Alice Norris seeking \$3250 in damages from the Ribarskys for their failure to complete the purchase. It alleged a written agreement providing for the payment of the full purchase price of \$20,000 within 45 days from January 26, 1947, and that time was the essence of the contract (no mention was made of the \$2,000 deposited in escrow); that plaintiffs performed all conditions by them to be performed prior to March 15, 1947, and were willing, ready and able to deliver title and possession to defendants; that defendants wilfully and without cause, refused to pay the sum of \$20,000 or any part thereof and refused to complete the purchase; that relying on the representations of defendants that they would complete the purchase, plaintiffs obligated themselves to the purchase of another piece of property, and hence by reason of defendants' default, were forced to sell their real property for the net sum of \$17,000 and incurred other necessary expenses of \$250 as the direct and proximate result of defendants' breach of contract.

Defendants entered a general denial and filed a cross-complaint against Homer and Alice Norris, and Keeler and Chance doing business as the Peninsula Realty Company. They alleged that cross-defendants Keeler and Chance were employed by cross-defendants Norris, and then continued with allegations of fraudulent representations substantially the same as those contained in the affidavit in opposition to the Motion for Summary Judgment, noted above. It was further alleged that cross-defendants agreed to refund the \$2000 deposit if any of the representations were untrue, and that the agreement should then be null and void; and finally that when defendants ascertained that cross-defendants "would not and did not sell their real property for the sum of * * * \$18,000 or for any sum at all, and on the 15th day of March, 1947, defendants rescinded the agreement to purchase plaintiffs' real property and the same by mutual consent and agreement of the

parties hereto, was rescinded." Cross-complainants asked that plaintiffs take nothing by their action; or (2) for judgment in the sum of \$3250; (3) costs; (4) such other and further relief as the court might deem proper.

Cross-defendants Keeler and Chance answered denying all the allegations of fraud and the allegations setting forth an agreement between said cross-defendants and cross-complainants concerning an agreement to sell cross-complainants' property; denied also the allegation of a mutual rescission.

Cross-defendants Norris answered, denying each and every allegation of the cross-complaint.

Defendants also filed a second count of amended cross-complaint alleging an oral guarantee by cross-defendants Keeler and Chance to sell defendants' property for a minimum of \$20,000, in reliance whereon defendants signed the contract to purchase the Norris property and that said agents' violation of their agreement caused cross-complainants to be unable to fulfill their obligation to plaintiffs and to become liable to them in damages for breach of contract."

The Findings of Fact and Conclusions of Law first recited that judgment had been entered for plaintiffs and in favor of cross-defendants on the cross-complaint, but upon motion for new trial by defendants and pursuant to Section 662 of the Code of Civil Procedure, the court set aside its judgment and reopened the case for the introduction of additional evidence on the issue of damages.

The court then made Findings of Fact reciting that a deposit receipt for the purchase of plaintiffs' real property had been signed by defendants on January 26, 1947; that said receipt provided for a deposit of \$2,000 and the balance of the purchase price within 45 days from said date; that the real estate agents for said sale was the Peninsula Realty Company; that on or about March 13, 1947, defendants notified plaintiffs and Peninsula Realty Company that defendants would not comply with the terms of the aforesaid deposit receipt; that the fair and reasonable value of the real

property to said plaintiffs on March 13, 1947, was the sum of \$20,000; that the sale by plaintiffs on March 17, 1947, was a forced sale and did not represent the reasonable market value of said property at a fair sale on the open market. It was found further that the allegations in the paragraph of the cross-complaint alleging fraud of the real estate agents were untrue.

In the Conclusions of Law the court stated that plaintiffs failed to prove that they sustained any damage as a result of defendant's refusal to complete the purchase of plaintiffs' property. Judgment was for defendant with costs, and on the cross-complaint judgment was that cross-complainants take nothing.

Appellants contend that the trial court erred in granting respondents' motion for summary judgment on the pleadings and affidavits.

[1, 2] It is argued first that such a judgment is proper only when the supporting affidavit states facts sufficient thereto and the affidavit in opposition tenders no triable issue or defense. *Coyne v. Krempels*, 36 Cal.2d 257, 223 P.2d 244; *Eagles Oil & Refining Company v. Prentice*, 19 Cal.2d 553, 122 P.2d 264. "In considering a motion for summary judgment the affidavits presented thereon must be considered most favorably to the party against whom the judgment is sought and facts alleged in his affidavits must be accepted as true. (Citations)." *Weichman v. Vetri*, 100 Cal.App. 2d 177, 223 P.2d 288, 290. And a summary judgment is improper if the supporting affidavits are insufficient for any reason, even if opposing affidavits raise no issue of fact, or if there is no opposing affidavit. *Gardenswartz v. Equitable Life Assur. Soc.*, 23 Cal.App.2d Supp. 745, 68 P.2d 322.

Appellants say that the supporting affidavit of William M. Chance, Jr., states no cause of action as to respondents Keeler and Chance against defendants herein. The affidavit states that plaintiffs Norris agreed in writing to sell the property described in the deposit receipt and "agreed in writing to pay plaintiffs Keeler and Chance as commission the sum of Five (5%) of sale price, or one half the deposit in case

same is forfeited by purchaser * * *"; that the deposit receipt executed by plaintiffs Norris and defendants Ribarsky further provided that if the purchaser failed to pay the remainder of the purchase price or complete the purchase "the amounts paid hereon shall, at the option of the Seller be retained as liquidated damages." It is true, the affidavit shows a cause of action by respondents Chance and Keeler against plaintiffs to pay said brokers one-half the deposit, if it is conceded that it was forfeited by the purchasers, but their claim would not be against either defendant Title Company or the appellants. Respondent replies that while there may be some merit in this contention, the argument is purely academic as far as appellants are concerned, if the plaintiffs Norris were properly awarded a judgment for \$2000 against defendants and appellants.

Appellants maintain that the supporting affidavit was lacking in essential averments as to the difficulty of assessing damages, and that such an averment is required if liquidated damages are pleaded. Section 1670 of the Civil Code provides that contracts fixing liquidated damages for a breach of an obligation are to that extent void except as provided in Section 1671, which section allows liquidated damages for a breach "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." In the present case there is no allegation or showing of the difficulty of fixing actual damages.

[3] If plaintiffs herein are basing their claim on the theory of liquidated damages, not only would the pleading be defective as pointed out by appellants, but the claim being in damages for the same breach of contract pleaded in the prior action, would be barred by the former judgment. *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; *Morrison v. Willhoit*, 62 Cal. App.2d 830, 145 P.2d 707; *Slater v. Shell Oil Co.*, 58 Cal.App.2d 864, 137 P.2d 713. For although respondents did not ask for liquidated damages in that suit, the court could allow damages according to the proper measure. *Phillips v. Stark*, 186 Cal. 369, 199 P. 509; *W. C. Cook & Co. v. White*

Truck & Transfer Co., 124 Cal.App. 721, 13 P.2d 549.

Respondents avoid this result by asserting that they are not seeking in this action of debt to recover *damages* of any kind; that the present case involves only the right of respondents to retain the deposit of \$2000, the down payment on the purchase price. It is pointed out that the case of *Martinelli v. Hogrefe*, 123 Cal.App. 438, 11 P.2d 412, 414, upon which the trial judge based his decision herein, was a case in which the defaulting vendee sought to recover a \$500 deposit paid under a contract for the purchase of real property at a price of \$17,500, in which it was provided that upon plaintiff's default, his rights would cease and his deposit would be retained as "liquidated and agreed damages." The opinion therein states: "And evidence was produced by plaintiff at the trial that there had been no diminution in the value of the property, and hence no damage from plaintiff's failure to perform. But, as was said in the *Glock Case* [*Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1 at page 13, 55 P. 713, 43 L.R.A. 199], a covenant for liquidated damages is of no consequence in such contracts, 'where the liquidated damages are expressed as the moneys paid by the vendee; for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated as liquidated damages or not'." In *Krobitzsch v. Middleton*, 72 Cal.App.2d 804, 165 P.2d 729, the above rule is reiterated, and in *Wilson v. Security-First Nat. Bank*, 84 Cal.App.2d 427, 432, 190 P.2d 975, 978, it is said, "The right of the seller to retain the amounts paid on the purchase price exists regardless of any provisions in the contract for forfeiture or liquidated damages." The defendant title company under this theory, would be holding moneys received by them to the use of respondents.

[4] In *Peak v. Jurgens*, 5 Cal.App.2d 573, 578, 43 P.2d 569, 572, a case in which a vendee defaulted, and a broker was suing the vendor for a commission, the vendor having previously sued the title company and vendees to recover the deposit, it was said that "The purpose of escrowing this payment was obviously to place it within

the reach of either who might be entitled thereto, if there was a controversy between the parties on that score. The suit by the respondent here was necessary. It was not a suit to recover damages * * * it was not, strictly speaking, a suit to enforce the contract at all. It was one to have the rights of the vendees terminated and, incidentally, to have the depository turn over the deposited sum to its rightful owner. * * * In principle, we can see no difference between the case of the vendor retaining a payment actually in his possession under such circumstances and his suing to recover the same from an escrow holder." In 25 Cal.Jur. 608, sec. 113, it is said, "Where time is made essential and payment by the purchaser is to be made not later than a specified date, the forfeiture resulting from not making such payment is complete on that date and may not be undone by any subsequent act of the purchaser." Under these authorities, respondents say, they are entitled to the \$2,000 without allegation and proof of damage. This assumes, of course, that the pleadings herein, and the judgment roll of the prior action disclose an unexcused default by appellants. If there has been such a default, then under the above cases, the forfeiture has automatically taken place, and the money on deposit with the escrow holder as of that date belongs to respondents Norris.

[5] Appellants contend that there is an issue of fact to be tried because of their defense of failure of consideration resulting from fraud of the real estate agents of the Peninsula Realty Company. This issue has been concluded by the former judgment for in the prior case the same defense of fraud was pleaded and was found by the court to be untrue. Therefore, appellants failure to complete the purchase stands as an unexcused default and the only inference that is possible from the pleadings in this and the prior case, is that such default was wilful, the excuse pleaded having been adjudged untrue.

[6] The forfeiture having taken place on March 13, 1947, the money belonged to respondents Norris when they wished to

claim it. The subsequent damage suit which was unsuccessful and afforded them no remedy, would have no effect upon the money which had already vested in said respondents upon the forfeiture. In the damage suit, plaintiffs did not plead the deposit and the court did not adjudicate the status of said deposit, although it found that such a deposit had been paid. The decision in the case herein would indicate that the trial judge was of the opinion that as a matter of law the deposit belonged to the plaintiffs. While appellants in that first action did not specifically pray for a return of their deposit, they alleged that it had been paid and that there was an oral promise to refund it if cross-defendants representations were untrue; they asked the court for whatever relief it should deem proper and all relief was denied.

[7, 8] Appellants maintain that there was a triable issue of election of remedies, and therefore a summary judgment was improper, but this is question of law, not of fact. They say that the provision in the contract that upon default the deposit "shall, at the option of the seller, be retained as liquidated damages," clearly shows an intent that "the seller has an election to retain the deposit in lieu of actual damages, i. e. to choose between the two but not to take both." In the present case it is clear that respondents have not taken both, for the reason that the damage suit was unsuccessful. It is true that the remedies of retention of the deposit and a suit for damages are alternative remedies. In a recent case, *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13, the court said: "It has frequently been stated that the vendor may retain payments as an alternative remedy to an action for damages for breach of a contract to purchase real property." If they are inconsistent remedies an election would have been made by prosecution of the damage action to judgment. *Steiner v. Thomas*, 94 Cal.App.2d 655, 211 P.2d 321; 10 Cal.Jur. 3-10. However, if they are not inconsistent remedies, there would be no election. In volume 10 Cal.Jur. p. 9, sec. 7, under the heading of "Alternative but not Inconsistent Remedies," it is said "Where the law affords distinct but not

inconsistent remedies, an election to follow one does not operate as a waiver of the other." Both retention of the deposit and a suit for damages are remedies in affirmation of the contract. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 716, 43 L.R.A. 199; 25 Cal.Jur. 609, sec. 113.

In *Glock v. Howard & Wilson Colony Co.*, supra, which is followed consistently in all of the cited cases having to do with forfeiture of a deposit upon wilful default in contracts for the sale of realty, it is said after enumerating the alternative remedies of suit for damages, retention of the deposit, and specific performance, that "he [the vendor] may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case *alone*, the vendee in default would be entitled to a *repayment* of his money." (Emphasis added.) And in *Barkis v. Scott*, 34 Cal.2d 116, 121, 208 P.2d 367, 370, the court points out in commenting on the *Glock* case, that in cases where the defaulting vendee could not qualify for relief under Civil Code section 3275 [wilful default being such a case] "his only hope of recovering any of the money he had paid * * * was in proving that it was the vendor who was in default." In the cross-complaint in the first suit appellants pleaded a mutual rescission because of the fraud alleged in the preceding paragraphs of said cross-complaint, and while the court made no finding on this particular allegation, it found the allegations of fraud untrue and found against appellants on their cross-complaint.

[9, 10] If *Glock v. Howard & Wilson Colony Co.*, is still good authority, and this phase of the cited case appears to remain unshaken by *Barkis v. Scott*, supra, which limited the application of the *Glock* case in other respects, then the forfeiture of a deposit such as that herein is still sanctioned upon wilful default. It is also the rule of the Restatement of Contracts, sec. 357, comment e, that "one who sues for restitution of value that he has given in part performance, can recover none of it if his breach is wilful and deliberate * * *." It would seem that Martinelli

v. Hogrefe, 123 Cal.App. 438, 11 P.2d 412, on which the trial judge relied, and *Glock v. Howard & Wilson Colony Co.*, which it followed, warrant the interpretation that a *forfeiture* and not a *damage* theory is the basis of the retention of the deposit (See Williston on Contracts, Rev.Ed. Vol. 3, sec. 791). Under this theory, the forfeiture having taken place automatically on March 13, 1947, the \$2000 has since that time been the property of respondents Norris.

There would be merit in appellants' argument that the prior judgment of "no damages" in favor of defendants foreclosed respondents' right to bring this suit if it could be said that there is a damage theory behind the retention of such a deposit. While logic would seem to demand such a theory *Glock v. Howard & Wilson Colony Co.*, as interpreted in a long line of cases, appears to hold otherwise. It is true that *Barkis v. Scott*, 34 Cal.2d 116, pages 121-122, supra, 208 P.2d 367, suggests a damage theory in cases of retention of deposits (and even cites the *Glock* case as authority therefor) but that case is not one of wilful default. Another recent case, *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13, supra, seems to suggest that if a wilfully defaulting vendee can show that the payment deposited exceeded the damage to the vendor, he can recover the excess. In the *Baffa* case the vendee did not furnish proof of an excess of the deposit over the vendor's damage and there was no recovery. It is difficult to tell whether this case is following the old rule of no recovery to a wilfully defaulting vendee or is holding that there is no recovery because the vendee failed to prove unjust enrichment. We cannot be sure that this case has turned from the long established rule of this state toward the rule which is at present the minority rule in this country. (See Williston on Contracts, Rev.Ed., Vol. 3, sec. 791). We must therefore conclude that the old rule still obtains until expressly overruled, although in cases where a judgment has decreed there is no damage, it would certainly appear to be the enforcement of a penalty.

[11] Since appellants herein contracted to buy respondents' property for \$20,000

and the resale price was \$17,000, respondent sellers received less than the benefit of their bargain after recovery of the deposit, so in any event there was no unjust enrichment.

Judgment affirmed.



101 Cal.App.2d 242

KING v. WILSON et al.

Civ. 18134.

District Court of Appeal, Second District,
Division 1, California.

Dec. 20, 1950.

Rehearing Denied Jan. 11, 1951.

Hearing Denied Feb. 15, 1951.

Action by Gladys G. King against Griffin Walter Wilson, individually and as executor of the estate of George W. King, also known as Henry H. King, and others. The Superior Court of Los Angeles County entered a judgment for defendants and plaintiff appealed. Defendants filed a motion to dismiss appeal. The District Court of Appeal, White, P. J., held that the notice of appeal was not filed within the required 60 days from notice of entry of judgment.

Motion granted.

1. Appeal and error ⇨347(1)

The 30 day extended period for filing a notice of appeal does not begin to run until entry of an order of denial of a motion for a new trial in the formal minutes. Rules on Appeal, rules 2, 3 and subd. (a).

2. Appeal and error ⇨345(1)

A notice of intention to move for a new trial which is not filed within 10 days after receiving written notice of entry of judgment is not a valid notice so as to extend time for filing a notice of appeal. Rules on Appeal, rules 2, 3 and subd. (a).

3. Appeal and error ⇨347(1)

Where service of a notice of entry of judgment was made upon the switchboard operator in attorney's office, which operator to all intents and purposes was in charge

of offices maintained by attorney and other attorneys associated with him, under the statute providing for service upon an attorney, a valid service was made on the switchboard operator. Code Civ.Proc. § 1011, subd. 1.

4. Appeal and error ⇨345(1)

Where judgment was entered April 3, 1950, and notice of entry of judgment was filed April 10, bearing an acknowledgment of service as of April 10, but the notice of motion to move for a new trial was not filed until April 21, and the notice of appeal was not filed until June 19, 1950, appellant's notice of intention to move for a new trial was filed too late and therefore notice of appeal was not filed within required 60 days. Rules on Appeal, rules 2, 3 and subd. (a).

Jerrell Babb, Los Angeles, for appellant.

Walter G. Danielson, H. Spencer St. Clair, Los Angeles, for respondents.

WHITE, Presiding Justice.

Respondents moved to dismiss the within appeal on the ground that the notice of appeal was not filed within the time required by Rules 2 and 3 of Rules on Appeal. At the initial hearing of the motion appellant appeared in person and stated that she was without counsel, whereupon this court ordered the matter continued that appellant might be represented by counsel. Thereafter appellant's present counsel, Mr. Jerrell Babb, filed an answer to the notice of motion, as well as affidavits in opposition; counter-affidavits were filed, and the matter was argued and submitted.

The judgment was entered April 3, 1950. Notice of entry of judgment was filed April 10, bearing an acknowledgment of service as of April 10. Notice of intention to move for a new trial was filed on April 21 and denied on May 16. The notice of appeal was filed June 19, 1950. From a supplementary certificate of the clerk of the superior court it appears that although the court orally denied the motion for new trial on May 16, the order was "entered on the Minutes of said Superior Court on the 22 day of May, 1950."

[1,2] Rule 2 of Rules on Appeal provides that the notice of appeal shall be filed within 60 days from the date of entry of judgment unless the time is extended as provided in Rule 3. Subdivision (a) of Rule 3 provides that when a *valid* notice of intention to move for a new trial is served and filed within 60 days after entry of judgment, if the motion is denied the time for filing the notice of appeal is extended until 30 days after denial of the motion by order of court or by operation of law. It is settled that the 30-day extended period does not begin to run until entry of the order of denial in the formal minutes. *Jablon v. Henneberger*, 33 Cal.2d 773, 205 P.2d 1; *Grande v. Donovan*, 55 Cal.App.2d 694, 131 P.2d 855; *Berman v. Blankenship Motors*, 140 Cal.App. 134, 34 P.2d 1035. Appellant's notice of appeal was therefore filed within the prescribed thirty-day period. However, her time was not extended under Rule 3(a) unless her notice of intention to move for a new trial was "valid". Section 659 of the Code of Civil Procedure provides that the party intending to move for a new trial must, either before the entry of judgment or within ten days after receiving written notice of the entry of the judgment, file and serve his notice of intention, and that "The time above specified shall not be extended by order or stipulation." It must therefore be held that a notice of intention to move for a new trial which is not filed within the time specified in section 659 of the Code of Civil Procedure is not a "valid" notice as required by Rule 3(a) of Rules on Appeal. See *Whiting-Mead Commercial Co. v. Bayside Land Co.*, 178 Cal. 93, 172 P. 598; *Middle Fork Gold Mining Co. v. Green*, 79 Cal.App.2d 350, 351, 179 P.2d 363; *Estate of Nutt*, 180 Cal. 419, 181 P. 661; *Mellin v. Trousdell*, 33 Cal.2d 858, 205 P.2d 1036. If the notice of entry of judgment was served on April 10, as the record indicates, then appellant's notice of intention to move for a new trial was filed too late.

Appellant has attempted to show by affidavits that the notice of entry of judgment was not properly served on her then counsel on April 10, but must be deemed to have been served on April 11, in which case the

notice of intention to move for a new trial was filed in time. Appellant's former counsel in his affidavit stated that the notice of entry of judgment was handed to him on Tuesday, April 11, by "an employee handling the switchboard in the reception room of a law office in which affiant herein had his office"; that affiant had not authorized this employee or any person to accept service for him, and that the switchboard operator was not his secretary. The switchboard operator deposed that she was employed by a group of lawyers to handle the switchboard in the reception room; that appellant's then counsel occupied a private office in the suite; that on April 10 some one handed her a document called Notice of Entry of Judgment and told her to initial the same, which she did, and a copy of the notice was left with her; but that she did not see appellant's then counsel until the following day, when she handed him the document. In a counter-affidavit filed by respondents, the secretary of respondents' counsel averred that she delivered the notice to the switchboard operator on April 10 and saw her at that time hand the notice to appellant's then counsel.

Were the question to be decided that of whether appellant's counsel actually personally received the notice of entry of judgment on April 10 or April 11, a most vexing factual conflict would be presented; but the true question here is whether service was complete on April 10, and under the provisions of section 1011 of the Code of Civil Procedure, it must be held that it was. The section provides that the service may be as follows: "1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, *or with a person having charge thereof*; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; * * *."

[3] Under the circumstances here present, to hold that service of a notice of entry of judgment upon the switchboard operator who, to all intents and purposes, was in "charge" of the offices maintained

by appellant's former counsel and other attorneys associated with him, would do violence to the expressed legislative intent of the code section just quoted. Common sense and reason both dictate that a valid service was made in the instant case on April 10, pursuant to the above-quoted provision of section 1011 of the Code of Civil Procedure.

[4] The motion to dismiss the appeal herein is granted.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.



101 Cal.App.2d 416

Ex parte HAYES.

Application of PADWAY.

Cr. 2722.

District Court of Appeal, First District,
Division 2, California.

Dec. 26, 1950.

Proceeding in the matter of the application of I. B. Padway on behalf of Jess Freeman Hayes for a writ of habeas corpus. The District Court of Appeal, Dooling, J., held that amended complaint which charged applicant with wilful failure to provide for his children in Oklahoma, and which further charged that while not personally present in Oklahoma, he committed act complained of in the State of California, intentionally resulting in commission of the crime in Oklahoma, applicant could be extradited to Oklahoma.

Writ discharged.

1. Extradition 29

Where warrant from Governor of Oklahoma was based upon an amended complaint which charged applicant with wilful failure to provide for his children in Oklahoma, and that while not personally present in Oklahoma he committed the act complained of in California, intentionally resulting in commission of the crime in

Oklahoma, the requisition upon which Governor of California acted was sufficient, and applicant could be extradited to Oklahoma. Pen.Code, § 1549.1.

2. Extradition 29

One who commits an act in California which intentionally results in a crime in the demanding state may be extradited to the demanding state. Pen.Code, § 1549.1.

I. B. Padway, San Jose, for petitioner.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., N. J. Menard, Dist. Atty. of Santa Clara County, San Jose, for respondent.

DOOLING, Justice.

The writ of habeas corpus was issued in this case upon a verified petition which recited that Hayes was in custody by reason of a warrant issued by the Governor of this state in an extradition proceeding to answer a charge of abandonment and desertion of his minor children in the State of Oklahoma. The petition alleged that neither the demand nor warrant from the Governor of Oklahoma alleges that Hayes was present in Oklahoma at the time of the commission of the alleged crime, or thereafter fled the State of Oklahoma, "or that said Jess Freeman Hayes committed an act in the State of California or in any state intentionally resulting in a crime in the State of Oklahoma."

[1,2] These allegations brought the case within the rule announced in *In re Brewer*, 61 Cal.App.2d 388, 143 P.2d 33. However the return shows that our Governor acted upon a requisition from the Governor of Oklahoma based upon an amended complaint which charges Hayes with wilful failure to provide for his children in Oklahoma and charges further that "while not personally present in the State of Oklahoma (Hayes) committed the act complained of in the State of California, intentionally resulting in the commission of said crime in the State of Oklahoma." The quoted allegation of the amended complaint takes this case out of the field of the *Brewer* case cited above and places it in that of

In re Morgan, 86 Cal.App.2d 217, 194 P.2d 800. The Morgan case holds squarely that one who commits an act in California which intentionally results in a crime in the demanding state may be extradited to that state pursuant to Penal Code section 1549.1.

Writ discharged.

NOURSE, P. J., concurs.



101 Cal.App.2d 257

MILMOE et al. v. DIXON et al.

Civ. 17827.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Hearing Denied Feb. 15, 1951.

Joseph R. Milmo and another sued Compton C. Dixon and another to recover damages for defendants' alleged fraud in sale of an improved real property. The Superior Court, Los Angeles County, Philip H. Richards, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence did not establish that plaintiffs relied on their own inspection of premises or that of bank appraiser and that the defendants' concealment of structural defects and of construction without a building permit was actionable fraud.

Judgment affirmed.

1. Fraud ☞58(4)

In action against vendors for damages for fraud in sale of an improved real property, evidence did not establish that purchasers relied on their own inspection of premises before buying or inspection of bank appraiser.

2. Fraud ☞21

Where a party makes an inspection of property, he does not forfeit his right to rely on representation or concealment of vendor as to matters of a technical nature or as to facts not ascertainable by exercise of reasonable diligence in inspection.

3. Fraud ☞21

Where defects in premises purchased by purchasers were of technical nature and it was unlikely that ordinary diligence on part of purchasers would have revealed their presence inasmuch as most were apparently not visible to eye since they had been concealed by outer construction and were only revealed after alterations had been commenced, purchasers did not forfeit their right to rely on representation or concealment of vendors as to matters of technical nature or as to facts not ascertainable by exercise of reasonable diligence in inspection.

4. Fraud ☞17

Generally, a vendor not in a confidential relation to purchaser is not under a duty to make full disclosure concerning object which he would sell but if he undertakes to do so he is bound not only to tell truth, but is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated and if he speaks at all he must make a complete and fair disclosure.

5. Fraud ☞27

Purchasers were privileged to assume that vendors had complied with law in securing building permits, if any were required and in conforming with building code and fact that except for original three rooms, all construction was accomplished without permit materially qualified vendors' representation that they personally erected dwellings and that same were sound and well built, and concealment of the structural defects and of construction without a building permit constituted actionable fraud.

6. Fraud ☞62

Where evidence showed that purchasers paid \$21,000 for property and actual value of property was only about \$8,000, award of \$12,500 as damages to purchasers in suit based on vendors' actionable fraud was not unreasonable. Civ.Code, § 3343.

James B. Hudson, Los Angeles, and Rinehart, Merriam, Parker & Berg and Jay D. Rinehart, all of Pasadena, for appellants.

Kates & Tannen, San Fernando, for respondents.

MOORE, Presiding Justice.

Defendants appeal from an adverse judgment for the sum of \$12,500 as damages for fraud in their sale of an improved real property. They demand a reversal on the ground that the evidence does not support the findings.

In March, 1948, respondents purchased from appellants for \$21,000 five and a half acres of realty improved by two structures referred to herein as the main house and the guest house. Both dwellings had been erected by appellants. They commenced construction in 1938 pursuant to a building permit obtained for a structure 18 x 21 feet comprising only the dining room, bedroom and bath of the main house as it stood at the time of the sale. By 1943 appellants had built several additional rooms to this original unit without procuring a single building permit. Likewise, the guest house, at first constructed as a chicken coop without a permit, was improved by the addition of the other rooms and was in 1945 used by appellants as their residence. As a consequence of such puerile procedure, concealed structural defects inhered in both houses which substantially affected their fitness for human habitation and their salability on the open market. In many particulars the buildings did not comply with the applicable building codes. Such defects were not discovered until after respondents occupied the property when they undertook to make alterations they had planned for the main house. A city building inspector was then engaged to scrutinize the premises. As a result appellants were ordered to procure permits for both houses and conform them with the building code requirements or demolish them. Because of the exorbitant cost of making the necessary alterations to the main house it had to be destroyed and one entirely new was built upon the site thus cleared for a new building.

The foregoing facts were found by the trial court which also determined specifically that building code requirements had not been complied with in that foundations

and bolts were inadequate, wall studding was overspaced, corner studding insufficient, plaster had been applied on an unauthorized base, studding had been improperly spliced, angle braces were missing between studs and the mudsills had not been treated. It was also found that while the defendants had made no affirmative misrepresentations they had concealed the fact that no building permit had been obtained and that such concealment was for the purpose of inducing respondents to enter into the agreement of purchase and that respondents would not have made the purchase if they had known the facts so concealed.

[1] Appellants' first contention is that plaintiffs made their purchase after personal inspection; relied upon their own independent judgments and were not induced to enter into the transaction by any statements or concealment of facts by appellants. They argue that since the evidence shows respondents to have made a personal inspection of the buildings and to have had an architect and a bank appraiser examine and appraise the premises, respondents must be deemed, as a matter of law, to have discovered all material facts, citing, *Carpenter v. Hamilton*, 18 Cal.App. 2d 69, 72, 62 P.2d 1397; *Hackleman v. Lyman*, 50 Cal.App. 323, 328, 195 P. 263; *Cameron v. Cameron*, 88 Cal.App.2d 585, 594, 199 P.2d 443; *Gifford v. Roberts*, 81 Cal.App.2d 712, 718, 184 P.2d 942; *Nielson v. McKenna*, 8 Cal.2d 690, 694, 67 P. 2d 1044. However, the evidence does not support such contention. Mr. Milmoie and the architect both testified that the latter's inspection was after the transfer of the property had taken place. The inspection by the bank representative was a hurried, general examination of only 15 or 20 minutes duration. There was no evidence that the parties discussed the construction details of the house other than testimony that some conversation was had about the buildings' being of older construction, for which reason apparently loans for the purchase of the property were denied. This evidence falls far short of establishing as a matter of law that respondents relied on their own inspection or that of the bank

appraiser. On the contrary, Mr. Milmoé testified that he relied on Mr. Dixon's statements that he had erected the house himself and that it was strong and well built.

[2,3] The authorities cited by appellants do not support their contention in view of the fact that in each of them the buyer was charged with knowledge of the defects inasmuch as they were obvious and no technical knowledge was required in order for their presence to be revealed. The true rule pronounced by these very decisions is that where a party makes an inspection of property, he does not forfeit his right to rely upon the representations or concealment of the seller as to matters of a technical nature or as to facts not ascertainable by the exercise of reasonable diligence in the inspection. See also *Fay v. Mathewson*, 179 Cal. 318, 319, 180 P. 939; *Dow v. Swain*, 125 Cal. 674, 680, 58 P. 271. In the case at bar the defects as found by the trial court were of a technical nature and it is unlikely that ordinary diligence on the part of the respondents would have revealed their presence inasmuch as most were apparently not visible to the eye, since they had been concealed by outer construction and were only revealed after alterations had been commenced.

Was the concealment of the structural defects and of the construction without a building permit actionable fraud?

[4,5] It is a general rule that a vendor not in a confidential relation to the buyer is not under a duty to make full disclosure concerning the object which he would sell. However, it is a universally recognized exception that if he undertakes to do so he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. If he speaks at all he must make a complete and fair disclosure. *Rogers v. Warren*, 20 Cal.2d 286, 289, 125 P.2d 7; *Macco Construction Company v. Fichert*, 76 Cal.App.2d 295, 299, 172 P.2d 951; *Dyke v. Zaiser*, 80 Cal. App.2d 639, 652, 182 P.2d 344; *Boas v. Bank of America*, 51 Cal.App.2d 592, 597,

125 P.2d 620. Certainly respondents were privileged to assume that appellants had complied with the law in securing building permits, if any were required, and in conforming with the building codes. *Ehlers v. Bihn*, 71 Cal.App. 479, 487, 235 P. 673; *Bell Corporation v. Bell View Oil Syndicate*, 24 Cal.App.2d 587, 611-612, 76 P.2d 167. Consequently, the fact that, except for the original three rooms, all the construction was accomplished without permits materially qualifies the appellants' representations that they personally erected the dwellings and that the same were sound and well-built. The trial court correctly concluded that this was not a privileged concealment and the failure to disclose it constituted fraud.

There is apparently no authority touching upon the problem that is involved in the facts of this cause but in analogous situations recovery has been permitted. In *Rothstein v. Janss Investment Company*, 45 Cal.App.2d 64, 113 P.2d 465, and *Clauser v. Taylor*, 44 Cal.App.2d 453, 112 P.2d 661, the existence of filled ground not disclosed to the buyers has been held to be actual fraud. Also, in *Dyke v. Zaiser*, supra, it was held fraudulent where a vendor of a concession lease failed to disclose to the buyer that the police were about to close the concession because it was in violation of the law. In this latter decision it was said by the court [80 Cal.App.2d 639, 652, 182 P.2d 353] that "the present tendency * * * is to class concealment as actual fraud in those cases where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer."

In *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 86 P.2d 102, it was held fraudulent where a vendor of securities sold same without a permit required by the Corporate Securities Act. In its memorandum for decision the trial court pertinently and correctly observed, "if * * * the seller of a security impliedly represents that the law has been complied with and that a permit for such sale has been issued, does it not follow that if the builder-owner of a house sells such house he impliedly represents that the law has

been complied with and that the requisite building permits have been issued for the construction thereof? This court can see no logical difference."

[6] Finally, there is no error present in the amount of damages awarded. Under Civil Code, section 3343, the trial court properly awarded respondents "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received". The evidence shows that respondents paid \$21,000 for the property and the testimony adopted by the court established the actual value of the property to be only about \$8,000. It cannot be said that the award of \$12,500 as damages was unreasonable.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



101 Cal.App.2d 215

MATTSON v. HOLLYWOOD TURF CLUB.
Civ. 17651.

District Court of Appeal, Second District,
Division 3, California.

Dec. 19, 1950.

Hearing Denied Feb. 15, 1951.

Action by Herbert J. Mattson against the Hollywood Turf Club, a corporation, to recover on winning pari-mutuel show tickets on a horse race which were cashed by defendant after they were stolen from plaintiff. From a judgment of the Superior Court of Los Angeles County, Arthur Crum, J., for the defendant the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence established that defendant was not negligent in cashing the tickets and that plaintiff could not rely upon a theory of recovery which he did not allege nor prove below.

Judgment affirmed.

1. Gaming ⚡49(3)

In action by holder of winning pari-mutuel tickets on a horse race against turf

club for cashing tickets after they were stolen from plaintiff, evidence did not establish that plaintiff was negligent because he carried the tickets in an unnecessarily exposed position in his outside breast pocket of his coat when he was in a crowded public place among people whom he did not know.

2. Gaming ⚡49(3)

In action by holder of winning pari-mutuel tickets against turf club which cashed the tickets after they were stolen from plaintiff, evidence established that the tickets were cashed before defendant was notified of plaintiff's loss and that defendant was not negligent in cashing the tickets.

3. Gaming ⚡4

Under the "pari-mutuel system" of betting on horse races a licensed track sells tickets and acts as custodian of the funds which are accumulated in pools for win, place and show; the track takes a share of its partner, the State, and its own share, from the top and divides what is left in the several pools among the holders of winning tickets.

See publication Words and Phrases, for other judicial constructions and definitions of "Pari-Mutuel System".

4. Gaming ⚡28(1)

In action by holder of winning pari-mutuel tickets which were cashed by defendant turf club after they were stolen from plaintiff, the doctrine of "caveat emptor" did not apply so as to impose liability on the defendant since defendant was guilty of no breach of contract or any breach of duty in cashing the tickets to the holder thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Caveat Emptor".

5. Appeal and error ⚡172(2)

In action by holder of winning pari-mutuel tickets against defendant turf club which cashed them after they were stolen from plaintiff, where plaintiff did not allege nor attempt to prove negligence of defendant in failing to diligently police the track enclosure, he could not rely thereon upon appeal.

Guthrie, Darling & Shattuck, Los Angeles, for appellant.

Freston & Files, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff, an industrialist sojourning from Louisville, purchased thirty \$100 pari-mutuel show tickets on a horse running at Hollywood Park, a race course operated by defendant. The horse won, and shortly thereafter the tickets were stolen from plaintiff's pocket. Twenty of them were presented by the thief, or an accomplice, to a cashier, and were cashed; the remaining ten were not cashed. The track eventually paid plaintiff the winnings on the ten tickets that were not cashed upon satisfactory proof made to the California Horse Racing Board, pursuant to section 19598, Business and Professions Code, but refused to pay him for the twenty that had been cashed. Plaintiff sued for the value of these tickets amounting to \$4,700, and appeals from an adverse judgment.

The court made several findings adverse to plaintiff, namely: That the tickets were cashed before defendant was notified of the theft, that defendant was not guilty of negligence, and that plaintiff was guilty of contributory negligence. These findings are challenged as without support in the evidence.

The *modus operandi* of defendant upon the occasion in question was the following: The race was a photo finish between the first and second horses; within a minute after the horses passed the wire the picture of the finish was sent to the judges by the official photographer, showing that plaintiff's horse had won by a head, and the numbers of the winning horses were promptly posted on the board. While the picture was being prepared the horses were returning to the post and the jockeys were being weighed in. When this had been accomplished the race was declared official, and was so announced. The photo finish did not delay the computation of the pay-off for win, place and show, which was computed for both win and place for the first two horses, without waiting for announcement of the

winner. Messengers carried pay-off slips to the cashiers at five or six \$100 cashiers' windows and upon the flashing of a pay-off light the cashing of tickets began immediately. All this took place in a remarkably short space of time. The holder of the twenty tickets was standing at one of the cashier's windows when the pay-off slips arrived and his tickets were cashed at once. This individual was not identified except as an unnamed "motion picture extra." Plaintiff's activities after the race were the following: He took his show tickets, which were encircled with a rubber band, and twenty win tickets on the same horse from his left trousers pocket and placed them in an outside breast pocket of his coat. He had kept a hand upon his trousers pocket, in which he also had some \$20,000 in currency, and after the tickets were transferred he kept a hand upon his coat pocket. While thus guarding against the loss of his property he was accosted by a tout with whom he had a slight acquaintance and who had given him a tip on the winning horse. This character expected to be paid for the tip and insisted upon accompanying plaintiff to the cashier's window. Plaintiff did not relish this suggestion, but promised to "take care of" the tout. The latter, however, was persistent, and plaintiff left his pocket unguarded long enough to shove his annoyer away. Immediately thereafter he discovered that his show tickets were missing. He then went to the sellers' windows where he had purchased his tickets, and where he was known by name. He reported his loss, and a clerk reported it to defendant's Security Police. Plaintiff was then taken by one of the selling clerks to the information window where he made out a claim for the value of the thirty tickets. Security Police came upon the scene and took plaintiff to the office of their superintendent where he was shown a number of photographs. He identified one picture as that of the tout, and was told that this individual had a long criminal record. The police officers testified that plaintiff did not wish to have the tout prosecuted, since he believed his loss was covered by insurance. Plaintiff testified that the officers were dis-

inclined to arrest the tout for the reason they were using him as a "stool pigeon." This was denied by the officers. At any rate the tout was not arrested, although the officers contacted him and received from him a description of a man to watch for at the cashiers' windows. The evidence with relation to this incident was indefinite and incomplete. However, defendant's credulous police stationed themselves at the cashiers' windows waiting for the accomplice to walk into their trap. Needless to say, the latter, somewhat more astute, had not waited for all these activities to take place, and was not apprehended. Plaintiff testified that the selling clerks told him payment on the tickets would be stopped. The clerks denied this. Plaintiff also testified that, although he was not known by name to the cashiers, he went to one of their windows and notified a clerk of his loss. There was evidence to the contrary. The distance to be travelled between the particular sellers' windows and the window where the tickets were cashed was estimated by witnesses at about 240 yards, or a city block. There was no intercommunication between the sellers' and the cashiers' windows. The several cashiers were not notified of the theft. The police were merely hoping to arrest the person who had possession of the tickets. It is not the practice of defendant, when possession of a ticket has been reported as lost to stop payment upon all tickets of the same class.

[1] We shall discuss first the finding that the theft of plaintiff's tickets was due to his own negligence "in carrying them (tickets) in an unnecessarily exposed and insecure position in an outside breast pocket of his coat and he was in a crowded public place among people whom he did not know." This finding is clearly without support in the evidence. Plaintiff exercised great care to protect his property from loss. He knew the methods of touts, and that he was dealing with one, but he did not know the fellow had a criminal record. Defendant's police knew all about him and that it was unsafe to have him on the premises. We cannot see any reason for shifting part of the blame to plaintiff.

Surely the exercise of due care does not require patrons of defendant's track to carry their valuables in money belts, or otherwise conduct themselves as if all strangers were pickpockets. If, in view of the evidence, plaintiff was guilty of contributory negligence, it would mean that defendant may, with impunity, allow persons of immoral character to mingle with its other patrons.

[2] We conclude from the evidence related that it was sufficient to sustain the finding that the tickets were cashed before defendant was notified of plaintiff's loss. The same evidence supports the finding that defendant was not guilty of negligence. It was alleged that defendant was negligent in that defendant did not "require each person who presented to defendant a \$100.00 show ticket or tickets on horse No. 1 Race No. 4 held July 12, 1947, at Hollywood Park for payment to prove that he was the owner of such pari mutuel ticket or tickets before paying out on such tickets" etc. It was also alleged in the same cause of action that defendant had been notified of the theft of the tickets before any tickets were cashed. We do not understand plaintiff to claim that defendant was negligent if the tickets were cashed without notice that they had been stolen. The finding on that issue therefore disposes of this claim of negligence.

[3,4] Finally, plaintiff relies upon the doctrine of *caveat emptor*. He cites the case of *Crocker Nat. Bk. v. Byrne & McDonnell*, 178 Cal. 329, 173 P. 752, where the owner of non-negotiable bonds was allowed to recover their value from defendants to whom they had been pledged by a thief, and other cases to the same effect. He says that his pari-mutuel tickets were property, and that defendant could not acquire title thereto from a thief. This contention requires examination of the main features of the transaction in which the parties were engaged. The pari-mutuel system of betting on horse races was described in the evidence, it is quite generally understood in California, and our references to it will be of a general nature. Whether it is a game of skill, as some believe, or

of chance, as many have learned, it provides a legal method for getting rid of one's money. A licensed track sells tickets and acts as custodian of the funds, which are accumulated in pools for win, place and show; the track takes the share of its partner, the State, and its own share, from the top, and divides what is left in the several pools among the holders of winning tickets. The tickets in a given pool in a given race are identical as to form. A holder who has lost his ticket has no means of identifying it. Possession is his only evidence of ownership. It is also the only evidence upon which the track makes distribution. Therefore, as we have said, if a ticket should be reported as lost or stolen defendant has no practice of requiring each holder of a ticket of the same type to prove that he came by it honestly, before paying him the amount his ticket represents, although it may be inferred that defendant would withhold payment on a ticket in the hands of a known or suspected thief. Such are the terms offered to the betting public, and they constitute the essential features of the implied contract between the track and its bettors. One who gambles must do so in accordance with the rules of the game. Plaintiff, who was no novice at the tracks, was not unfamiliar with the system. Neither was he unaware of the fact that there are ways of losing money at race tracks without betting on the horses. He took good care of his money and tickets except for one fatal, and it would seem, unavoidable mistake.

[5] The rule with relation to stolen property does not apply to plaintiff's situation. Defendant did not purchase the tickets, nor acquire any interest in them. It already had plaintiff's money, and would gain nothing by cashing them. Its duties were only those which are to be implied from the relation of the parties, their purposes, and the circumstances and conditions under which the betting was carried on. We are unable to see that defendant was guilty of any breach of contract or any breach of duty, in cashing the tickets. It is clear, however, that defendant was under a duty not to allow upon its premise

persons of known immoral character, such as the unnamed tout. Defendant's agents displayed a strange indifference to his presence, as well as a willingness to expose its patrons to his criminal activities in order to have his assistance in apprehending others of his kind. Such practices carry a responsibility for losses such as the one suffered by plaintiff. However, plaintiff did not allege, nor did he attempt to prove negligence of defendant in failing to diligently police the track enclosure, and cannot now rely upon it.

The judgment is affirmed.

WOOD, J., concurs.

VALLÉE, J., being disqualified, did not participate.



101 Cal.App.2d 297

PEOPLE v. MEANS et al.

Cr. 2239.

District Court of Appeal, Third District,
California.

Dec. 20, 1950.

Elijah Means and Hurtha Winn were convicted in the Superior Court, Solano County, Harlow V. Greenwood, J., of burglary and robbery, and they appealed. The District Court of Appeal, Van Dyke, J., held that argument of the prosecuting attorney was within permissible limits.

Appeal of defendant Means dismissed, and judgment as to defendant Winn affirmed.

I. Criminal law ☞722(2), 1171(6)

In prosecution of each of two defendants on counts of burglary and robbery, remark to defendant's counsel by prosecuting attorney that counsel had a "dog" on the stand, which was made at time defendant was a witness, and which jury was told to disregard, although to be condemned, was not prejudicial.

2. Criminal law $\S$ 720(1)

In prosecution of each of two defendants on counts of burglary and robbery, where prosecuting attorney was commenting during closing argument on length of trial and suggesting that accused's counsel had caused trial to deal with side issues not substantially pertinent, remark urging jury to forget "all other rubbish" that went on in the trial was in effect a way of saying arguendo that such matters were inconsequential and should have been left out and was within bounds of permissible argument.

3. Burglary $\S$ 41(1)

Evidence supported conviction of burglary.

4. Robbery $\S$ 24(1)

Evidence supported conviction of robbery.

Henry W. Mahan, Benicia, P. B. Lynch, Dist. Atty. and Arthur F. Krause, Deputy Dist. Atty., Fairfield, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Elijah Means, and appellant Hurtha Winn were charged with the crimes of burglary and robbery alleged to have been committed in the City of Vallejo. Defendants entered pleas of not guilty as to each count and the case was tried before a jury, which returned verdicts of guilty as to each defendant on both counts. Probation was applied for by Means and was denied. He was then sentenced to imprisonment in the county jail for a term of one year. Appellant Winn, being 18 years of age, was committed to the Youth Authority of the State of California for the term prescribed by law. Both appealed, but the appeal of Means has, at his request, been dismissed.

No contention is made that the evidence was insufficient to support the verdicts of the jury. A brief statement of facts, substantially shown by the record, will be sufficient to dispose of the contentions made. These contentions are that the court erred

in denying appellant's motions, for mistrial, and for directed verdicts of acquittal. The motions for mistrial were based upon certain alleged inflammatory and derogatory statements made by the prosecuting attorney.

The record discloses that A. M. Martin, a man 72 years of age, operated a grocery store in Vallejo and that on January 5, 1950, the two defendants, together with a third man, entered the store during the early afternoon. They moved about the store and made some purchases. One of them gave Martin a bill to change, whereupon he went into his living quarters in the rear of the building for that purpose. His living room was separated from the store by a drawn curtain, and while he was in it the three men watched him through this curtain. After they had left, Martin discovered that money was missing from a certain billfold. On the next day the same three men again entered Martin's store and acted much as they had the day before, but one of the three went into the back rooms and Martin, becoming suspicious, followed and discovered the man to be ransacking bureau drawers. The two other men then followed and the three threatened to beat Martin and to kill him. They threw him on the bed and continued to search the room. They attempted to force him to disclose the location of his money. Failing in this they took a bag of small change. They pulled the telephone off the wall. They then took money from the cash register and left.

The first assignment of prejudicial misconduct of the prosecuting attorney was made when, during the course of the trial and while appellant Winn was on the witness stand under cross-examination concerning a conversation between him and a police officer, the following occurred:

"Q. Then prior to the 11th of January, 1950, had you ever talked to Lieutenant Booras? A. No. * * *

"Q. Then you did not know his voice, if you had not talked with him before? A. He talked it to me from Sutter Street—from Illinois and Sutter all the way to the Police Station. And I wouldn't recog-

nize his voice? If a man talked to you like that man talked to me, for crying out loud, a dog could remember!

"The Reporter: A what?

"Mr. Mahan [Counsel for Appellant]: A what? A. A dog. A dog. D-o-g.

"Mr. Mahan: A dog. That is a good word. I got one, a good one.

"Mr. Krause [Prosecuting Attorney]: You have got one on the stand, too.

"Mr. Mahan: What?

"Mr. Krause: You heard it.

"Mr. Mahan: I said, 'That is a good word, a dog; I have got one,' and the District Attorney said, 'And he is right on the witness stand, too.' And I assign that as the rankest, rottenest kind of prejudicial misconduct that stinks—

"Mr. Krause: (Interrupting) Yes—

"Mr. Mahan: (Interrupting) That is absolutely the most insulting thing that I have ever heard.

"Mr. Krause: It was Mr. Mahan's inference when he said—

"The Court: (Interrupting) Let's go on with the trial. * * *

"The Court: The Jury is admonished not to pay any attention to the row between counsel that is now going on.

"Mr. Mahan: May the jury be admonished not to be prejudiced because my client has been called a dog?

"Mr. Krause: Yes, and I would like to say, your Honor, my reply was to Mr. Mahan, in reply to his insinuation that Lieutenant Booras—

"The Court: (Interrupting) I don't care anything about a row between you fellows. * * * I wish you would get on with the trial."

[1] The statement by the prosecuting attorney that counsel for accused had a dog on the stand, although addressed to counsel, not the accused, in one of the innumerable asides that occurred throughout the trial, is of course to be condemned. There was no just occasion for the remark; and neither, for that matter, was there justification for defense counsel's unwarranted interruption which precipitated the altercation.

But the court correctly described the incident as a row between counsel and promptly told the jury to disregard it. We feel sure no prejudice was suffered by appellants.

[2] Prejudicial misconduct on the part of the prosecuting attorney is also alleged to have occurred during the closing argument. The prosecuting attorney was commenting on the length of the trial and suggesting this was the fault of counsel for the accused in that he had caused the trial to deal with various side issues not substantially pertinent to the main issues. He urged the jury to forget "all this other rubbish that went on in this trial. There is only one real issue, and that is the identity of these defendants." Counsel for accused then interrupted, "Is the rest of the case rubbish? My remark * * * is intended to be as an objection to the record * * *. I attribute it to the comment of the District Attorney which is in the record that Winn was a dog, and I do say that is rubbish."

Other assignments of misconduct need not be specifically noted. They also have to do with argument and we think the argument complained of was within the permissible limits. As to the incident specifically noted, the prosecuting attorney referred to some of the testimony as rubbish. That was his way of saying, *arguendo*, that it was inconsequential and should have been left out. A reading of the voluminous record places the description used within the bounds of permissible argument.

We hold the trial court conducted the trial fairly and was correct in denying the motions for mistrial.

[3,4] Counsel for appellant also complains that the court should have granted his motion for directed verdict; but he does not, and, we think could not, seriously urge that the motion was well founded. It is unnecessary to treat the matter further.

As noted above, the appeal of Means was, at his request, dismissed. The judgment as to Winn is affirmed.

ADAMS, P. J., and PEEK, J., concur.

101 Cal.App.2d 190

DIMON v. DIMON.

Civ. 14504.

District Court of Appeal, First District,
Division 2, California.

Dec. 18, 1950.

Support action by Sara Jane Talbot Dimon against Charles Grayson Dimon. The defendant filed a cross-action. The Superior Court in and for the City and County of San Francisco, I. L. Harris, J., rendered judgment for plaintiff and the defendant appealed. Plaintiff was granted \$250 for costs and \$750 for attorney fees on appeal. The plaintiff moved for a stay of the appellate proceedings until the defendant complied with the order. The District Court of Appeal, Nourse, P. J., held that where no valid alimony or support had been granted in foreign divorce decree and there was at least some doubt as to jurisdiction of trial court to make order appealed from at least so far as wife herself was concerned since there was no evidence the wife could not proceed without receiving payment by husband, motion would be denied.

Motion denied.

Divorce **331, 332**

Where divorced wife moved for a stay of appellate proceedings in support action until former husband complied with order of trial court to pay costs and attorneys' fees to wife but no valid alimony or support had been granted in wife's foreign divorce decree and there was at least some doubt as to jurisdiction of trial court to make order appealed from and litigation was more than five years old and it would benefit all parties to let it proceed to a final determination, motion would be denied. Civ.Code, § 157.

Johnson, Harmon & Henderson, San Francisco, for appellant.

Samuel L. Fendel, Gerald D. Marcus, San Francisco, for respondent.

NOURSE, Presiding Justice.

Respondent moves for a stay of appellate proceedings until appellant complies with

an order for costs and attorney's fees pending appeal.

The parties were married in 1926 and have two children, a son, born November 24, 1928, and a daughter, born January 20, 1933. On September 14, 1945, when the wife resided in Connecticut she instituted a divorce action there, the husband being served by registered mail in New York. On March 1, 1946, the Connecticut superior court granted a divorce by default on the ground of intolerable cruelty, awarded the wife the care and custody of the children and \$25 per week support for the children and \$15 a week alimony. No appeal was taken.

On August 4, 1947, the wife filed in the San Francisco superior court a complaint, later amended to read for maintenance and support of minor children and for support of former wife, on the ground that the husband had not paid any support and that the Connecticut decree though final as to the divorce was without force as a judgment in personam against defendant because no jurisdiction of his person was obtained. Pending the action the wife remarried on August 31, 1948. The trial court on November 25, 1949, gave judgment for \$1,950 support for the wife from the Connecticut decree till the remarriage at the rate of \$15 per week but not based on the Connecticut decree; \$1,850 for support of the children until the commencement of the action in San Francisco at the rate of \$25 per week, and \$37.50 per child per month for maintenance and support of the children from the commencement of the action during the minority of each child, and \$500 costs. The cross-action of the husband need not be set out here.

The husband appealed and has not made any payments. On motion of the wife the superior court on September 15, 1950, made an order granting her \$250 for costs and \$750 for attorney fees on appeal and ordered that the \$37.50 support money awarded for the daughter should be paid during the appeal or until her majority. It is the non-compliance with the latter order which is stated as the ground for the stay of the

appeal from the judgment of November 25, 1949. Meanwhile the husband has also appealed from this order of September 15, 1950.

Kopasz v. Kopasz, 34 Cal.2d 423, 210 P.2d 846, cited by respondent, is authority for the stay of an appeal against a respondent spouse unable to pay the amounts actually necessary to conduct a defense when the appellant spouse does not provide the means, irrespective of whether the appellant is able to provide them. However the affidavit of the attorney Fendel supporting the motion does not state that the wife is unable to pay her own costs and those of the minor but only "that said respondent and her counsel should not be required to proceed further with the expense of the pending appeal unless appellant complies with the order * * *." The situation in that respect is more like *Pugliese v. Pugliese*, 200 Cal. 652, 254 P. 266, where stay was denied on that ground. Here respondent testified at the trial that she had received \$32,775 from property of the spouses, of which part had been used for support and of which about \$12,000 was left at the time of the trial.

Appellant in his opposition to the motion relies mainly on the contention that the court had no power to grant costs and attorney's fees on appeal, because there was no marriage existing and because section 137 of the Civil Code gives authority to grant alimony pendente lite and attorney's fees only when there is a marriage. *Colbert v. Colbert*, 28 Cal.2d 276, 279, 169 P.2d 633, calls the existence of the marriage jurisdictional. See also *Reeves v. Reeves*, 34 Cal.2d 355, 361, 209 P.2d 937. Respondent cites *Parker v. Parker*, 22 Cal.App.2d 139, 70 P.2d 1003, where it was held that costs and fees would also be granted for measures necessary to enforce a deficiency in alimony granted in a divorce decree. However, here no valid alimony or support had been granted in the decree.

Without expressing any conclusion as to the merits of the two appeals it is sufficient to say that there is at least some doubt as to the jurisdiction of the court to make the order appealed from, at least so far as the

wife herself is concerned since there is no evidence that the wife cannot proceed without receiving payment by the husband.

Furthermore it is manifest that a stay would be a disservice to the moving party. Such a stay would suspend all proceedings. Pending the stay there could be no enforcement of either the judgment or the order. The transcripts and appellant's opening brief are on file. The cause can be heard on the merits when respondent files her brief. The litigation is more than five years old and it would benefit all parties to let it proceed to a final determination.

Motion denied.

DOOLING, J., concurs.



101 Cal.App.2d 200

PEOPLE v. ABBOTT.

Cr. 825.

District Court of Appeal, Fourth District,
California.

Dec. 18, 1950.

Lucille Laverne Abbott was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of manslaughter, and she appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained the conviction.

Judgment affirmed.

1. Criminal law ☞1144(13)

An appellate court must assume in favor of the verdict, the existence of every fact which jury could reasonably have deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

2. Criminal law ☞1159(1)

If circumstances reasonably justify verdict of guilty, opinion of reviewing court that those circumstances might also reasonably be reconciled with defendant's

innocence, will not warrant interference with jury's determination.

3. Automobiles ⇨356

In manslaughter prosecution based on death of three children in automobile collision on narrow two-lane highway, questions whether, under traffic conditions existing at time on a holiday, speed at which defendant was driving her automobile was unreasonable and dangerous, and whether her speed caused the accident, were for the jury. Vehicle Code, § 510.

4. Automobiles ⇨355(13)

In manslaughter prosecution based on death of three children in automobile collision, evidence supported finding that defendant motorist drove on left-hand side of highway without excuse or justification, and that her act caused the children's deaths. Vehicle Code, § 525(a).

5. Automobiles ⇨354

In manslaughter prosecution for death of three children in automobile collision, although defendant had been acquitted of charge of driving a vehicle on a public highway, while under the influence of intoxicating liquors, fact that defendant had been drinking was relevant evidence for jury to consider in determining whether she acted as a reasonably prudent person under the circumstances. Vehicle Code, § 501; Pen.Code, § 26, subd. 6; § 192, subd. 3(a, b).

6. Automobiles ⇨356

In manslaughter prosecution for death of three children in automobile collision, question whether the accident was unavoidable, was properly presented to jury. Vehicle Code, § 501; Pen.Code, § 26, subd. 6; § 192, subd. 3(a, b).

7. Criminal law ⇨1159(2, 4)

Credibility of witnesses and weight to be given their testimony were for determination of trier of fact.

8. Automobiles ⇨355(13)

Evidence sustained conviction for manslaughter based on deaths caused by gross negligence in operation of motor vehicle. Pen.Code, § 192, subd. 3(a, b).

Robert H. Haden, Richard E. Dafler, Visalia, for appellant.

Fred N. Howser, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the crime of violating sec. 192, subd. 3(a) of the Penal Code (manslaughter) in that she killed three children in driving a vehicle with gross negligence. In a second count she was charged with violating sec. 501 of the Vehicle Code in driving a vehicle on a public highway while under the influence of intoxicating liquor. A trial by jury resulted in a conviction on count number one except the jury found her guilty under subdivision 3(b), sec. 192 of the Penal Code, and found her not guilty on the second count.

On appeal defendant attacks the sufficiency of the evidence and contends that the evidence shows the accident giving rise to the death of the children was unavoidable, citing *People v. Wilson*, 78 Cal.App. 2d 108, 177 P.2d 567; *People v. Rodgers*, 94 Cal.App.2d 166, 210 P.2d 71; Penal Code secs. 26 (Six) and 192; and *People v. McLachlan*, 36 Cal.App.Supp.2d 754, 759, 93 P.2d 280.

Mr. Roman was driving in a Plymouth car with his six children in a westerly direction, in his northerly one-half of a two-lane highway numbered 198 on February 12, 1950, about 5 o'clock in the afternoon, at a rate of speed of about 45 miles per hour. His car had just been overtaken and passed by a large bus proceeding in the same direction. Soon thereafter defendant, who was driving a 1936 Ford V-8 coupe in an easterly direction on the same highway, careened across the highway into the northerly lane and her car collided with the Plymouth car and killed three of the children and injured all parties involved in the accident. All were removed to near-by hospitals. A blood sample was taken from the defendant for the purpose of determining its alcoholic content. A partially filled pint bottle of whiskey was found in

defendant's demolished car, and one partially filled can of beer was found near-by.

The bus driver and several of the passengers testified as to the operation of defendant's car and the manner of its approach, i. e., that they first noticed the Ford about 100 yards in front of them proceeding at a speed of at least 50 to 55 miles per hour toward them; that they had just completed overtaking and passing the Plymouth; that when the Ford was about 200 feet in front of them it was in the southerly dirt portion or shoulder of the highway and caused dust to fly; that it came out of the dirt onto the highway and started to skid or "slide from the back end"; and that it appeared to be out of the control of the driver. The driver of the bus pulled his car over toward the north shoulder of the highway. From the rear-view mirror the bus driver saw that defendant was going to miss the rear end of his bus, but saw defendant's car cross over into the west-bound traffic lane and collide with the Plymouth. One passenger on the bus said he saw defendant's car "kinda weaving a little bit to the left and right" as it approached the stage. Another passenger testified she saw it weaving across the white center line and back again as it approached. Still another related that he saw it weaving back and forth across the road, first on one side and then the other; that it then went into the dirt on the south shoulder, and had the bus driver not pulled to the right defendant's car would have hit the bus. The passenger of one other car proceeding easterly about that time testified that the defendant's Ford passed him "down the road a ways" just before the accident occurred proceeding approximately 50 to 55 miles per hour, but making a normal pass; and that the traffic was "fairly heavy". The prima facie speed limit on that highway was 55 miles per hour.

Mr. Roman testified his Plymouth was "extremely over to the right", approximately four feet north of the center white line; that he remembered being there so the bus might pass him; that the bus had returned to its proper lane after passing him and that he did not remember anything after the collision occurred.

The traffic officers found both cars crushed and at rest in the west-bound lane, entirely north of the center line. There was a "black stripe" on the highway, indicating the course taken by the Ford. It extended from the south shoulder of the highway along the south lane, curving across the white center line and about four feet into the north lane. Although the defendant was found unconscious on the north shoulder of the pavement, the officers detected the smell of intoxicating liquor on her breath as well as on the breath of the other woman who was an occupant of defendant's car.

That evening another officer talked to defendant at the hospital. She still had the odor of alcohol on her breath at that time. Analysis of defendant's blood taken three hours after the accident, revealed 1.5 milligrams of alcohol per cubic centimeter of blood. The doctor testified that ordinarily, in his opinion, the nervous system and faculties, such as judgment, coordination and perception, would be affected by that amount of alcohol; that at that percentage some people's ability to operate a vehicle is interfered with and others are not; that alcoholic deterioration by the body, under ordinary conditions, through the breath, kidneys and skin, is at a minimum rate of about 10 per cent per hour.

On February 13, defendant signed a written statement of her activities on the day of the accident. She related that she and her passenger friend knew a bartender near Tulare; that about 4 p. m. she drank a Tom Collins and her girl friend had a beer; that on the highway in question she was driving and passed two or three cars; that she caught up with another and that she asked her friend if she thought she could pass it and that they agreed she could; that as they were overtaking it she moved her left foot and accidentally slipped a small rubber mat over the throttle; that while she was reaching down on the floor-board to remove it the wreck happened. She stated "The mat was not heavy enough to hold the gas feed down, but I wanted it off", and that the cars she passed and the car she hit were the only cars she saw just

before the wreck; that the car she hit was "right on the white line".

Most of defendant's witnesses testified in relation to her claimed intoxication and that testimony bore mainly on count number two. At the trial is the first time defendant stated that she saw a bus or that one was approaching her on the highway about the time she was overtaking and passing the cars mentioned. She claimed her car was not weaving from one side to the other, and that she pulled over onto the south shoulder of the highway to prevent the bus from hitting her; that it was then she reached down to remove the rubber mat and that it was then she saw the Plymouth coming down the highway "on the other side behind the bus" and "I thought was pretty close to the center of the road"; that her car "seemed like it started sliding" and she "tried to get it back into control and couldn't"; that she saw she could not control the car so "I think I did like that", i. e., "raising my hand in front of my face". The party who was riding in defendant's car corroborated defendant's story in many respects.

On appeal defendant claims that the evidence was insufficient to show that she committed any unlawful act or any lawful act in an unlawful manner or that any act of defendant was the proximate cause of the accident, and that the evidence was insufficient to support the charge of manslaughter.

[1,2] An appellate court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict. If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. *People v. Newland*, 15 Cal.2d 678, 682, 104 P.2d 778.

[3] Although the basic speed limit was 55 miles per hour at the scene of the accident, this does not afford the driver the

right to drive at that speed under all conditions. Sec. 510 Vehicle Code. The jury might well have believed that on this narrow two-lane highway, under the traffic conditions existing at the time, on a holiday, the speed at which defendant was driving her car was unreasonable and dangerous and that such unreasonable speed caused the accident in which three children were killed.

Section 525(a) of the Vehicle Code (with certain exceptions explained to the jury) provides that upon all roadways of sufficient width a vehicle shall be driven on the right half of the roadway. In *People v. Tennis*, 85 Cal.App.2d 521, 193 P.2d 5, it was held that where one drives on the left-hand side of the highway contrary to the provisions of the Vehicle Code, without excuse or justification, and such act results in the death of a human being, the driver may be found guilty of manslaughter. See, also, *Green v. Uarte*, 87 Cal.App.2d 75, 78, 196 P.2d 63.

[4] In the instant case the evidence supports the finding that defendant drove on the left-hand side of the highway without excuse or justification, and that her act caused the death of three human beings.

[5] While the jury acquitted the defendant of the charge involved in the second count, the fact that she had been drinking was relevant evidence for the jury to consider in determining whether she acted as a reasonably prudent person under the circumstances. Even under defendant's own testimony, she had diverted her attention from steering the vehicle, and her attention was elsewhere, as shown in her explanation of her activity in attempting to remove the rubber mat from the foot-feed or throttle when she "glanced down at it and looked back to the road".

[6,7] The question whether the accident which gave rise to the death of these three children "was an unavoidable one" was properly presented to the jury and defendant's contention was there rejected. The credibility of the witnesses and the weight to be given their testimony were for the determination of the trier of the facts.

People v. Neal, 97 Cal.App.2d 668, 218 P.2d 556.

[8] The jury was justified in reaching the verdict as recorded.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



CAPITAIN v. L. A. WRECKING CO. et al.
Civ. 18131.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Rehearing Denied Jan. 5, 1951.

Hearing Granted Feb. 15, 1951.*

Action by John Captain against the L. A. Wrecking Company, and others to recover amount paid as purchase price of building destroyed by fire. The Superior Court of Los Angeles County, Ralph McGee, J., rendered judgment for the plaintiff and defendants appealed. The District Court of Appeal, Wilson, J., held that where plaintiff paid balance due on purchase price of house before it was moved to location specified by plaintiff and when house had been placed on plaintiff's lot it was in a deliverable condition, fact that defendants were required to repair roof in order to place house in a liveable condition did not remove building from plaintiff's possession and loss of building due to fire fell on plaintiff.

Judgment reversed.

See also 96 Cal.App.2d 465, 215 P.2d 532.

1. Sales ⇨197

In absence of an agreement to contrary risk of loss follows the title. Civ. Code, § 1742.

2. Sales ⇨201(1), 202(1)

Where an unconditional contract of sale has been entered into, title passes to buyer on execution of contract and risk of loss is his even though possession of property has not been delivered and payment

of purchase price is an indicium of a present sale and passage of title. Civ. Code, § 1742.

3. Sales ⇨391(1)

Where plaintiff purchased house belonging to defendants which was to be moved by defendants to a vacant lot owned by plaintiff and purchase price had been paid in full when house was moved but foundation for house which was to be constructed by plaintiff had not been constructed and house was destroyed by fire, plaintiff was not entitled to recover purchase price. Civ. Code, §§ 1738, 1739, rule 5.

4. Alteration of Instruments ⇨18

Where contract provision authorizing a finance company to pay defendants balance of purchase price of building when building was on foundation constructed by plaintiff purchaser was not in contract as executed by plaintiff and defendant but was written by hand by plaintiff in a copy which was delivered to finance company, defendants were not bound by clause. Civ. Code, §§ 1738, 1739, rule 5.

5. Sales ⇨166(1), 200(4), 391(1)

Where vendors were required to deliver house to purchaser's vacant lot and it was necessary to remove a portion of roof of house in order to permit it to pass under power wires while being moved, vendors were required to repair roof in order to place house in a deliverable condition but their work in so doing did not remove building from plaintiff's possession after delivery had been made in accordance with contract and fact that roof had not been restored at time house was destroyed by fire did not entitle plaintiff to recover amount of purchase price.

6. Sales ⇨200(4)

The fact that something is to be done to goods after delivery will not prevent title to property from passing. Civ. Code, §§ 1738, 1739, rule 5.

Bloom & Bloom, Hollywood, Eleanor Jackson, Culver City, for appellants.

Barry Sullivan, Los Angeles, for respondent.

* Subsequent opinion 233 P.2d 544.

WILSON, Justice.

Plaintiff and defendants entered into an agreement in writing whereby plaintiff purchased a house belonging to defendants which was to be moved by the latter to a point to be designated by plaintiff on a vacant lot which he owned. The purchase price was paid in full and the house was moved to the point specified by plaintiff. It was a part of the agreement that plaintiff was to pay the cost of moving in addition to the price of the building. When the house reached the appointed location defendants left it on blocks awaiting the foundation which plaintiff was to provide. The building was completely destroyed by fire and this action was brought to recover the amount paid. The court entered judgment in favor of plaintiff from which defendants have appealed. There is also a purported appeal from the nonappealable order denying defendants' motion for a new trial.

[1] Since in the absence of an agreement to the contrary the risk of loss follows the title, Civ.Code, sec. 1742; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 P. 432, 25 L.R.A., N.S., 609, the sole question for determination is in whom title was vested at the time the house was destroyed.

[2] It is elementary that when an unconditional contract of sale has been entered into title passes to the buyer upon the execution of the contract and the risk of loss is his even though possession of the property has not been delivered. *J. S. Potts Drug Co. v. Benedict*, supra. Payment of the purchase price is an indicium of a present sale and the passage of title. *Aiello v. Sliskovich*, 72 Cal.App.2d 39, 43, 163 P.2d 768; *Gianelli v. Globe Grain & Milling Co.*, 48 Cal.App. 103, 106, 107, 191 P. 720. In the instant case plaintiff agreed to pay \$3,500 as the full price of the building plus \$87.50 sales tax. He made a deposit of \$500 on the purchase price at the time the contract was executed and agreed to pay the balance of \$3,087.50 to defendants when the application to move the building had been approved by the City or County of Los Angeles. The agreement also contained the following language: "This sale

subject to the approval of buyer to the additional cost of moving building to its new location. The Buyer agrees that if the total price of this building does not exceed \$6,500 delivered he will accept the entire contract." Plaintiff paid the balance due on the purchase price of the house before it was moved.

[3, 4] Plaintiff maintains that the agreement is an executory contract to sell; the balance remaining unpaid on the contract was not due and payable until the building was on the foundation and that therefore title had not passed at the time the house was destroyed by fire. Plaintiff's contention is untenable even if the contract be construed as an executory contract. Plaintiff himself testified that it was his obligation to construct the foundation and it had not been constructed. Moreover, the clause in the contract to which plaintiff refers, authorizing a finance company to pay defendants the balance due when the building was on the foundation, was not in the contract as executed by plaintiff and defendants but was written by hand by plaintiff in a copy which was delivered to the finance company. Defendants are therefore not bound by the clause.

"Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." Civil Code, sec. 1738. No different intention appearing from the record, under Rule 5 of section 1739 of the Civil Code the title passed to plaintiff when the house reached the place agreed upon.

[5, 6] It was necessary to remove a portion of the roof of the house in order to permit it to pass under power wires while being moved. The roof had not been restored at the time of the fire. Plaintiff contends that since defendants were in the process of repairing the roof the building was still in their possession and had not been delivered to him. When the house had been placed on plaintiff's lot it was in a deliverable condition and was delivered. Defendants were required to repair the roof in order to place the house in a liveable condition but their work in so doing did not

remove the building from plaintiff's possession after delivery had been made in accordance with the contract. The fact that something is to be done to the goods after delivery will not prevent the title to the property from passing. *Dentzel v. Island Park Ass'n*, 229 Pa. 403, 78 A. 935, 33 L.R.A., N.S., 54.

Judgment reversed. Purported appeal from order denying new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.



101 Cal.App.2d 509

PEOPLE v. ANDRADE.

Cr. 4525.

District Court of Appeal, Second District,
Division 3, California.

Dec. 28, 1950.

Frank Andrade was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., of robbery, and he appealed. The District Court of Appeal, Shinn, P. J., held that the receiving in evidence, over defendant's objection, the testimony of prosecuting witness given at preliminary hearing was error, in absence of a sufficient showing that prosecuting witness could not, with due diligence, have been found within state.

Reversed.

1. Criminal law $\S$ 543(2)

In robbery prosecution, receiving in evidence, over defendant's objection, testimony of prosecuting witness given at preliminary hearing was error, in absence of sufficient showing that prosecuting witness could not, with due diligence, have been found within the state. Pen.Code, $\S$ 686, subd. 3.

2. Criminal law $\S$ 662(1)

The right of defendant to be confronted by witnesses against him should be protected against practices which would

deprive accused of right of confrontation in cases where witness against him had merely moved from one location to another in same city, and could be located by exertion of diligent effort. Pen.Code, $\S$ 686, subd. 3.

Patrick D. McGee, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Frank Andrade and Pomposo Terrazas were charged by information with the crime of robbery, consisting of forcibly taking from Francisco G. Ruiz \$35.00. Terrazas was charged with the commission of two former felonies, which he admitted. Andrade, in his testimony, admitted two former convictions, but was not accused of them by the information. At the preliminary hearing Ruiz testified that the defendants forcibly robbed him of \$40.00. Terrazas made a confession to a police officer. Upon the trial he admitted having made the confession but claimed that he did so under the fear of personal violence, although none was threatened. Neither defendant was represented by counsel at the preliminary hearing and neither cross-examined Ruiz except for a single question propounded by Terrazas as to whether Ruiz on the night in question was drunk. Both defendants were convicted in a trial to the court, in which they denied having committed the offense; motions for a new trial and for probation were denied, and the defendants were sentenced to state prison. Andrade appeals.

[1,2] The question on the appeal is whether the court committed error in receiving in evidence, over the objection of the defendants, the testimony of Ruiz given at the preliminary hearing. The ground of the objection was that there was an insufficient showing that Ruiz could not, with due diligence, be found within the State. Penal Code, sec. 686(3). It was a good objection and should have been sustained.

Ruiz had given his address as 137 South Arizona in Los Angeles; he testified at the

preliminary that he was employed in the construction of sewer pipes for one "Jerry," whose last name he did not know. Defendant Terrazas had known Ruiz for about six months, and they were friends. The night of January 31, 1950, the two defendants and Ruiz were drinking at a wine shop. Ruiz, who was not drinking with the other two, became ill. He lived close by and was not a stranger in the neighborhood. The preliminary hearing was held February 10, 1950. Defendants were arraigned February 27th. They pleaded not guilty on March 3rd. The case was set for trial April 6th and was tried on April 10th. The evidence as to the commission of the offense consisted of the former testimony of Ruiz and that of a police officer who testified to a confession by Terrazas and to interviews with Andrade in which the latter denied participation in the crime. The evidence with respect to the alleged inability of the People to find Ruiz consisted of the testimony of a process server named Virgil Potts. He testified that he received a subpoena for Ruiz on March 10th; he went to 137 South Arizona and with the aid of Mrs. Castro, a next door neighbor, who interpreted for him, talked with Manuel Villa, the landlord at No. 137. Villa stated that Ruiz had left that address "and had expressed the intention of going to Bakersfield, both to live and work there, and that if successful in obtaining employment and quarters in which to live, he would write to Mr. Villa to have Mr. Villa send his personal possessions which he had left at 137 South Arizona." Villa said Ruiz was a ranch worker and intended to look for ranch employment. This inquiry was made on March 20th. Mrs. Castro said that if Villa heard from Ruiz she would advise Potts and that several letters had been received by Villa addressed to Ruiz "presumably sent by Ruiz' sister in Tucson, Arizona." Potts did not communicate with Villa again. He telephoned Mrs. Castro

several times and she told him she had received no word of Ruiz. On March 24th a foreign subpoena for Ruiz was issued to Kern County and was returned shortly thereafter by the sheriff of that county with a notation that he had been unable to locate Ruiz. No further foundation was laid for the introduction of Ruiz' testimony. The inadequacy of the showing is manifest. No effort was made to learn who were the friends of Ruiz in the neighborhood where he lived or his drinking associates, or to ascertain whether he had relatives in Los Angeles; no effort was made to learn the name of his employer or to ascertain whether he had quit his job; no inquiry was made at union hiring halls or at employment agencies, either in Los Angeles or at Bakersfield; no inquiry was made of his sister in Tucson as to whether she had heard from him; no inquiry was made of Manuel Villa as to whether Ruiz had sent for his belongings, or whether he, Villa, had received any word from Ruiz which he had not imparted to Mrs. Castro. It was thus shown that the search for Ruiz was merely perfunctory and casual. Even less effort was put forth than that related in *People v. Kuranoff*, 100 Cal.App.2d 673, 224 P.2d 402, in which we held there was no showing of due diligence. The reasons for our holding in the Kuranoff case support our conclusion in the present case and need not be repeated. The right of a defendant to be confronted by the witnesses against him is valuable and fundamental. It should be protected against practices which would deprive an accused of the right of confrontation in cases where a witness against him had merely moved from one location to another in the same city, and could be located by the exertion of diligent effort.

The judgment and order denying a new trial are reversed.

WOOD and VALLÉE, JJ., concur.

101 Cal.App.2d 179

RANDALL et al. v. BEBER et al.

No. 14537.

District Court of Appeal, First District,
Division 1, California.

Dec. 18, 1950.

Action by Harry Randall and Edward Randall against Edward Beber and others, some of whom were named fictitiously. The Superior Court of the State of California in and for the City and County of San Francisco, Frank T. Deasy, J., entered a judgment in favor of certain defendants, and the plaintiffs appealed. A motion to dismiss the appeal was filed by the fictitiously named defendants. The District Court of Appeal, Bray, J., held that an order denying motion to amend complaint to substitute the true names for the fictitious names of the defendants was not appealable and could be reviewed only on appeal from final judgment.

Motion to dismiss denied.

1. Appeal and error ⇨103

An appeal does not lie from an order denying leave to file an amended complaint. Code Civ.Proc. § 963, subs. 1, 2.

2. Appeal and error ⇨103, 870(5)

An order denying motion to amend complaint to substitute true names in place of fictitious names of defendants was not appealable and could be reviewed only on appeal from final judgment. Code Civ. Proc. § 963, subs. 1, 2.

Jaffa & Sumski, San Francisco, for appellant-respondent.

Marcel E. Cerf, Robinson & Leland, San Francisco, for Richard Kobritz, Earl B. Johnson and Allied Produce Co.

BRAY, Justice.

Motion of Richard Kobritz, sued and served as First Doe, Earl B. Johnson, sued and served as Second Doe, and Allied Produce Company, sued and served as Red & Green Company, a partnership,¹ to dismiss appeal by plaintiffs from a judgment

in favor of defendants Edward Beber, A. Schapiro, Harold F. Churchill Company, a limited partnership, and Harold F. Churchill.²

Question Presented.

Is the order denying a motion to amend the complaint to substitute true names in place of fictitious named defendants appealable or is the court's action reviewable only on appeal from the final judgment in the case?

Record.

At the beginning of a three day trial, certain defendants moved for a dismissal of the action against the fictitious defendants. At plaintiffs' request, action on this motion was reserved by the court. It never was passed on. On two occasions during the trial, plaintiffs stated that it appeared from the testimony that the proposed defendants had participated in the subject matter of the litigation and were liable with the defendants to plaintiffs; that thereupon plaintiffs had them served with summons (except Johnson, who was served shortly thereafter), and requested continuances of the trial to enable them to answer. These were denied. Approximately a month after submission of the cause for decision, plaintiffs moved to amend the complaint to substitute the true names of the proposed defendants in the place of the fictitious named defendants. The motion was based upon an affidavit of one of the plaintiffs to the effect that until the trial, he was unaware of the connection of the proposed defendants with the transaction or their business relationship to the defendants, and that the testimony at the trial showed the proposed defendants to be liable. Apparently this motion was taken under submission. Approximately a year later the court made an "order denying motion to amend." The order stated that from the evidence adduced at the hearing, including that adduced at the trial, the court in denying the motion found that plaintiffs, prior to the trial, were aware of the proposed defend-

1. For convenience, these parties will be referred to as "proposed defendants."

2. These defendants will be referred to as "defendants."

ants' participation in the transaction involved and had not exercised due or any diligence in joining them as parties defendant; that such joinder now would result in hardships and unfairness to the original defendants. Shortly thereafter, findings of fact and conclusions of law in favor of defendants and a judgment for defendants were filed. No mention of the proposed defendants is made in either. A motion by plaintiffs for a new trial was denied. Plaintiffs appealed from the judgment, including the proposed defendants in their notice of appeal. After plaintiffs' opening brief was filed, in which plaintiffs attacked the action of the court in refusing the requested continuances and in denying the motion to amend, the proposed defendants moved this court to dismiss plaintiffs' appeal as to them. The motion is made upon two grounds: (1) That the appeal was not taken within 60 days after the order was made. In other words, it is claimed that the order is appealable. (2) That the proposed defendants are not parties to the judgment.

Is the Order Appealable?

Plaintiffs contend that the order is not appealable, and can be reviewed only on an appeal from the final judgment. The order is not one of those specifically provided for in section 963, subdivision 2, Code of Civil Procedure. The proposed defendants contend that as to the relationship between plaintiffs and them, the order constitutes a final judgment and hence appealable under section 963, subdivision 1, which allows an appeal from a final judgment.

[1] It is well settled that an appeal does not lie from an order denying leave to file an amended complaint. *Cornic v. Stewart*, 179 Cal. 242, 176 P. 164; *Harper v. Hildreth*, 99 Cal. 265, 33 P. 1103; *Hurley v. Lake County*, 133 Cal.App. 219, 23 P.2d 838; *Kline v. Beauchamp*, 29 Cal.App.2d 340, 84 P.2d 194. In the *Kline* case the circumstances were somewhat analogous to those in our case. Suit was brought against Dr. Beauchamp and Dr. Simms. Dr. Kelley was served with summons. He appeared specially and moved to quash service of summons on the ground that he

had never used, or was known by, any other name than Kelley. At the time his motion was heard the court also heard a motion by plaintiff to amend the complaint to allege that the true name of Simms was Kelley and that Kelley was sometimes known as Simms. The court made an order granting the motion to quash and an order denying the motion to amend. Plaintiff appealed from both orders. The reviewing court first affirmed the order granting the motion to quash and then held that "An appeal does not lie from an order of the trial court denying permission to amend a complaint." 29 Cal.App.2d at page 342, 84 P.2d at page 195.

It is true that, as claimed by plaintiffs, the order denying them the right to amend their complaint and thereby bring in new parties, is a final denial by the trial court of their request, and results in a rather peculiar situation, namely, that a plaintiff, before he can test on appeal the trial court's action, must proceed to trial and judgment as to all parties actually in the case. If on appeal from that judgment it is determined that the trial court improperly denied his motion, he then must have a second trial, either with or without the defendants as to whom he obtained judgment, depending on the action of the reviewing court as to them. If this situation needs correcting it can be done only by the Legislature, which has specifically provided the instances in which an appeal lies, and has either declined or neglected to include an order of this kind. In *Camp v. Oakland Mortgage & Finance Co.*, 205 Cal. 380, 270 P. 685, it was held that an order substituting parties defendant under section 386 of the Code of Civil Procedure is not appealable for the reason that it is not included in the orders made appealable under subdivision 2 of section 963 of the Code of Civil Procedure, nor is it a final judgment under subdivision 1. While an order substituting parties is not the same as an order denying an amendment to bring in new parties, the reasoning in the *Camp* case applies with equal logic to appeals from both orders.

At first blush, *Walsh v. Superior Court*, 92 Cal.App. 454, 268 P. 442, seems to support defendants' contention that the order

here is appealable, as it apparently holds that an order refusing to allow plaintiff to substitute the executrix as defendant in place of her deceased husband is directly appealable. However, an examination of the case shows that both the trial and the appellate court treated the motion as a demurrer to the complaint, and that thereby "the sole question presented to the trial court was whether the plaintiff's cause of action, if any, survived the death of Derrick. But whether the proper practice or otherwise, that question was before the court only by treating the contention of the executrix as in effect a demurrer. The contention was sustained, and the motion to substitute was denied. It follows that the ruling thereon was in effect an order sustaining a demurrer." 92 Cal.App. at page 455, 268 P. at page 442. The court held that the motion being equivalent to a general demurrer, the order denying it was therefore equivalent to an order sustaining a demurrer. Neither *Cole v. Roebeling Construction Co.*, 156 Cal. 443, 105 P. 255, holding that in proper cases a judgment may be given against one defendant and in favor of another, *Rocca v. Steinmetz*, 189 Cal. 426, 208 P. 964, holding that a judgment against one defendant, leaving the action to proceed against the other defendant, is appealable, or *W. H. Marston Co. v. Kochritz*, 80 Cal.App. 352, 251 P. 959, holding directly appealable an order quashing service of summons and dismissing the action as to one of several defendants, have any application to the facts of our case. Nor does *Baxter v. Boege*, 173 Cal. 589, 160 P. 1072, apply. There the appeal was from a judgment entered in favor of certain defendants after their demurrers to the complaint were sustained and plaintiff declined to amend. Obviously the judgment was a final one.

[2] Cases like *Braun v. Brown*, 13 Cal. 2d 130, 87 P.2d 1009; *Dollenmayer v. Pryor*, 150 Cal. 1, 87 P. 616, and *Ryan v. McKinley*, 124 Cal.App. 765, 13 P.2d 522, hold that an unsuccessful intervenor may appeal directly from the order denying his motion to intervene, as the order is a final judgment as to him. That fact differentiates the situation from that in the case at bar.

The order denying amendment is, as to the plaintiffs, not a final judgment. The final judgment is to follow. The same is true of *Young v. Superior Court*, 16 Cal.2d 211, 105 P.2d 363, allowing an appeal from an order setting aside an order of substitution, and in *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39, where the appeal was from an order striking a cross-complaint. In both cases the particular order was held to be a final judgment as to the party appealing.

The motion to dismiss is denied.

PETERS, P. J., and WOOD, J., concur.



101 Cal.App.2d 163

**HOWELL v. DUCOMMON METALS
& SUPPLY CO. et al.**

Civ. 17570.

District Court of Appeal, Second District,
Division 1, California.

Dec. 14, 1950.

Rehearing Denied Jan. 3, 1951.

Hearing Denied Feb. 8, 1951.

Action by Wilbur Howell against Ducommon Metals & Supply Co. and another to recover for injuries sustained by truckdriver when steel plates being loaded on truck from named defendant's warehouse by means of overhead crane operated by named defendant's employee fell on driver. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment in favor of named defendant notwithstanding verdict against it and a judgment on verdict in favor of co-defendant crane operator and plaintiff appealed. The District Court of Appeal, Doran, J., held that verdict finding that plaintiff was not a special employee of named defendant and holding named defendant liable for injuries under *res ipsa loquitur* doctrine, while relieving crane operator from liability, was supported by substantial evidence.

Judgment notwithstanding verdict as to named defendant reversed with directions to enter judgment on verdict in favor of plain-

tiff and judgment in favor of codefendant affirmed.

1. Judgment ☞199(3.10)

Trial court may grant a judgment for defendant notwithstanding verdict in favor of plaintiff, only where, giving to plaintiff's evidence all the value to which it is regularly entitled and indulging in every legitimate inference which may be drawn from the evidence, there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.

2. Judgment ☞199(3.2, 3.3)

In passing on a motion for judgment notwithstanding verdict, trial court does not attempt to weigh the evidence but must view it in the most favorable light in support of the verdict.

3. Trial ☞134

The function of a jury is to resolve conflicts in the evidence, determine the credibility of witnesses and arrive at a decision which will set the matter at rest.

4. Judgment ☞199(3.7)

Where the verdict finds support in the evidence, trial judge may not grant judgment notwithstanding the verdict merely because he is unable to follow the reasoning of the jury.

5. Judgment ☞199(1)

The purpose of a motion for judgment notwithstanding the verdict is to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation and not to afford a review of the jury's deliberation.

6. Appeal and error ☞1001(1)

In action for injuries sustained by truckdriver when heavy steel plates being loaded on truck from defendant's warehouse by means of overhead crane operated by defendant's employee fell on driver, verdict finding that truckdriver was not a special employee of defendant and holding defendant liable for injuries under *res ipsa loquitur* doctrine, while relieving crane operator from liability, was supported by substantial evidence. Labor Code, § 3201 et seq.

Spray, Gould & Bowers, C. W. Bowers, all of Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, John Henry Peckham, Jr., all of Los Angeles, for respondents.

DORAN, Justice.

The present appeal is from a judgment in favor of defendant Ducommon entered by the trial court notwithstanding a verdict of \$8,000.00 against said defendant, for personal injuries sustained by plaintiff. Plaintiff also appeals from a judgment entered on a verdict in favor of defendant Haskins who was an overhead crane operator for Ducommon.

Plaintiff was the driver of a truck owned by the Williams Transfer Co. and at the time of the accident had placed the truck in Bay 3 at the Ducommon loading dock. Heavy steel plates were being transferred from the Ducommon warehouse to the truck, and while so loading by means of the overhead crane operated by Haskins two pieces of steel weighing about 1,900 pounds fell upon the plaintiff.

The answer filed by the Ducommon company and defendant Haskins, denied any negligence, pleaded contributory negligence and unavoidable accident.

Respondents contend that appellant Howell although in the general employ of the Williams Transfer Company, was nevertheless in the "special" employ of Ducommon and in its control and direction; that therefore appellant's only remedy was under the Workmen's Compensation Act, Labor Code, § 3201 et seq. In respect to this issue the record discloses substantial evidence to the effect that appellant was hired and paid by Williams, required to punch a time clock at the Williams plant, assigned to do trucking for the Ducommon company; that like other truck drivers, Howell was instructed "to do whatever is requested by Ducommon for them to do". The truck was owned and maintained by Williams who was engaged in a general trucking business. Loading of the trucks was a matter of cooperation between employees of Ducommon and Williams' truck drivers;

Ducommon's employees would direct the placing of the trucks and the loading operations. Williams maintained a dispatcher at the Ducommon plant whose duty it was to dispatch the trucks wherever Ducommon wanted materials hauled; this dispatcher had charge of all Williams drivers hauling materials out of the Ducommon plant.

Just previous to the accident Ducommon's loading foreman had directed appellant to move the Williams truck into Bay 3 underneath a particular crane, which was done. A Ducommon employee then placed two circular pieces of steel 103 inches in diameter within a so-called safety plate grip attached to the crane, which grip is said to hold the metal firmly so long as tension remains on the chain. The crane operator then moved the steel to the proper position above the truck. Howell, standing on the truck, put his hands on the steel to guide it in the customary manner. The crane operator then inquired "if he (Howell) was ready to let it down and he nodded his head (meaning yes)". Then, again quoting from the operator's testimony, "things went flooey. I don't know what happened. Then is when it fell". According to the operator, an edge of the steel was on the truck or was "resting on something" when it fell on appellant; the operator did not actually see this but knew it by a "feeling on the hoist lever". The grip or "grab" appeared to come loose before the steel was laid flat on the truck. The operator did not know what caused the fall and testified that nothing like this had happened before.

Appellant's testimony is fairly consistent with that of the crane operator as to what happened, and no more explanatory as to why it happened. As the material came down appellant kept "motioning" the operator back, then (appellant presumed) the steel hit the bottom of the truck and "That is when the accident happened". Howell did not anticipate there was going to be an accident and there was not sufficient opportunity to move out of the way. Appellant had nothing to do with the choice of apparatus used and did not tell Haskins how to operate the crane. Ducommon's

superintendent, Chester Cooper, testified that no other accident of this kind had occurred except one which was caused by grease being on the steel, a condition not shown by any evidence in the present case.

Appellant's case was predicated on the *res ipsa loquitur* doctrine, it being claimed that such doctrine was applicable since (1) the accident was of a kind which does not ordinarily occur; (2) that it was caused by an instrumentality under respondents' exclusive control; and (3) it was not due to any voluntary contribution on appellant's part. The trial court instructed the jury on this issue.

It is respondents' contention that there was no evidence to support the verdict in favor of appellant; that there was no evidence of negligence on respondent's part, and that appellant was a special employee of Ducommon. It is therefore urged that the action of the trial court in overriding the verdict for appellant and granting a judgment notwithstanding the verdict, was proper.

As bearing on the contention that there was no evidence of negligence respondents call attention to the fact that this type of grip had been in use by Ducommon since 1926, that the apparatus was in nowise defective, that apparently the steel was properly gripped and the crane properly operated; that the cause of the action is unexplained, and that the *res ipsa loquitur* doctrine is inapplicable.

[1] In respect to the propriety of granting a judgment *non obstante veredicto* after the jury had returned a verdict for appellant, "Respondents agree that * * * the judgment could only have been granted when, giving to plaintiff's (appellant's) evidence all the value to which it is regularly entitled and indulging in every legitimate inference which may be drawn from the evidence, the result is that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff". The rule is the same as that which applies to the granting of a nonsuit.

[2] As stated in *Valentin v. La Societe Francaise De Bienfaisance Mutuelle De*

Los Angeles, 76 Cal.App.2d 1, 4, 172 P.2d 359, 361, "If at the time the case was submitted to the jury there was any substantial evidence in the record to prove that defendant was negligent * * * the court erroneously granted the motion". And, in passing on such motions the court does not attempt to weigh the evidence but must view it in the most favorable light in support of the verdict. See *Blake v. Hearst Publications*, 75 Cal.App.2d 6, 8, 170 P.2d 100.

In the instant case it appears that at the close of the evidence motions for directed verdict in favor of respondents were made and denied by the trial court. Thereafter the issues were submitted to the jury under appropriate instructions and a verdict returned against the Ducommon company, but in favor of defendant Haskins, the crane operator. The trial court then granted a motion for judgment notwithstanding the verdict, and in so doing, stated: "I can't follow the reasoning of the jury in holding Ducommon liable and the crane operator not liable". The trial court further took the position that "Mr. Howell was a special employee of Ducommon, and that he is not entitled to relief as against Ducommon for that reason. * * * I am willing to stand by my decision as to Ducommon and let the District Court of Appeal worry about it".

Under the circumstances as disclosed by the record and the well established principles governing judgments notwithstanding the verdict, the trial court's action in overturning the verdict and granting such a judgment must be deemed erroneous. By so doing the trial court in effect proceeded to weigh the evidence, determine its credibility, and substitute a decision of the court for that of the jury.

[3,4] The parties to the litigation had seen fit to demand a jury trial rather than leaving the matter to the decision of a trial judge. The right to a jury trial will become meaningless if a verdict, supported by substantial evidence, is to be set aside because the judge entertains an opinion con-

trary to that arrived at by the jury. The function of a jury is to resolve conflicts in the evidence, determine the credibility of witnesses, and arrive at a decision which will set the matter at rest. In the instant case it was unnecessary that the trial judge should be able to follow the reasoning of the jury so long as the verdict finds support in the evidence.

[5,6] The purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation. That the present record reveals substantial evidence and legitimate inferences from the evidence in support of the verdict, can hardly be denied. The doctrine of *res ipsa loquitur*, that of *respondeat superior*, and other applicable rules of law were before the jury, and were evidently applied to the facts with the result mentioned. The appellant is entitled to the benefit of the jury's decision.

The judgment notwithstanding the verdict as to Ducommon Metals and Supply Company is reversed with directions to enter judgment in favor of appellant on the verdict rendered. The judgment in favor of defendant Haskins is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur.

We are not here confronted with a situation wherein the court was ruling on a motion for a new trial. In passing upon a motion for a new trial the trial judge, as it were, becomes a thirteenth juror, and may weigh the evidence and pass upon the credibility of witnesses. But, as pointed out in the foregoing opinion, no such power is reposed in the court when passing upon a motion for judgment notwithstanding the verdict.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

101 Cal.App.2d 282

LARSON et al. v. BARNETT et al.

Civ. 7807.

District Court of Appeal, Third District,
California.

Dec. 20, 1950.

Action by June Patricia Larson and husband against Earl Barnett, Jr., and others, to recover damages for personal injuries and property damage sustained in automobile collision. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment against named defendant and another, and they appealed. The District Court of Appeal, Van Dyke, J., held that where transferee, pursuant to agreement to sell to son automobile acquired in trade, delivered to son automobile and certificate of ownership endorsed by former legal owner and registered owner without endorsing transferee's name and address on certificate and without delivering or mailing to Motor Vehicle Department either a notice of transfer or appropriate documents for registration of vehicle pursuant to transfer, transferee was liable under statute as owner to the extent of \$5,000 for personal injuries and \$1,000 for property damage resulting from negligent operation of automobile by son.

Judgment affirmed with directions.

1. Automobiles ⚡19

Where transferee, pursuant to agreement to sell to his son automobile acquired in a trade, delivered to son automobile and certificate of ownership endorsed by former legal owner and registered owner without endorsing transferee's name and address on certificate and without delivering or mailing to Motor Vehicle Department either a notice of the transfer or appropriate documents for registration of the vehicle pursuant to transfer, transferee was liable under statute as owner to the extent of \$5,000 for personal injuries and \$1,000 for property damage resulting from negligent operation of automobile by son before son had applied for issuance of a new certificate of ownership to him. Vehicle Code, §§ 175, 178, 186, 402.

2. Automobiles ⚡19

Transferee immediately upon completion of transfer of title to automobile to

him is required by statute to write his signature and address upon the reverse side of certificate of ownership issued for such vehicle in order that the purpose of all statutory provisions concerning the transfer of title to motor vehicles may be subserved. Vehicle Code, § 175.

3. Automobiles ⚡19

That ownership certificate shall at all times show the ownership of the vehicle described therein is the clear purpose and intent of statutory provisions concerning transfer of title to motor vehicles. Vehicle Code, §§ 175, 178, 186.

4. Parties ⚡73

Where parties damaged by negligent operation of automobile shortly after its transfer were unable to ascertain the new owner or owners because ownership of automobile had not yet been transferred through Motor Vehicle Department, they were entitled under statute to sue such new owner or owners by fictitious names and new owner was properly treated as having been sued under a fictitious name and as having been a party from the beginning of action, though plaintiffs at all times knew his true name but did not know that he was the new owner of automobile. Vehicle Code, §§ 178, 402; Code Civ.Proc. § 474.

5. Limitation of actions ⚡122

Where owner of automobile was properly treated as having been sued as fictitiously named defendant and as having been a party defendant from the beginning of action for damages to third persons resulting from negligent operation of automobile, action as against such defendant was not barred by lapse of more than one year between the filing of complaint and the service of process on him as a fictitiously named defendant. Vehicle Code, § 402; Code Civ.Proc. § 474.

6. Parties ⚡73

Statute providing for suing under fictitious names parties whose true names are unknown is an enabling statute and should be so construed as to cure the evil it was designed to correct and advance the remedy. Code Civ.Proc. § 474.

7. Parties $\S$ 95(4)

Complaint designating defendants by fictitious names should be amended upon discovery of true names of such defendants by inserting true name of defendant in place of fictitious name in order to support a judgment against such defendant. Code Civ.Proc. $\S$ 474.

8. Appeal and error $\S$ 1178(8)

Where permission to amend complaint by inserting true name of defendant in place of fictitious name by which he was designated in complaint was sought and granted, but such amendment was not actually made, such defect could be supplied on appeal by direction to trial court to amend complaint or cause it to be amended as of a date prior to judgment by inserting in complaint wherever appropriate the true name of defendant in place of fictitious name. Code Civ.Proc. $\S$ 474.

9. Judgment $\S$ 241

Judgment for personal injuries against named driver of automobile in the sum of \$9,335 and against named owner in the sum of \$5,000 was sufficient to show judgment against driver for the full sum of damages awarded and liability of owner as to \$5,000 of such sum jointly with driver and was not objectionable as subjecting driver to liability for \$5,000 in addition to judgment for \$9,335.

Stephen P. Galvin and Stephen P. Galvin, Jr., Merced, for appellant.

C. Ray Robinson, Willard B. Treadwell and Margaret A. Flynn, all of Merced, for respondent.

VAN DYKE, Justice.

Respondent June Patricia Larson brought this action against appellant, Earl Barnett, Jr., and a named corporation defendant, George Johnson, a named defendant, and three fictitiously named defendants. The corporation and George Johnson were dismissed from the action. The complaint alleged that respondent had been injured through the negligent operation of an automobile by Earl Barnett, Jr. Respondent Dean Larson, husband of June, in a second

cause of action sought recovery upon the same grounds for the reasonable cost of repairing the automobile in which she was riding, which vehicle belonged to him. Appellant Earl Barnett, Jr. answered for himself alone, admitting that he was driving the other car involved in the accident, denying the allegations of negligence and affirmatively alleging that he was the sole owner of that car. Service of process was made on the corporation defendant by serving Earl Barnett, Sr., father of Earl Barnett, Jr., as vice president of the corporation. The deposition of Barnett, Sr. was taken and thereupon the action was dismissed as to the corporation and as to the named defendant George Johnson. The relief against both had been demanded pursuant to appropriate allegations that they, with the fictitiously named defendants, owned the car Barnett, Jr. was driving and that he was driving it with the owner's permission. The deposition had developed to the satisfaction of respondents that the corporation and George Johnson had no interest in the Barnett car. Trial was begun before the court and after several witnesses had been called and examined respondents asked that the trial be continued until process could be served on Barnett, Sr. This request was granted and such service was made, the return thereof reciting that service was made upon him as Doe One, a fictitiously named defendant. When the cause again came on for trial counsel for Barnett, Sr. moved to quash service of summons and to dismiss the action as to him on the ground that he was not a party to the action. It was contended that he could not be considered as having been sued as a fictitiously named defendant because his true name had been at all times known to respondents and that the attempt to serve him as a fictitiously named defendant was sham and subterfuge. The motion was denied and the cause proceeded to trial upon the answers of Barnett, Jr. and Barnett, Sr., the answer of the latter denying ownership in him of any interest in the car Barnett, Jr. had been driving and denying the allegations of negligence and damage for want of information and belief. He also pleaded the statute of limitations

since more than a year had elapsed between the filing of the complaint and the service of process upon him as Doe One. After the close of the evidence the court made findings of fact. It found to be true the allegations of the complaint that Barnett, Sr. was sued as Doe One, his true name and capacity being unknown to plaintiff at the filing of the complaint; that at all pertinent times he was the owner of the car that Barnett, Jr. was driving; that Barnett, Jr. was driving it with permission of Barnett, Sr.; that Barnett, Jr. drove the car negligently and that as a proximate result thereof respondents suffered damage; that respondent June Patricia Larson suffered general damages in the sum of \$5,000 and special damages in the sum of \$4,335; that the automobile of respondent Dean Larson was damaged in the sum of \$470; that Dean Larson was not guilty of contributory negligence in the operation of his car. The court further found that respondents at the time of filing the complaint knew the true name of Earl Barnett, Sr., but did not know that he was the owner of the car Barnett, Jr. was driving. The court concluded that judgment should be rendered in favor of June Patricia Larson in the sum of \$9,335 against Barnett, Jr., in the sum of \$5,000 against Barnett, Sr., and that Dean Larson was entitled to judgment against both in the sum of \$470. Both Earl Barnett, Jr. and Earl Barnett, Sr. have appealed.

In support of their appeal they contend that the evidence does not support the finding and decision that Barnett, Sr. was the owner of the car Barnett, Jr. was driving; that the court had no jurisdiction of the person of Barnett, Sr. and that the judgment against him is erroneous and the motion to dismiss should have been granted; that the decision and conclusions of law are erroneous and prejudicial as to the damages assessed against the appellant Barnett, Jr.

We shall discuss first the contention that the evidence does not support the findings and the judgment based thereon that Barnett, Sr. was the owner of the car. The pertinent facts may be stated as follows:

The car driven by Barnett, Jr. was a Chrysler. Barnett, Sr. and Barnett, Jr. between them testified as follows: Just prior to the accident the Chrysler had been owned by a Mrs. Parlavechio and she traded it to Barnett, Sr. for a pick-up car owned by him. On the day of the accident Barnett, Sr. and Mrs. Parlavechio met at the bank which held a lien upon the Chrysler car and there both she and the bank, as legal owner and registered owner, endorsed the pink slip and turned it over to Barnett, Sr. He turned the pick-up over to Mrs. Parlavechio and she drove it away. Barnett, Sr. took possession of the Chrysler and placed it in a car lot. Barnett, Jr. came to the lot and took possession of the Chrysler, pursuant to previous agreement with his father that Barnett, Sr. would sell the car to him. The pink slip was turned over to Barnett, Jr. Later that evening when Barnett, Jr. was driving the car on his way home from the car lot the collision with the Larson car occurred. Although Barnett, Sr. turned the pink slip over to Barnett, Jr., he did not endorse it or sign his name thereon in any capacity. But he did receive part payment for the car from his son. Sometime after the accident Barnett, Jr. endorsed the pink slip and sent it in to the Motor Vehicle Department, which in time issued an ownership certificate to him, showing him to be the owner of the Chrysler. Appellants contend that by virtue of the transactions related, Barnett, Sr. effectively transferred the Chrysler car to his son so that he was not at the time of the accident the owner thereof. On the contrary, respondents contend that under the provisions of the Vehicle Code the transactions recited did not, as against respondents, divest him of ownership so as to free him from owner's liability. The pertinent provisions of the Vehicle Code are the following: Section 186 provides that no transfer of the title or any interest in or to a vehicle registered thereunder shall pass and any attempted transfer shall be ineffective unless and until the parties to the transfer shall have fulfilled either of the following requirements: 1. The transferor shall have made proper en-

dorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee and the transferee has delivered to the department or placed in the mail addressed to the department such certificate and card with the proper transfer fee and application for a transfer of registration; 2. The transferor shall have delivered to the department or shall have placed in the mail addressed to it the appropriate documents for registration or transfer of registration of the vehicle pursuant to such sale or transfer. It is provided that the section is subject to the provisions of Section 178. Section 178 provides that:

"An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:

"(1) When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

"(2) When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in Section 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer."

[1] Appellants contend that the requirements of Section 178 were met in this, that there was a bona fide sale and transfer, that the purchaser, Barnett, Jr. had received the car from Barnett, Sr. and that Barnett, Sr. had made proper endorsement and delivery of the certificates of ownership and of registration. On the other hand, respondents contend that these requirements had not been met in that Barnett, Sr. had not in any manner endorsed the certificate of ownership before its delivery to his son. We think this contention of respondents must be sustained.

It was held by the Supreme Court in *Henry v. General Forming, Ltd.*, 33 Cal. 2d 223, 227, 200 P.2d 785, that the requirements for registration of title and ownership as indicated by the code provisions were enacted in the interest of public welfare, to protect innocent purchasers, and to afford identification of vehicles and persons responsible in cases of accident and injury. And in the earlier case of *Bunch v. Kin*, 2 Cal.App.2d 81, 84, 37 P.2d 744, it was held that these registration provisions derived their importance from the nature of motor vehicle traffic which requires that there be readily ascertained indicia of ownership for the protection of the general public in case of accident or violation of the law. Construing these same code sections, the court in *Smith v. Western Casualty & Surety Co.*, 60 Cal.App.2d 508, 511-512, 141 P.2d 10, declared that the effect of Sections 178 and 186, construed together, was that upon sale and delivery of an automobile, together with delivery of the endorsed certificate, the title passed to the transferee so as to make such transferee the owner and to divest the transferor of his ownership so far as civil liability under Section 402 of the Vehicle Code for the operation of such vehicle thereafter by another be concerned. The court further held that upon such delivery the transferee became the owner of the vehicle for the purpose of fixing such liability. See *Ferroni v. Pacific Finance Corp.*, 21 Cal.2d 773, 778, 135 P.2d 569. It results from the facts recited, and indeed is not disputed by appellants, that the transactions between Barnett, Sr. and Mrs. Parlavechio were efficient when completed to make Barnett, Sr. the owner of the car and subject to the liability declared by Section 402, which liability continued through the time of the accident, unless by the recited transaction between himself and his son which followed he effectually shifted that liability to his son. Since he did not deliver or mail to the Motor Vehicle Department either a notice of the transfer or appropriate documents for registration of the car pursuant to the transfer he could only rid himself of ownership liability by making "proper endorsement and delivery of the certificate of ownership" to his

transferee, Barnett, Jr. This he did not do. It is true that Barnett, Jr., armed with possession of the vehicle and the ownership certificate, might have applied for issuance of a new certificate to himself and might have secured the same, for the certificate as it would have been presented by him would not have indicated to the department that the transfer from Mrs. Parlavechio to Barnett, Sr. had occurred. It would have shown the endorsements of Mrs. Parlavechio as legal owner and of the bank as registered owner and with the endorsement of Barnett, Jr. as transferee would have indicated to the department that a transfer had taken place between Mrs. Parlavechio and the bank on the one hand and Barnett, Jr. on the other. But the purpose of the code provisions as they have been construed would have been defeated by such a course of conduct on the part of the two Barnetts. By an express provision of the Vehicle Code, Barnett, Sr. was charged, on becoming the transferee of the former owner, with a duty which he did not perform. Section 175 of the Code declares: "Upon transfer of the title or any interest of the legal owner or owner in or to a vehicle registered hereunder, the person whose title or interest is to be transferred shall write his signature, *and the transferee shall write his signature and address*, in the appropriate spaces provided upon the reverse side of the certificate of ownership issued for such vehicle." (Italics added.)

[2,3] Immediately upon the completion of the transfer of title to him, Barnett, Sr. was by law required to endorse the certificate in the manner indicated to the end that the purpose of all the code provisions concerning transfer of title to motor vehicles be subserved. It is the clear purpose and intent of these provisions that the ownership certificate shall at all times show the ownership of the vehicle described therein. And when Barnett, Sr. delivered the car and the pink slip, as he did, he could only deliver it "properly endorsed" by having written thereon his own name and his address. This he did not do and therefore when the accident happened he was liable under Section 402 of the Ve-

hicle Code for damage suffered by respondent June Patricia Larson up to \$5,000 and for damage suffered by respondent Dean Larson up to \$1,000. The liability declared against him by the findings and judgment of the court was within these limits.

[4-6] Appellants next contend that the court erred in treating Barnett, Sr. as having been sued under the fictitious name of Doe One. The argument runs that respondents at all times knew his true name and from the record this must be conceded. What the record shows respondents did not know was that Barnett, Sr. was the owner of the car involved at the time of the accident. The affidavit of Mr. Treadwell, one of the attorneys for respondents, presented to the court, in opposition to appellants' motion to dismiss as against Barnett, Sr., sets forth that when the action was begun the ownership of the automobile had not been transferred through the Motor Vehicle Department; that the parties were informed that Barnett, Jr. was an employee of the Potter-Barnett Corporation, a one-time defendant, which operated an automobile agency and used car lot; that the parties were informed that the automobile involved had been sold on the day of the accident by Mrs. Parlavechio and that from these facts it was assumed that the corporation had purchased the car; that nevertheless the complaint was drafted so as to protect the respondents and to that end fictitiously named defendants, among others being Doe One, were made parties as owner, along with the corporation defendant; that it was only after depositions were taken that respondents discovered the true status of Barnett, Sr. and he was thereupon served as Doe One. The complaint concerning the group of defendants, other than Barnett, Jr., and including the corporation, George Johnson and Doe One, alleged that they were owners of the automobile and sought to fasten upon them in that capacity the ownership liability, it being alleged they had permitted the use of the car by Barnett, Jr. With respect to Doe One the usual allegations were made pursuant to Section 474 of the Code of Civil Procedure that the plaintiffs were ignorant of the

name of that defendant. It is clear enough that respondents, when they filed their action knowing that the car had recently been transferred by Mrs. Parlavechio and unable to ascertain the new owner or owners for want of registration identifying him or them did not know the true name of such owner or owners. Believing that such owner or owners, however, existed, they had a right under the code to sue such party or parties by fictitious names and the court, we hold, was fully justified in denying the motion to dismiss as to Barnett, Sr.; in treating him as having been a party from the beginning of the action; and in denying his defense based upon the statute of limitations, which defense, of course, would fail once it was justifiably found that he had been such party from the beginning. The construction of the code section contended for by appellants, that respondents could not sue the owner or owners under fictitious names because when the complaint was filed respondents happened to know the name of Barnett, Sr., though they did not know that he was also the party they were seeking to hold as such owner, would be so narrow a construction as in large measure to defeat the beneficent purpose of the statute. In *Irving v. Carpentier*, 70 Cal. 23, 26, 11 P. 391, 392, the court had this to say concerning the code section:

"The statute above referred to is an enabling one, and should be so construed as to cure the evil it was designed to correct, and advance the remedy. Persons are sometimes compelled to bring suits in haste. They have not time to ascertain the true names of parties to be made defendants. The statute of limitations may, in a day from the time the preparation of the complaint is commenced, effect a bar. Sometimes there is no means readily accessible of ascertaining the true names. The statute above referred to was enacted to afford a remedy in such cases. Should a plaintiff lose his right to have his case tried because of ignorance of the names of parties whom he has a right to sue, and as to whom he may have a good cause of action? How is the party sued by a name not his own injured? He loses no right by allowing a plaintiff to proceed as provided by the stat-

ute. He has every opportunity accorded to any other defendant to make his defense. He can demur or file his answer, and set up every defense which he is advised he can rely on.

"The counsel for respondent herein likens this case to that of a party allowed to bring an action for relief on the ground of fraud, in which case the cause of action is not deemed to have accrued until the discovery by the party aggrieved of the facts constituting the fraud. In construing this rule it has always been held that a party discovers the fraud when, by the use of reasonable diligence, he might have ascertained the facts constituting the fraud. But the rule prescribed by the statute in this case is entirely different. It is when he is actually ignorant of a certain fact, not when he might, by the use of reasonable diligence, have discovered it. Whether his ignorance is from misfortune or negligence, he is alike ignorant, and this is all the statute requires. This is the true meaning of the statute. We adopt it the more readily because the party thus brought in as a defendant loses no rights by it."

These declarations of the Supreme Court are applicable here. The trial court was correct in treating Barnett, Sr. as having been sued under the fictitious name of Doe One.

[7,8] It appears from the record that although permission was sought and granted that the complaint be amended to substitute the name of Earl Barnett, Sr. by inserting it therein in the place of Doe One, this was not done and appellants contend without this having been done the judgment is void as to Barnett, Sr. While undoubtedly such an amendment should have been made, the defect can still be supplied under the authority of *Alameda County v. Crocker*, 125 Cal. 101, 106, 57 P. 766, by directions to the trial court to amend the complaint or cause the same to be amended as of a date prior to the judgment by the insertion therein wherever appropriate of the name of Earl Barnett, Sr. in the place of the name Doe One. In the cited case the same situation existed upon the record there as on the record here and the same

point was made. The Supreme Court said that while it was essential that there should be a valid judgment against all defendants whose lands were sought to be condemned, and that the judgment, without amending the complaint, could not be supported, *Bachman v. Cathry*, 113 Cal. 498, 45 P. 814, that nevertheless the course pointed out in *Baldwin v. Bornheimer*, 48 Cal. 433, should be followed and that there was no necessity or reason for subjecting the parties to a new trial on account of the failure to amend the complaint.

[9] Complaint is made by appellants as to the form of the judgment entered in favor of June Patricia Larson. That form was as follows: "That the Plaintiff June Patricia Larson shall be entitled to Judgment against the defendant Earl Barnett, Jr. in the sum of \$9335.00 and against the Defendant Earl Barnett, Sr. in the sum of \$5,000.00". Appellants contend that the result flowing from the form used is that Earl Barnett, Jr. has been subjected to a judgment for \$9,335, the total damages suffered by June Patricia Larson and an added sum of \$5,000, because, as is asserted by appellants, if Barnett, Sr. pays the amount awarded against him he can recover the same sum from Barnett, Jr., who nevertheless would remain liable in the sum adjudged against him. We think the judgment is not capable of that construction and that it is apparent from the judgment roll that the result intended by the court has been clearly stated, that is, judgment against Barnett, Jr. for the full sum of damages awarded and a liability of Barnett, Sr. as to \$5,000 of that total sum jointly with Barnett, Jr.

However, it is not necessary to labor the point. Respondents have indicated here their consent that the judgment be clarified. They say: "If appellants are apprehensive that the judgment might be construed as permitting respondent [June Patricia Larson] to recover \$14,335.00, respondent is willing to have the judgment modified in any appropriate manner to indicate that the total amount of damages recoverable by respondent against both appellants is \$9,335.00, for which appellant

Barnett, Sr. is liable only in the amount of \$5,000.00." See *King v. Unger*, 35 Cal.App. 2d 192, 198, 94 P.2d 1040, where this procedure was adopted. We shall follow it here.

The judgment appealed from is affirmed with the following directions to the trial court: 1. That the judgment in favor of June Patricia Larson be amended as of July 25, 1949, to provide that she recover of defendant Earl Barnett, Jr. the sum of \$9,335 and that of said sum defendants Earl Barnett, Jr. and Earl Barnett, Sr. are jointly and severally liable in the sum of \$5,000; 2. That the trial court amend the complaint or cause the same to be amended as of a date prior to the date of judgment herein by the insertion therein, wherever appropriate, of the name of "Earl Barnett, Sr." in the place of the name "Doe One".

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 221

In re DE MOULIN'S ESTATE.

DE MOULIN v. RICHARDS et al.

Civ. 17881.

District Court of Appeal, Second District,
Division 3, California.

Dec. 19, 1950.

Rehearing Denied Jan. 3, 1951.

Hearing Denied Feb. 15, 1951.

Proceeding in the matter of the estate of Horace Louis De Moulin, also known as Horace L. De Moulin, deceased, wherein Mary E. De Moulin, petitioner, filed a petition for distribution, and wherein Constance De Moulin Richards and Horace Edmond De Moulin, Jr., were contestants. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered an order settling final account and an order for distribution, and the contestants appealed. The District Court of Appeal, Wood, J., held that deceased had died intestate as to residue of his estate and that testimony of scrivener who took down will in longhand and who typed it, that she had in-

advertently omitted from typed will, direction of testator that residue should go to his wife, was inadmissible.

Order settling final account affirmed, and order for distribution reversed with directions.

1. Wills ⚡487(3)

Exception to rule that in construing will oral declarations of testator are not admissible, is that oral declarations of testator consisting of instructions to scrivener, regarding testator's intention, are admissible to explain an imperfect description or ambiguity appearing in will. Probate Code, § 105.

2. Wills ⚡866

Where will of testator who left son, daughter, and wife surviving him, bequeathed \$100 to son and \$100 to daughter, and made reference to residue of testator's estate but failed to mention beneficiary of residue, testator died intestate as to residue and it was to be distributed according to the laws of succession, one-third to son, one-third to daughter, and one-third to wife, and testimony of scrivener that when will was dictated to her by testator and she wrote it down in longhand, testator directed that residue should go to wife, and that when she typed out will she inadvertently omitted reference to the wife, was not admissible. Probate Code, § 105.

Forrest D. Macomber, Santa Monica, for appellants.

Robert M. L. Baker, John W. Hurtt, Los Angeles, for respondent.

WOOD, Justice.

Appeal from an order settling final account and for distribution, wherein it was ordered, among other things, that the residue of the estate be distributed to Mary E. De Moulin, the surviving spouse of the testator. The appellants, who are the daughter and son of the testator by a former marriage, contend that the testator did not dispose of the residue by his will, and that it should have been distributed under the laws of succession—one-third each to the daughter, son, and surviving spouse.

Horace Louis De Moulin died on November 1, 1948. He left a last will which was as follows:

"November 21, 1945

To Whom It May Concern:

I, Horace Louis De Moulin, of the city of Los Angeles, State of California, being of sound and disposing mind and memory, do hereby make and declare this to be my Last Will and Testament, and hereby revoke all Wills made by me heretofore.

First, I direct that all debts and funeral expenses be paid by the executrix, hereinafter named, as soon as conveniently may be after my decease.

Second, I hereby bequeath my daughter, Constance De Moulin Richards, the sum of One Hundred Dollars (\$100.00).

Third, I hereby bequeath my son, Horace Edmond DeMoulin Junior, the sum of One Hundred Dollars (\$100.00).

Fourth, all the rest, residue and remainder of my estate both personal and real and all factory stock owned by me in the De Moulin Brothers Factory, located in Greenville, Illinois.

Fifth, I hereby nominate and appoint my wife, Mary E. DeMoulin to be the executrix of this, my Will, and I direct that she be permitted to qualify as such without the giving of a Bond or other security.

Horace Louis De Moulin

Witnesses

Eve Martin

Herbert E. Martin

"

In her petition for distribution the executrix of the will, Mary E. De Moulin, alleged that on November 21, 1945, the decedent dictated his last will to Eve Martin for typing; that he so dictated paragraph "Fourth" thereof in the following words: "Fourth, all the rest, residue and remainder of my estate, both personal and real and all factory stock owned by me in the DeMoulin Brothers Factory, located in Greenville, Illinois, I bequeath to my wife, Mary E. DeMoulin."; that through inadvertence, oversight, and mistake Eve Martin in typing said paragraph from her notes as so dictated failed to type therein the words "I

bequeath to my wife, Mary E. De Moulin." She alleged further therein that it was decedent's intent and last will that the residue of his estate should be distributed to his wife, Mary E. De Moulin, and in fact said residue was bequeathed to her by said paragraph "Fourth" of his will.

The decedent's daughter and son, who were mentioned in the will, filed objections to the petition for distribution wherein they objected to the addition of the words "I bequeath to my wife, Mary E. De Moulin" to said paragraph "Fourth" of the will. They declared, in their objections, that there is no ambiguity in the will, that no beneficiary as to the residue of the estate was named in the will, and that decedent died intestate as to the residue. They asked that the residue be distributed according to the laws of succession.

At a hearing upon the petition for distribution and the objections thereto oral and documentary evidence was received. The court found that the decedent by his will disposed of his whole estate as follows: \$100 to the daughter; \$100 to the son; and the residue to his wife, Mary E. De Moulin. The objections to the petition were overruled, and it was ordered that the estate be distributed in accordance with said findings. The daughter and son appeal.

At said hearing, and over the objection of appellants, Eve Martin testified that on November 21, 1945, decedent asked her to type a will for him; he dictated the will and she wrote the dictation in longhand; the document marked Exhibit No. 1 (being the longhand "notes" from which she typed the will) is all in her handwriting and the writing was dictated to her by decedent; she handed said writing to him and he read it; she typed from that writing; after the will was typed decedent signed it in her presence and in the presence of her husband; she thought that at the time he signed the will he "just glanced at it"; on the occasion when she made Exhibit No. 1 he told her that he wanted Mary to have the house, personal property and some factory stock because she had worked so hard and had taken such good care of him.

The document marked Exhibit No. 1, from which Mrs. Martin typed the will, is a sheet of white paper on both sides of which there is pencil writing. The words and figures on that document are the same as the words and figures on the will, except as follows: The date on the document is "11/21/45" instead of "November 21, 1945." The paragraphs in the document are numbered "1st," "2," "3," "4," "5," instead of "First," "Second," "Third," "Fourth" and "Fifth." The document does not have "(\$100.00)" after the words "one hundred dollars" in paragraphs 2 and 3. The document has the abbreviation "Jr." in paragraph 3, instead of the word "Junior." In paragraph 4 of the document pencil lines have been drawn through the word "Illinos," (sic) and thereafter is the abbreviation "Ill." In paragraph 4 of the document immediately after "Ill." there are the following words, "I bequeath to my wife, Mary E. De Moulin." (The names of the testator and the witnesses, which appear at the end of the will, were not on the document.)

Paragraph 4 of the document is as follows: "4. All the rest, residue and remainder of my estate, both personal and real, and all factory stock owned by me in the De Moulin Brothers Factory, located in Greenville, ~~Illines~~ Ill. I bequeath to my wife, Mary E. De Moulin."

Appellants contend that the testator did not dispose of the residue of his estate, and that as to the residue he died intestate. They argue that the testimony regarding the conferences at the time of making the will was inadmissible, and that the court did not have power to add the name of a beneficiary to the will. Paragraph "Fourth" of the will does not contain any words indicating that the testator was therein making a gift or a bequest of the residue or anything, and that paragraph (or any other part of the will) does not name anyone as beneficiary of the residue. The words of that paragraph do not constitute a complete statement or declaration. As above-mentioned, the words therein are: "Fourth, all the rest, residue and remainder of my

estate, both personal and real and all factory stock owned by me in the De Moulin Brothers Factory, located in Greenville, Illinois." That paragraph merely mentions or announces a subject or subject matter, but it contains no words with respect to what is to be done with or concerning the subject matter.

[1, 2] Section 105 of the Probate Code provides: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations." An uncertainty arises upon the face of the will as to whom the testator intended to give the residue. The testator's intention, regarding the beneficiary of the residue, is to be ascertained from the words of the will, taking into view the circumstances under which the will was made, excluding oral declarations of the testator as to his intention. Sec. 105, Prob. Code; see *Estate of Blalock*, 95 Cal.App.2d 463, 468, 213 P.2d 100. An exception to the rule that in construing a will the oral declarations of a testator are not admissible is that the oral declarations of a testator that consist of instructions to a scrivener, regarding the testator's intention, are admissible to explain an imperfect description or an ambiguity appearing in the will. See *Estate of Pierce*, 32 Cal.2d 265, 274, 196 P.2d 1. In the will in the present case, however, there is not an imperfect description of a beneficiary of the residue or an ambiguity as to such a beneficiary, but there is no description at all of such a beneficiary or any word at all naming or indicating anyone as such a beneficiary. In this case there was a total failure to name or describe a beneficiary of the residue. The testimony of Mrs. Martin was not admissible since it was not in explanation of an imperfect description or an ambiguity in

the will as to a beneficiary of the residue. In the *Estate of Blake*, 157 Cal. 448, at pages 458-459, 108 P. 287, at page 291, it was said: " * * * 'The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used." In the *Estate of Beldon*, 11 Cal.2d 108, at page 112, 77 P.2d 1052, at page 1054, it was said: "A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended." In that case it was also said, 11 Cal. 2d at page 112, 77 P.2d at page 1054: "To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the testator's property. 'Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed.'" It cannot be ascertained from the words of the will what disposition the testator intended to make of the residue. The testator died intestate as to the residue of his estate.

The order settling the final account is affirmed. The order for distribution is reversed, and the superior court is directed to order distribution of the residue according to the laws of succession, that is, one-third each to the daughter, the son, and the surviving spouse.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

101 Cal.App.2d 417

PEOPLE v. PALMER.

Cr. 4542.

District Court of Appeal, Second District,
Division 3, California.

Dec. 26, 1950.

Chester Marvin Palmer was convicted in the Superior Court, Los Angeles County, Walter S. Gates, J., of three violations of the statute making it a crime to perform lewd or lascivious acts on persons of children, and he appealed from the judgment and from an order denying a motion for new trial. The District Court of Appeal, Vallée, J., held that the evidence supported the convictions.

Judgments and order affirmed.

Infants ☞20

Evidence supported convictions for violation of the statute making it a crime to perform lewd or lascivious acts on persons of children. Pen. Code, § 288.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged in three counts with violations of Penal Code section 288. He was convicted of the offense charged in each count and sentenced to prison. A separate judgment was entered on each count. He appeals from the judgments and from the order denying his motion for a new trial. His only contention is that the evidence is insufficient to support the judgments.

The complaining witness, a child eleven years old, testified to facts constituting the three acts charged. No purpose would be served in relating in detail her testimony here. She testified that the defendant committed lascivious acts upon her body which could not have been done for any purpose other than gratifying the lust and passions of the defendant. The claim is that the story of the child is incredible. Her testimony was coherent and consistent. We

cannot say, as a matter of law, that her story is incredible. The appeal is frivolous.

The judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

SHINN, P. J., and WOOD, J., concur.



101 Cal.App.2d 329

CHAKMAKJIAN v. LOWE.

Civ. 17620.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1950.

Action by Moushek Chakmakjian against Jennie Lowe for personal injuries, wherein defendant moved to satisfy judgment on ground that defendant had paid plaintiff in full, the amount of an award by the Industrial Accident Commission. The Superior Court, Los Angeles County, Arnold Praeger, J., entered a special order denying the motion, and defendant appealed. The District Court of Appeal, Doran, J., held that plaintiff was entitled to recover on judgment entered in law action against defendant notwithstanding that defendant had paid employee amount of an award by Industrial Accident Commission which was in excess of judgment for damages rendered in law action.

Order affirmed.

1. Workmen's compensation ☞1103, 2100

An uninsured employer is subject to an action at law by injured employee, and also subject to a proceeding brought by injured employee before Industrial Accident Commission. Labor Code, §§ 3706, 3707, 3709; Const. art 20, § 21.

2. Workmen's compensation ☞1765

An award of the Industrial Accident Commission is not a judgment for damages. Labor Code, §§ 3706, 3707, 3709.

3. Workmen's compensation ☞1164

Proceeding against employer by injured employee before Industrial Accident Commission is not a negligence action. Labor Code, §§ 3706, 3707, 3709.

4. Workmen's compensation ☞2107

Where injured employee recovered judgment in action against uninsured employer in superior court, and Industrial Accident Commission later awarded employee larger amount than employee had recovered in law action, uninsured employer had to satisfy judgment in law action, notwithstanding that he had fully paid employee amount of award by commission. Labor Code, §§ 3706, 3707, 3709; Const. art. 20, § 21.

Stanton & Stanton and Louis B. Stanton, all of Los Angeles, for appellant.

Herlihy & Herlihy and Joseph W. Pierce, all of Los Angeles, for respondent.

DORAN, Justice.

The present appeal is from a special order made after a judgment in favor of plaintiff, and injured employee, denying the employer's motion to satisfy the judgment. The basis of such motion was that the uninsured employer (appellant) had fully paid to the employee the amount of an award by the Industrial Accident Commission which was in excess of the judgment for damages rendered by the Superior Court. Appellant contends that "By the use of the two concurrent remedies, the employee seeks to obtain for the one injury a double recovery".

The accident in question occurred November 10, 1945 during plaintiff's employment. The present action was filed December 6, 1945, under provisions of Sections 3706, 3707 of the Labor Code, permitting such an action against an uninsured employer. On July 22, 1946 judgment was entered for the respondent employee in the sum of \$2,250.00 and \$112.50 costs. On appeal, this judgment was affirmed by the Supreme Court in 33 Cal.2d 308, 201 P.2d 801.

After filing the action for damages in Superior Court, respondent employee on May 9, 1946 filed a claim before the Industrial Accident Commission, but requested that no hearing thereon be had until the Superior Court action was determined. On June 5, 1947 the Industrial Accident Commission awarded the employee \$2,890.00 and \$350.00 attorney fee. The finding and award recite that "The applicant has received \$2,250.00 plus costs of \$112.20 in a parallel negligence action against the uninsured employer herein, which matter is pending on appeal". It was further found that "The defendant (appellant herein) was wilfully uninsured". This award was paid by appellant and formed the basis for the motion to satisfy the judgment for damages which was denied by the trial court in the order now appealed from.

Appellant cites Section 21 of Article XX of the California Constitution authorizing enactment of a Workmen's Compensation Act, which section, it is said, "denounces double recoveries for injuries suffered"; this language, however, is that of appellant and is not used in said section. Also referred to is Section 3709 of the Labor Code which provides that where a judgment is obtained against the employer in excess of the compensation award, payment of the award may be credited on the judgment. Such, however, is not the situation here for the award was in excess of the judgment obtained in Superior Court. The section makes no provision for credit in such a case. It is to be noted that appellant does not question "the right of the employee to take the concurrent remedies", and "No question is raised as to the validity of the award of the Commission or of the Court as separately considered".

It is appellant's contention that an equitable interpretation of Section 3709 of the Labor Code should be adopted in order to prevent what appellant terms a "double recovery". It is also asserted that relief should be granted "on the ground of extrinsic fraud" in "obtaining the judgment with resultant injury to defendant".

Answering these contentions respondent's brief points out that Section 21 of

Article XX of the Constitution, cited by appellant, "contains no express provision to the effect that an uninsured employer shall not be subjected to the payment of both an award of the Industrial Accident Commission and a judgment for damages * * * and no language from which any such limitation on the power of the Legislature can reasonably be inferred". Moreover, attention is called to the fact that Section 3706 of the Labor Code provides that "in addition" to an award of compensation, an injured employee "may bring an action at law against such (uninsured) employer for damages, as if this division did not apply".

It is further pointed out that the only provision showing any relation between the decisions arrived at in pursuing the two authorized remedies is that found in Section 3709 hereinbefore referred to. This sole provision reads as follows: "If, as a result of such action for damages, a judgment is obtained against the employer in excess of the compensation awarded under this division the compensation awarded by the commission, if paid, or security is given * * * shall be credited upon such judgment".

In the case of *Chakmakjian v. Lowe*, 33 Cal.2d 308, 201 P.2d 801, 802, which affirmed the judgment against the appellant herein, the Supreme Court refused to consider "the merit of defendant's objection to the successive awards as embracing a 'double recovery'", since "such question manifestly was not before the trial court in its initial disposition of plaintiff's authorized damage action". On that appeal defendant was contesting "the validity of the judgment, not the premise of its enforcement in the admeasurement of plaintiff's total relief". However, in reference to the two remedies available against an uninsured employer, the reviewing court there said: "Under section 3706 of the Labor Code, the injured employee may bring an action for damages in any case where his employer failed to carry compensation insurance, and this right may be exercised independently of any proceedings before the Industrial Accident Commission".

The substance of appellant's claim is that by judicial interpretation or by reason of equitable considerations, a further provision should be read into Section 3709 making it a duty of the trial court to satisfy an employee's judgment for damages against an uninsured employer, where the employee has received payment of a larger award by the Industrial Accident Commission.

Unfortunately for appellant's contention, courts have neither express nor implied power to indulge in such judicial legislation. It must be assumed that the enacting body had fully considered the situation and that the resulting statute represents the law as the legislature wished it to be. If changes are to be made in the statutory law as it stands, or additional provisions are deemed necessary, obviously such alterations fall within the jurisdiction of the legislative body. Any other disposition could but result in a complete destruction of the separate functions of the three divisions of government.

[1] The essential differences between an action in the courts for damages resulting from negligence, and the statutory proceeding to secure an award of compensation by the Industrial Accident Commission, are too well known to require discussion. Actually, except as expressly provided by statute, there is no relation between the two remedies. And in the present action, by becoming an "uninsured" employer, appellant became subject to both remedies.

The fact that both proceedings arose out of the same accident affords no support to appellant's insistence that there has been an inequitable "double recovery". The appellant was afforded the requisite day in court and due process at each hearing. The record here presented discloses no fraud, extrinsic or otherwise. As set forth in its findings, the Industrial Accident Commission at the time of making the award had before it the information that respondent had already obtained a judgment for damages against appellant in the Superior Court. That judgment was affirmed by the Supreme Court.

[2-4] It is well known that the underlying theories of the two proceedings are entirely different. In no sense was the award of the Industrial Accident Commission a judgment for damages; the proceeding itself cannot be considered a negligence action. And if any change in the statutory law is to be made for the relief of cases similar to that urged by appellant, such amendment must of necessity come from the law making body and cannot be effected by judicial construction.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



101 Cal.App.2d 245

MALOTT v. SEYMOUR et al.

Civ. 16694.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Action by P. Malott against Sam Seymour and others to collect certain notes executed by a partnership known as Dr. Forbes Farms for which defendants had executed a guaranty. The Superior Court, Los Angeles County, Stanley N. Barnes, J., rendered summary judgment for defendants and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that action could not be maintained at law but should have been brought in equity.

Judgment affirmed.

1. Partnership ⇨104

In absence of statutory authority, an action at law cannot be maintained against a person's copartners with respect to partnership transaction.

2. Partnership ⇨20

Where first partnership consisted of individuals, and second partnership, individual members of first partnership, and

members of second partnership were "copartners".

See publication Words and Phrases, for other judicial constructions and definitions of "Copartners".

3. Partnership ⇨104

Where first partnership was comprised of individuals and second partnership, and individual members of first partnership and second partnership executed a guaranty in reliance on which bank made loan to first partnership evidenced by certain notes, and subsequently individual member of second partnership acquired notes and assigned them for collection, assignee could not bring an action at law for their collection but should have brought action in equity.

Knight, Gitelson & Ashton, Los Angeles, Alfred Gitelson, Los Angeles, for appellant.

Overton, Lyman, Plumb, Prince & Vermille, Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a summary judgment rendered against him in his action brought against the guarantors of certain obligations evidenced by promissory notes executed by a partnership known as Dr. Forbes Farms. Respondent partnership was comprised of respondents and another partnership, to wit, Lesser & Son which in turn was made up of five individuals. Appellant's assignor, Louis Lesser, was one of the five.

On November 27, 1946, respondents and Lesser and Son executed a certain "Continuing Guaranty by General Partners" in favor of the Union Bank & Trust Company of Los Angeles. In reliance on this guaranty, the bank in January, 1947, made a loan of \$50,000 to Dr. Forbes Farms which loan was evidenced by two promissory notes of \$25,000 each bearing interest at 4 per cent per annum payable six months after date. This loan was from time to time extended until May 19, 1947, when the loan was renewed by the two promissory notes sued upon herein executed by the

same copartnership, each in the sum of \$25,000 payable August 18, 1947.

Nothing was ever paid on the obligations and in September, 1947, Louis Lesser purchased the notes and guaranty from the bank for \$50,519.46 and prior to the commencement of this action assigned same to the appellant for collection.

The question for decision is whether the trial court erred in granting respondents' motion for a summary judgment made on the theory that Lesser, as a partner, could not maintain an action at law, but was relegated to his action in equity for an accounting and dissolution.

[1] It is established that while Lesser was one of the general partners of Dr. Forbes Farms he acquired the claim sued upon as an individual and in his own right. Now, if he was a general partner in the debtor copartnership, he could not sue his associates. It is a ubiquitous rule that in the absence of statutory authority an action at law cannot be maintained against a person's copartners with respect to partnership transactions. *Johnstone v. Morris*, 210 Cal. 580, 583-584, 292 P. 970; *DeMartini v. Industrial Accident Comm.*, 90 Cal.App.2d 139, 150, 202 P.2d 828; *Cunningham v. de Mordaigle*, 82 Cal.App.2d 620, 621, 186 P.2d 423. The reason for this general rule is that it is ordinarily impossible to determine whether or not the defendant partner is in fact indebted to the plaintiff partner until the partnership accounts are settled and the true standing of the parties has been ascertained. The partners have not, by implication, agreed to account otherwise; and until that is done, no debt arises. *Mechem's Elements of Partnership*, 2d Edition, sec. 204. Moreover, the process and remedies in an action at law are not usually adequate to the investigation of claims requiring such an accounting. *Ibid.*

[2,3] Appellant contends that Louis Lesser alone is not a partner of respondents but that on the contrary the firm of Lesser & Son is the actual copartner. But on further reflection appellant cannot fail to see that creditors of the Forbes Farms partnership could if necessary eventually

look to him for satisfaction of the partnership's indebtedness. He could not shield himself behind the Lesser & Son partnership in the sense that a shareholder of a corporation enjoys this insulation and protection. Thus it appears that Lesser is subject to possible liability on the obligation notwithstanding that he purportedly signed the guaranty only on behalf of Lesser & Son. It follows that for some purposes, at least, the parties would be viewed as copartners. See *Mechem*, supra, sec. 54. Therefore, to adjust all possible obligations among the partners and possibly preferred claims of firm creditors, appellant's assignor and respondents should herein be treated as copartners and the action brought in equity. See *Laughlin v. Haberfelde*, 72 Cal.App.2d 780, 788, 165 P.2d 544.

Appellant has cited no applicable authority supporting his position. The numerous cases relied upon are all readily distinguishable in that they involved actions by one partner against another for breach of the partnership agreement, actions for contribution after dissolution of a partnership or suits on a transaction easily segregated from other partnership matters as in the case where plaintiff-partner loaned money to the firm. *Blee v. Lead Mountain Mines*, 8 Cal.2d 550, 66 P.2d 646. In such situations it is undisputed that an action at law can be maintained.

Appellant's argument that the general rule does not apply where the obligation sued upon was not a partnership transaction or has been segregated by agreement of the parties is of no avail. Although this exception to the general rule is also well established, see *Bull v. Coe*, 77 Cal. 54, 18 P.2d 808; *Johnson v. Rosenstein*, 132 Cal.App. 675, 23 P.2d 418, it is clear from the pleadings and affidavits filed herein that the note and guaranty involve partnership business. The notes were executed by Dr. Forbes Farms to an outsider and the guaranty was specifically made to cover debts of this partnership.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

101 Cal.App.2d 238

**SLOSBERG v. MUNICIPAL COURT OF
CITY OF LOS ANGELES, IN AND
FOR LOS ANGELES COUNTY.**

Civ. 17697.

District Court of Appeal, Second District,
Division 1, California.

Dec. 20, 1950.

Prohibition proceeding by Benjamin Robert Slosberg and Pauline Lachs Slosberg against the Municipal Court of the City of Los Angeles, in and for the County of Los Angeles, State of California. The Appellate Department of the Superior Court of Los Angeles County, Hartley Shaw, Edward T. Bishop and Jess E. Stephens, JJ., rendered a judgment granting peremptory writ as to Benjamin Robert Slosberg and denying peremptory writ as to Pauline Lachs Slosberg, and Pauline Lachs Slosberg appealed. The District Court of Appeal, White, P. J., held that decedent's non-resident sister who was in state for purpose of appearing as witness on hearing of citation which sister had caused to be issued directing surviving husband, as administrator, to show cause why administrator should not include certain clothing of decedent in inventory, was not immune from service of summons in action brought by husband individually wherein husband charged that sister had converted husband's personal property consisting of decedent's clothing and jewelry.

Judgment affirmed.

1. Process ☞119

The general rule that nonresident who comes within state as party litigant or as witness in judicial proceeding is immune from service of civil process while in actual attendance at the hearing and for reasonable time in coming and going is subject to exception that nonresident who brings action in state against citizen of state is not immune from process issued in action by defendant seeking relief connected with subject of litigation commenced by plaintiff.

2. Process ☞120

Decedent's nonresident sister who was in state for purpose of appearing as witness on hearing of citation which sister

had caused to be issued directing surviving husband, as administrator, to show cause why administrator should not include certain clothing of decedent in inventory, was not immune from service of summons in action brought by husband individually wherein husband charged that sister had converted husband's personal property consisting of decedent's clothing and jewelry. Probate Code, §§ 201, 1230.

Don Marlin, William H. Levit, and Harold Rubins, all of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

Appellant herein, Pauline Lachs Slosberg, and her husband, residents of the State of New York, sought a writ of prohibition in the Superior Court of Los Angeles County, to be directed to the Municipal Court of the City of Los Angeles, requiring the latter court to refrain from further proceedings in an action pending against them, upon the ground that they were immune from service of process while temporarily in this state for the purpose of appearing as witnesses in a judicial proceeding. A peremptory writ was denied as to appellant and granted as to her husband. This appeal is from that portion of the judgment denying appellant a peremptory writ.

Appellant and her husband were in this state in connection with a probate proceeding in the Superior Court of Los Angeles County in the matter of the estate of Regina Lachs Horn, deceased. Appellant, who is a sister of decedent, had caused a citation to be issued directing Henry Horn, as administrator of the estate, to show cause why he should not include in the inventory certain clothing of the decedent of the approximate value of \$1,500.00. Henry Horn is the surviving spouse of Regina Lachs Horn. While appellant and her husband were in Los Angeles for the purpose of appearing as witnesses on the hearing

of the citation, they were served with summons and complaint in an action in the municipal court brought by Henry Horn individually, wherein it was charged that the defendants had converted personal property of the plaintiff, consisting of women's clothing and jewelry.

[1] The rule is well settled that non-residents who come within the territorial limits of the state as parties litigant or to testify as witnesses in judicial proceedings are immune from service of civil process while in actual attendance at the hearing and for a reasonable time in coming and going. *Gerard v. Superior Court*, 91 Cal. App.2d 549, 205 P.2d 109, and authorities there cited. A recognized exception to the rule, however, is that a nonresident who brings an action in this state against a citizen of this state is not immune from process issued in an action by the defendant seeking relief connected with the subject of the litigation commenced by the plaintiff. See *Von Kesler v. Superior Court*, 109 Cal.App. 89, 292 P. 544.

Appellant points out here that the municipal court action was commenced by Henry Horn in his individual capacity, and urges that the denial of immunity should be restricted to situations where the subsequent litigation was incidental to and connected with the proceedings originally instituted, and should not be extended to all actions involving the same general questions of property rights involved in the first proceeding. It is further urged that "the asylum of non-resident immunity should not be invaded except for the dire necessities of strong public policy."

Appellant's contentions are ably answered in the unpublished decision of the Appellate Department of the Superior Court, a portion of which we quote and adopt as a part of this opinion.

[2] " * * * From the exhibits attached to the petition herein, including affidavits of the parties, it appears that the property in controversy in both the citation proceeding and the Municipal Court action was personal property that had belonged to Regina Horn prior to her death. It is possible, though it does not clearly appear,

that some of the same property may be included in both; but whether or not that is so, it is clear that both actions involve the general subject of property of the decedent—each party claiming that the other is holding such property without right. In *Von Kesler v. Superior Court*, supra, 109 Cal.App., at page 91, 292 P. 544, it is said: 'In *Tiedemann v. Tiedemann*, 35 Nev. 259 (129 P. 313), the court held that immunity from being sued could not be claimed by a non-resident "when within the jurisdiction on matters affecting the same correlated subject-matter, and the action is brought in good faith and calls for the adjudication of substantial rights."' This is a sound and just modification of the rule. In the case before us we have this situation—according to the allegations of the complaint (as clarified by the affidavits made a part of the petition) petitioner Pauline Lachs Slosberg has in her possession some \$1800 worth of personal property which belonged to the deceased and which is being held by said Pauline without right; it would be a strange rule indeed which would permit her to come into our courts claiming the administrator was withholding property from the estate and deny the administrator the right to make the same charge against her. It is true that the Municipal Court action is brought in the name of Henry Horn individually, no mention being made of his official capacity as administrator. It may be that in so proceeding he is relying upon section 201 of the Probate Code which provides that upon the death of the wife or husband one-half of the community property belongs to the surviving spouse and the other half, in the absence of testamentary disposition, also goes to such survivor subject to administration. Whether or not he acted wisely in thus proceeding is a matter not before us; it is sufficient that the record before us, and which was before the Municipal Court in passing upon the motion to quash, discloses that the two proceedings 'affect the same correlated subject matter.' It is argued that the *Von Kesler* case is not applicable because petitioner is not a plaintiff in the probate proceeding. Even viewing this statement from a purely technical

standpoint, it is inaccurate, for under Probate Code section 1230, in such a proceeding 'the party affirming is plaintiff, and the one denying or avoiding is defendant.' We need not, however, rely upon such technical grounds. She was the moving party in the probate proceeding, the one who set in motion the particular proceeding involved. The rule before us is not established by statute, thus requiring construction of specific words, but by the courts themselves as a matter of public policy. Applying the reasons for such policy to the case before us, it seems clear that petitioner Pauline Lachs Slosberg was not immune from service of summons."

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



101 Cal.App.2d 233

PEOPLE v. RIELLY.

Cr. 826.

District Court of Appeal, Fourth District,
California.

Dec. 19, 1950.

Anna Rose Rielly was convicted in the Superior Court of Kern County, Robert B. Lambert, J., of murder in the second degree and she appealed. The District Court of Appeal, Barnard, P. J., held that where it appeared that defense relied on was that defendant was unconscious at time she shot and killed her mother, exclusion of suicide notes to show that defendant was in an unsettled state of mind several days before shooting, exclusion of evidence showing her quarrels with her mother and defendant's mother's disapproval of her marriage and financial management and exclusion of evidence that defendant was acting under heat of passion when shot was fired was not error.

Judgment affirmed.

Criminal law — 1170(1)

In murder prosecution, where defense relied on was that defendant was unconscious at time that she shot and killed her mother, exclusion of suicide notes to show that defendant was in an unsettled state of mind several days before shooting, exclusion of evidence showing defendant's quarrels with her mother and of mother's disapproval of her marriage and her financial management and exclusion of evidence that defendant was acting under heat of passion when shot was fired was not reversible error.

John M. Nairn, Bakersfield, Don W. Kinney, Taft, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant shot and killed her mother on March 27, 1950. She and her husband lived with the mother in a house belonging to the mother. While she was cleaning her mother's room a man came to collect two payments on her automobile. She agreed to make one payment and to meet him an hour later to arrange for easier payments. She gave him a check for \$102, knowing she had no money in the bank. She had previously tried, without success, to get her mother to mortgage the house as security for her debts. When the man left, she asked her mother for financial help. The mother refused and began to criticize her about the way she was handling the finances of her family. She resumed her cleaning in the mother's room, and the mother continued with her criticism. She then picked up a .22 rifle which was in the mother's room, went to the kitchen door, and shot her mother in the back of her head.

The defendant then drove to the office of her brother-in-law and told him she had just killed her mother. In reply to his question as to what had happened she told him that a man had called to collect a delinquent automobile payment; that her mother injected herself into the conversa-

tion, berating the defendant and her husband for their inability to handle their finances; that she tried to quiet her mother and keep her from making a scene; that finally she wrote a check for \$102 and the man left; that her mother "increased her tirade against her"; that she was overwrought and upset and went into the bedroom and her mother went into the kitchen; that she started vacuuming to relieve her tension; that she could still hear her mother talking over the noise of the vacuum cleaner; that as she worked she noticed the gun in the bedroom; that she picked up the gun, walked to the door and fired one shot; and that she did not know why she did it. The brother-in-law also testified that the defendant said she had asked her mother for help several times before, that her mother knew she was desperate and needed help, and that she had asked the mother to let her borrow money on the house to clear up her debts.

A deputy sheriff, who was called in by the brother-in-law, asked the defendant what happened. She replied: "I have stood things just as long as I could, and I shot my mother". A little later she told this officer that she had had financial troubles, that she had asked her mother for aid and been refused, and that she had "shot her with a .22 rifle."

Later the same day, the defendant told another officer that she had wanted her mother to mortgage the property so she could pay some bills; that her mother refused and argued; that while she did not get mad very easily, "I think I came to a head and I couldn't stand any more"; and that she had got the gun and shot her mother. She also told a deputy coroner that she had asked her mother for help several days before; that the visit of the collector brought it to a head; that it was bothering her terribly and it was more than she could take; that she and her mother did not argue very long; that after she was convinced her mother was not going to give her financial assistance she went into the bedroom and started to work; and that she saw the gun and just picked it up and shot her mother.

The defendant was charged with murder, to which she pleaded not guilty and not guilty by reason of insanity. On the first issue the jury found her guilty of murder in the second degree, and she then withdrew her plea of not guilty by reason of insanity. She had appealed from the judgment which followed.

The only point raised is that the court committed prejudicial error by excluding "evidence tending to show the defendant's state of mind at the time of the homicide." The record shows no definite exclusion of evidence except with respect to some suicide notes. Otherwise, the appellant relies on remarks and general rulings of the court.

In his opening statement counsel for the appellant said: "We contend the evidence will show that the defendant was not in a state of mind so she was legally capable of committing the act, or committing any crime." The court remarked that this contention was applicable on the other issue as to insanity but not here, and that "The only state of mind you can show on this is, she was unconscious when she did the act." The court went on to say that the defendant's state of mind was not a defense to this first plea, but that in this proceeding she could show that she was unconscious or did not know what she was doing when she fired the shot. Counsel then stated "What we intend to prove is she could not form the requisite intent at that time, because of the fact * * *." The court interrupted saying there were several degrees of this crime, suggesting that they "get away from the state of mind except on the question of forming the intent," and stating that the state of mind "is not material except as to the question of the degree of the crime, or if she was completely blacked out, and did not know she did it." Counsel then said: "That is what we contend, precisely." Counsel then made a long statement saying that the defendant had been under extreme financial difficulties for years, living with her mother in a small house with her mother taking control; that on this morning when the collector left she had appealed to her mother for help and

was rewarded by a tirade against her husband and their lack of financial ability; that since her marriage the mother had disliked the defendant's husband, and had tried to get her to get a divorce; that the mental strain she had suffered over this period of years had built up until she was near the breaking point; and that at that time she did not know what she was doing. The court interrupted to say "That would be admissible if she didn't know what she was doing under the plea of insanity." Counsel then concluded by saying "She was unconscious."

After the People rested the defendant took the stand. She was first asked whether her mother had ever approved of her marriage. She replied "No, sir." Counsel then repeated the question, and the court stated that this was not material, but did not strike out the answer. The court then said that a lot of these things could be shown under the other plea but that going back into the history would not be material here. Counsel stated "We would like to show the circumstances of mitigation and what led up to it," and the court replied that this could not be done "except what happened that day." Counsel then asked: "Do you want me to make an offer of proof?" The court replied: "No, you have stated what you wanted to prove." Counsel then went back to the morning in question. The defendant testified that after the man from the bank left she asked her mother for help and was refused; that "I don't argue with anybody,—I was not mad at her—I always tried to do what she said. I just wanted help, but when she told me no, that was enough. She didn't have to go on talking, but she always talked. I never do anything right."; that she didn't argue with her mother at all; that "I just left her, and she didn't stop talking, she just keeps it up all the time, any time over anything all the time."; that the next thing she remembered was that her mother was slumped over; and that "I didn't know what I did."

The defendant was asked if it was not a fact that she had tried to commit suicide three days before, and she replied "Yes". She then testified that she left some suicide

notes but she did not know where these notes were now. Her counsel asked the district attorney to produce these notes if he had them. The court then said these notes would not be admissible on this hearing, but would be upon the plea of insanity.

On cross-examination the defendant testified that prior to that day she had requested her mother to allow her to use the house for security; that she knew she had no money in the bank when she wrote the check; that she wrote it with the expectation that her brother-in-law or mother would help her; that she did not become angry when her mother refused to help her; that the last thing she remembered after the collector was there was while she was finishing her work in the bedroom; that she saw the gun back of the door; that she did not remember picking it up and firing at her mother; and that "I was vacuuming, then I knew my mother was slumped and I had the gun, I didn't know what happened after that. The next thing I knew I was here in jail." She then testified that she did not remember talking with her brother-in-law, talking to the various officers, or making any of the statements to them which had been written up and which were read to her.

The appellant now contends that "the proffered evidence" was to prove that she did not have at the time the act was committed "the required mental state, that is, malice aforethought"; that the opening statement of counsel informed the court of the type of evidence he would introduce for the purpose of showing "lack of the requisite mental state of malice aforethought and that the defendant was unconscious at the time of the killing and thus incapable of committing any crime"; that she was not allowed to produce evidence to dispel the showing of malice aforethought; and that she acted "under such a heat of passion and could not form the necessary element of malice aforethought." She relies particularly on *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53; *People v. Letourneau*, 34 Cal. 2d 478, 211 P.2d 865.

It is argued that the suicide notes were admissible to show that she was in an un-

settled state of mind several days before the shooting; that the court refused to admit evidence showing her quarrels with her mother, and her mother's disapproval of her marriage and her financial management; and that it was error to exclude evidence that she was acting under heat of passion when the shot was fired.

From the opening statement and from defendant's testimony, it clearly appears that the defense relied on was that the defendant was unconscious at the time. In view of that defense, no reversible error in excluding evidence here appears. *People v. Danielly*, 33 Cal.2d 362, 202 P.2d 18. No mention was made in the opening statement of any claim that the act was committed under any sudden heat of passion, and no evidence was rejected which had any material bearing on such an issue. Evidence as to the intent involved in "malice aforethought" was not excluded. While some of the court's remarks could have been better expressed, he did not rule that no evidence would be received with respect to any mental state of the defendant. While he tried to keep the issue of insanity out of this proceeding, he told counsel that evidence with respect to the state of mind was admissible on the question of forming an intent, for the purpose of fixing the degree of the crime, and to show whether she was unconscious. When the first question arose, on defendant's testimony, her counsel said he would like to show the circumstances of mitigation and what led up to it, and the court said he could not do that "except what happened that day." Counsel was in no way limited in introducing evidence as to what happened on that day. No attempt was made to show that any heat of passion existed at the time, and no offer or suggestion of proof was made in that connection. That state of mind, the existence of a heat of passion, was the material element, and not the complete history behind it. *People v. Danielly*, 33 Cal.2d 362, 202 P.2d 18.

The defendant, who had no difficulty in remembering everything up until she saw the gun in her mother's room, testified as to what occurred up to that time. She testified that she was not angry when her

mother refused to help her; that she just left her and went back to her work; that she could still hear her mother talking; that the next thing she remembered was that her mother was shot and she had the gun in her hand; and that she didn't know what she did. She was allowed to testify as to what occurred, and no other material evidence on heat of passion was offered. There was no dispute as to the basic facts, and it was admitted that she shot her mother. No exclusion of material evidence, or prejudicial error, appears from the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



101 Cal.App.2d 338

LAMB et al. v. WARD et al.
Civ. 18059.

District Court of Appeal, Second District,
Division 2, California.

Dec. 21, 1950.

Hearing Denied Feb. 15, 1951.

Action by Stacy C. Lamb and Theodore P. Lamb against I. M. Ward, and others. The Superior Court, Los Angeles County, William B. McKesson, J., sustained a general and special demurrer to plaintiffs' fourth amended complaint, and entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that complaint which sought to enforce forfeiture of a mineral lease and which asserted claims for damages arising from tort, and claims arising under a separate contract, and damages for conversion of chattels, was insufficient.

Judgment affirmed.

I. Mines and minerals ⚔78(7)

Complaint which sought to enforce forfeiture of a mineral lease and which did not allege notice of a violation of the lease was insufficient.

2. Mines and minerals ⇨78(3)

Where first notice of nonpayment of September and October rentals due under a mineral lease was served on October 23, and such installments were paid in November, the default was cured.

3. Pleading ⇨218(1)

Parties who urge a demurrer on special grounds are entitled to a ruling.

4. Pleading ⇨225(1)

Where demurrer had been properly sustained to fourth successive amended complaint, defendants were entitled to judgment.

5. Pleading ⇨218(1)

When a special demurrer is well founded, the merits of a general demurrer are immaterial.

6. Pleading ⇨51

A complaint may seek both legal and equitable relief and yet allege but a single cause of action.

7. Mines and minerals ⇨78(7)

Complaint which sought to enforce forfeiture of a mineral lease and which alleged several causes of action under a license to operate a mine on the land, and which also sought damages for breach of a separate written agreement for payment of \$5,000, and for conversion of property sold from the mine, against several purchasers, and which also sought damages against auctioneer who conducted sale, and for counsel fees incurred in prosecution of the action, was uncertain and improperly stated more than one cause of action.

8. Judgment ⇨217

Where first complaint sought to enforce forfeiture of mineral lease and asserted claims for damages arising from tort, claims arising under a separate contract and damages for conversion of chattels, and second and third amended complaints both attempted to combine several causes in a single count, judgment dismissing fourth amended complaint on same grounds was final.

Bertram H. Ross, Los Angeles, for respondents.

MOORE, Presiding Justice.

A demurrer both general and special having been sustained to their fourth amended complaint the court adjudged that "plaintiffs take nothing by this action" and that defendants recover their costs. The appeal is from such judgment. A reversal is demanded on the grounds that the judgment is uncertain and that the complaint states a single cause of action.

The pleading asserts claims against 38 defendants. Four of these are subsisting corporations; three are fictitious names of corporations; two are actual partnerships; three are partnerships designated by fictitious names; twenty-one are individuals.

It is alleged that plaintiffs as owners of unpatented placer mining claims leased them to Crystal Lime Corporation (herein designated "corporation") on August 24, 1947, and that it took possession thereof on the same day; in March, 1949, corporation caused to be incorporated the Crystal Lime Company (herein called "company") to succeed it; plaintiffs consented to the transfer of its lease to company which agreed to perform all of corporation's obligations, to pay plaintiffs for "certain personal property belonging to plaintiffs on the claims" and to assume and pay plaintiffs \$500 cash and the balance of \$4500 as an additional royalty on materials removed, pursuant to the lease, which would be deemed full payment for the personal property. Only \$100 of such contract price has been paid. Company took possession of the claims and all the property theretofore placed thereon by corporation and all other assets of the latter. Ever since August 24, 1947, corporation and company have been in possession of the claims, have operated the mine; have had in their possession all the property and improvements thereon; have installed on the claims "certain property and improvements"; have used them in working the mines. All improvements are indispensable elements to the coordinated mining operations. All were there at the time of their sale by defendants on October 25, 1949. The items

John A. Jorgenson, Los Angeles, for appellants.

as listed in the inventory with their reasonable values—attached to the complaint—were imbedded in the land or permanently resting upon it, or permanently attached.

At the time of the sale of the equipment corporation and company were delinquent in the payment of rental due September 1 and October 1, 1949, aggregating \$600; had failed to weigh all materials removed from the claims; had failed to pay promptly all labor and material bills and other debts incurred in their mining operations; had failed to operate continuously and not at all during the preceding 90 days; had failed to furnish plaintiffs since July, 1948, statements of weights of materials removed during the preceding month.

October 23, 1949, plaintiffs caused to be prepared and served notice of such defaults, declaring that the lease would be terminated unless the specified defaults were cured within 15 days from the mailing of the notice. A copy of the notice was sent to respondents Ross, corporation and company at their addresses by United States registered mail. On November 2, 1949, copies of a similar notice were by plaintiffs served on the same defendants declaring the existence of default in their failure to pay the minimum rental of \$300 due on November 1, 1949, demanding that such default and those mentioned in the notice of October 23, 1949, be remedied within 15 days of the mailing of such copies. On November 9, 1949, plaintiffs prepared and served a written notice on each of the aforementioned defendants in which said defaults (except the rental installments due on September and October 1, 1949) were again recited and demand made for the payment of the \$300 rental due on November 1, 1949, and the \$4900 past due for the purchase price of the personal property sold to corporation and company. The same notice demanded the two last named defendants deliver to plaintiffs a sufficient deed conveying to plaintiffs a good and marketable title to the mining claims, and that all equipment, tools, machinery, buildings and fixtures removed on October 25 be restored to plaintiffs on said claims. On November 19, 1949, plaintiffs by use of United States

mail repeated the notice and demands of November 9.

None of said defaults has been cured except that on November 1, 1949, plaintiffs were paid the two installments of \$300 each maturing September 1 and October 1, 1949.

In the middle of October, 1949, defendants Ward, corporation, company, Ross, Ponder, Coffman, Loewe, Oliver and Jandorf published in various newspapers in Southern California a notice that on October 25 1949, they would sell to the highest bidder for cash certain specified movables. On the date of sale plaintiffs appeared and orally notified all persons present including defendants of their lease and the terms thereof and of plaintiffs' claim of ownership of the property advertised for sale and that those who might purchase would do so at their peril and in disregard of the rights of plaintiffs and that the nine defendants had no right to make such sale. Notwithstanding such announcement, the same nine defendants then and there announced that plaintiffs had no rights in said property; that defendants were entitled to make sale and delivery thereof and would guarantee title; whereupon defendants proceeded to auction off to twenty designated defendants the movables.

At the time of the sale certain named defendants converted the personal property then sold or delivered to them to their own use to plaintiffs' damage in the sum of \$57,120; and said defendants and defendant Virgil Blase converted to their own use a quantity of plaintiffs' lime, and the other defendants then and there respectively severed from said real estate where necessary to removal and converted to their respective uses those items of property sold to them to plaintiffs' damage in the amount specified as its value. Certain items have been rendered valueless through the severance and removal of related items, to plaintiffs' damage in the sum of \$14,000 and by reason of the severance and removal of other specified items by defendants to plaintiffs' damage in the sum of \$9,500 (their value as listed in Exhibit A attached to the complaint.)

While certain named defendants have not sold and delivered specified items listed in Exhibit A they claimed the right to do so at said sale and still threaten to dispose of the same, and are attempting to do so. A controversy therefore exists with reference to the right of said defendants to sell and dispose of said items. Defendants corporation and company have failed and refused to deliver a good and sufficient deed cancelling said lease and conveying to plaintiffs a good and merchantable title to said claims, free and clear of all liens, encumbrances, and claims thereon not existing on the date of said lease. Said defendants have refused to deliver possession of said property to plaintiffs. The Nelson Inclined Twin Furnace has been stripped by said defendants of some of its parts to plaintiffs' damage in the sum of \$8,000, the lessened value thereof.

Plaintiffs are informed and believe that certain named defendants collected in effecting such sales an aggregate sum of \$25,000. Prior to the sale defendants corporation and company and certain named defendants resolved to liquidate said corporation and company, and, for that purpose, appointed defendant Ross their liquidating agent. Said Ross received said entire fund of \$25,000 and still holds the same, and has entered into a written contract with plaintiffs under which he has promised to retain possession of such funds until plaintiffs' claims are adjudicated in this action.

Plaintiffs have not been paid the \$300 rent maturing November 1, 1949, nor any part thereof; nor any rent, nor part thereof, accruing thereafter; nor have defendants, corporation or company, since November 1, 1949, performed any of the promises they agreed to perform in said lease.

Th complaint is a hopeless compilation in one count of seven separate and distinct causes of action against 39 separate entities. It demands judgment (1) for \$93,847 against 18 designated defendants; (2) that plaintiffs are owners of the mining claims and specified movables situate thereon; (3) that defendants wrongfully converted and sold plaintiffs' property; (4) that the proceeds received therefrom are a trust fund for the reimbursement of plain-

tiffs' damages and that defendants be required to pay such sum to plaintiffs; (5) that the corporation and the company pay plaintiffs \$10,000 for attorneys' fees; and (6) be required to deliver lessors a deed conveying a merchantable title to the claims free of all encumbrances; (7) that plaintiffs' title to the mining claims be quieted against all defendants; (8) that they be awarded damages caused by the auctioneer who conducted the sale; and (9) for general relief.

[1, 2] Considering the pleading as one to enforce the forfeiture of a lease it must fail for the reason that no sufficient notice of violating the lease appears. The first notice of nonpayment of the September and October rentals was served on October 23. Such installments were paid in November leaving due only the November rent. Since the default was cured there was no breach in effect at the time of filing the complaint November 25, 1949. *Bedford Investment Company v. Folb*, 79 Cal.App.2d 363, 366, 180 P.2d 361; *Extension Oil Company v. Richfield Oil Corporation*, 52 Cal.App.2d 105, 108, 125 P.2d 895.

[3-5] Appellants deem themselves to be aggrieved because the judgment is "uncertain." We search in vain for such uncertainty. Because the fourth amended complaint demands so many different things against so many different entities in a single count the trial court properly held that the pleading is uncertain and that several causes of action against several distinct entities are alleged and numerous parties are joined in one action on separate grounds for relief. Inasmuch as respondents urged their demurrer on special grounds they were entitled to a ruling. After such demurrer had been sustained to the fourth successive amended complaint respondents were entitled to judgment. *Wood, Curtis & Co. v. Missouri Pacific Railway Co.*, 152 Cal. 344, 348, 92 P. 868; *Gridley v. Selleck*, 92 Cal. App. 97, 99, 267 P. 708; *Lapique v. Monroe*, 19 Cal.App. 253, 254, 125 P. 760. When a special demurrer is well founded the merits of the general demurrer are immaterial. *Cruse v. Grubbs*, 121 Cal.App. 554, 559, 9 P.2d 520.

Appellants contend that since they alleged only one distinct primary right of their own to have been violated and but one wrong against that right by respondents, therefore only one cause of action is stated. They maintain that the act of setting forth incidental matters bringing in other parties as necessary to a complete statement of the cause, the pleading does not necessarily state two or more causes of action. Such contention well states a rule that frequently establishes the validity of an extended pleading. But such rule does not prevail where a complaint seeks both legal and equitable relief from various defendants and where the several causes alleged have arisen not only under a lease of land and a license to operate a mine thereon but also from a separate written agreement for the payment of \$5,000 combined with causes for conversion of property sold from the mine against the several vendees and an action for damages against the auctioneer who conducted the sale and for counsel fees incurred in the prosecution of this action.

Neither *Burns v. Ross*, 190 Cal. 269, 212 P. 17, nor *Wright & Kimbrough v. Carly*, 11 Cal.App. 325, 104 P. 1009, is authority for appellants' contention. In both the same relief was asked against all the defendants and but one cause of action was alleged. The complaint in *Lichtenthaler v. Samson Iron Works*, 32 Cal.App. 220, 162 P. 441, bears no analogy to the pleading here involved. That action was for a breach of warranty contained in a written contract whereby the defendant had agreed to furnish the necessary tools and machinery to erect a pumping plant on the plaintiff's land. The plaintiff's suit was a simple action to recover damages flowing from the breach and did not ask varieties of relief from various defendants. It deserved a reversal of the judgment of dismissal after a demurrer had been sus-

tained without leave to amend. Likewise, *Southern Surety Company v. Bank of Lassen County*, 118 Cal.App. 149, 4 P.2d 952, was an action on contract to which all the defendants had been signatories.

[6] Notwithstanding appellants' expressed contrary intention the varying forms of relief demanded do not contribute to but one cause of action, nor are the allegations all germane to the enforcement of a single primary right. See 1 C.J.S., Actions, § 68, Notes 10-22. While a complaint may seek both legal and equitable relief and yet allege but a single cause of action, *San Diego Water Co. v. San Diego, Flume Co.*, 108 Cal. 549, 41 P. 495, 29 L.R.A. 839, such rule of pleading by no means covers an attempt where so many persons of different interests are included.

[7,8] Not only does the instant pleading seek to enforce the forfeiture of a lease but it asserts claims for damages arising from tort, claims arising under a separate contract and damages for conversion of chattels. Because of such condition of their pleading it is now incurable unless this court should disregard the established rules with respect to the finality of judgments entered after a trial of issues at law. The second and third amended complaints both attempted to combine the several causes in a single count. Appellants having refused to conform with the fundamentals of correct pleading find themselves now in the unhappy position of having an adverse judgment against them notwithstanding they may be aggrieved by the acts of their own contractees with respect to important property rights.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

NUNNELEY v. EDGAR HOTEL et al.

L. A. 21454.

Supreme Court of California, in Bank.

Dec. 19, 1950.

Rehearing Denied Jan. 15, 1951.

Action by Golda J. Nunneley against Edgar Hotel and others to recover damages for injuries sustained by invitee of hotel guest in fall down a shaft opening onto roof of hotel. The Superior Court, Orange County, Franklin G. West, J., rendered judgment for plaintiff and defendants appealed. The Supreme Court, Edmonds, J., held that since general verdict against both owner and manager of hotel was supported by sufficient evidence of general negligence as alleged in first count of complaint and instructions as to negligence alleged in second count, based on violation of statutory requirement as to minimum height of parapet of shaft, referred only to conduct of owner, the giving of such instructions did not result in a miscarriage of justice.

Judgment affirmed.

Traynor and Spence, JJ., dissented.

Prior opinion 214 P.2d 64.

1. Innkeepers ⇨10.3

Liability of hotel owner for injuries sustained by an invitee of hotel guest in fall down shaft opening onto roof of hotel could not be predicated on violation of statute requiring 30-inch parapet at roof line of every vent shaft in hotels, unless injured person was one of class of persons for whose benefit statute was enacted, statute was designed to prevent accidents of the nature which caused injury and violation of statute was proximate cause of injury. Health and Safety Code, § 16827.

2. Negligence ⇨6

Violation of a statute is actionable negligence only as to those persons for whose benefit or protection it was enacted.

3. Innkeepers ⇨10.3

Statute requiring 30-inch parapet at roof line of every vent shaft in apartment house or hotel was enacted for the protection of any person lawfully on or about the premises, including an invitee of hotel guest. Health and Safety Code, § 16827.

4. Negligence ⇨6

Violation of a statute by failure to do a required act results in liability only if the harm which the violation causes is that which it was the purpose of the statute to prevent.

5. Innkeepers ⇨10.3

The statute requiring a minimum height of 30 inches for the parapet of every vent shaft in the roof of an apartment house or hotel was intended to protect persons lawfully upon the premises from walking or stumbling into such an opening and not to guard one from the danger of falling into a shaft by reason of sitting upon the parapet. Health and Safety Code, § 16827.

6. Negligence ⇨56(3)

Liability cannot be predicated upon noncompliance with a statutory command unless the act or omission proximately caused or contributed to the injury.

7. Innkeepers ⇨10.8

In action against hotel owner and manager for injuries sustained by invitee of hotel guest when she sat on mattress resting on 27-inch parapet of shaft opening onto roof of hotel and fell down the shaft, jury was improperly instructed that violation of statute requiring a minimum height of 30 inches for parapet of every vent shaft in roof of apartment house or hotel constituted negligence per se, since statute was not intended to prevent such an accident and fact that parapet was 3 inches lower than required by statute did not cause accident. Health and Safety Code, § 16827.

8. Appeal and error ⇨930(2)

Reviewing court must assume that jury understood the instructions and correctly applied them to the evidence.

9. Appeal and error ⇨1170(9)

Where general verdict against both owner and manager of hotel for injuries sustained by invitee of hotel guest in fall down shaft opening onto roof of hotel was supported by sufficient evidence of general negligence, as alleged in first count of complaint, and instructions as to negligence,

alleged in second count, based on violation of statutory requirement as to minimum height of parapet of shaft referred only to conduct of owner, the giving of such instructions did not result in a miscarriage of justice and was not reversible error. Health and Safety Code, § 16827; Const. art. 6, § 4½.

10. Trial ☞28(2)

Whether jury should be allowed to view the premises where an accident occurred is governed by statute and is committed to the sound discretion of trial judge whose ruling in such regard will not justify reversal of a judgment unless record clearly shows an abuse of such discretion. Code Civ.Proc. § 610.

11. Trial ☞28(2)

In action against owner and manager of hotel for injuries sustained by invitee of hotel guest in fall down shaft opening onto hotel roof, permitting jury to view scene of accident under instructions that fact that changes had been made was not to be considered by jury for any purpose was not abuse of discretion. Code Civ. Proc. § 610.

Forge, Reinhaus & Forge, Arthur M. Bradley and Stanley M. Reinhaus, all of Santa Ana, for appellants.

Harvey, Rimel & Johnston and Fred D. Johnston, all of Santa Ana, for respondent.

EDMONDS, Justice.

A jury awarded Golda J. Nunneley substantial damages for personal injuries sustained by her when she fell down a shaft opening onto the roof of a hotel building. The appeal from the judgment in her favor presents for decision questions as to the sufficiency of the evidence to support the verdict, the construction of section 16827 of the Health and Safety Code, and the propriety of certain instructions based upon that statute.

The chain of events which led to the accident commenced at a bar where Miss Nunneley met two Marine Corps sergeants. After a festive afternoon during which the group had a few drinks, she accom-

panied them to their rooms on the fourth floor of the Edgar Hotel. The rooms on this floor did not cover the entire area of the structure, and from the hallway one could walk onto the roof of the third floor.

The record includes evidence that by signs posted in conspicuous places, guests were warned to keep off the roof. According to other testimony, there had been added to cards posted in several rooms stating the Hotel Rules, a typewritten notice which read: "Stay off roof—No guests or persons allowed on roof of hotel." Miss Nunneley and one of the Marines told the jury that the lights in the hallway were dim, and they saw no such signs. Three police officers who investigated the accident did not recall seeing any signs.

There is also testimony which may be summarized as follows: Miss Nunneley and the sergeants each had one drink in the hotel room, but did not finish it. None of the group was intoxicated. In the company of one of her companions, Miss Nunneley stepped out of the hallway onto the roof of the building. The door to the roof was open, and nothing but a small ledge impeded the exit. The only light on the roof was from the street lights or from adjacent buildings.

The couple walked on the roof until they came to a mattress which appeared to them to be resting on what looked like "a flat top or another little roof like a little house". However, this was the opening of a shaft which extended vertically downward for a distance of approximately two stories. No lights could be seen coming from the shaft. The shaft, 68 inches wide, was surrounded by a parapet 27 inches high at the point where the mattress rested. The mattress was 72 inches in length. Using the Marine Corps term for a bed, Miss Nunneley said, "Here is a sack. * * * I think I will sit on it." She did so and fell to the bottom of the shaft receiving serious injuries.

The manager of the hotel testified that he had placed the mattress upon the springs of an old bed which was on the roof. He said that he did not know it had been moved to the top of the shaft and could not explain how it got there.

By the first count of her complaint, Miss Nunneley alleged general negligence on the part of Gladys P. Brickel, the owner of the hotel, and Charles F. Brickel, her husband, who was the manager of it. Her pleading declared that there were no warning signs of the danger upon the roof, nor was there adequate lighting. It also charged that, with the knowledge of the defendants, the mattress was left upon what appeared to be a solid foundation. In a second count, Miss Nunneley asserted that the defendants were negligent in that a "vent shaft", surrounded by a parapet less than 30 inches in height, was maintained contrary to the provisions of section 16827 of the Health and Safety Code.

The jury returned a general verdict in favor of the plaintiff without reference to the two counts in the complaint. A motion for a new trial was denied.

As ground for reversal of the judgment, the Brickels assert that certain instructions given to the jury were prejudicially erroneous. In support of this contention, it is insisted that the provisions of the Health and Safety Code which were a part of the charge do not apply to the hotel because the statute was enacted after the building was erected, and does not purport to apply retroactively. Furthermore, it is argued, even if the code section applies retroactively, the opening into which Miss Nunneley fell is not a vent shaft within the meaning of that term as used by the Legislature. The action of the court in allowing the jury, at Miss Nunneley's request, to view the premises, is also challenged. The appellants assert that the premises were not in the same condition at the time of trial as at the date of the accident.

Miss Nunneley declares that in the light of its legislative purpose and express terms, the provisions of the Health and Safety Code upon which she relies are applicable to her cause of action. With regard to the term "vent shaft", a liberal construction of the statute designed to minimize the hazards caused by open shafts would give her the benefits of its provisions. In any event, it is said, her complaint refers to "vent shaft", and the answer of the

Brickels accepts that term and fails to deny that it was such an opening. In addition, she points to the record, which shows that the words "vent shaft" and "light well" were used interchangeably throughout the trial by counsel for both parties.

Other points relied upon in support of the judgment are that the instructions attacked by the appellants could not be prejudicially erroneous as far as the judgment against Charles F. Brickel is concerned because, by their terms, they are not directed to any conduct by him. Furthermore, the complaint is in two counts and a general verdict was returned without mention of either of them. Miss Nunneley also argues that, because the Brickels did not question the form of the verdict, nor request submission of special issues to the jury, the challenged instructions are not prejudicially erroneous if the evidence upon either count will sustain the general verdict. Another point relied upon is the contention that if the Brickels wished to have the jury informed as to the legal difference between a "vent shaft" and a "light well", it was their duty to offer appropriate instructions. As they did not do so, she says, they are not in a position to complain that the jury was not properly charged.

[1] Assuming, but not deciding, that by maintaining a parapet less than 30 inches in height around an open shaft the owner of the Edgar Hotel violated section 16827 of the Health and Safety Code, Miss Nunneley may not recover damages based upon such violation unless she is one of the class of persons for whose benefit the statute was enacted. She must also prove that the accident which occurred was of the nature which the statute was designed to prevent, and present proof of violation of the statute as the proximate cause of her injury.

[2, 3] Not every infraction of a statute will result in civil liability. "Many statutes, such as those directed against various activities on Sunday, obviously are intended to protect the interests of the state, or the community at large, rather than those of any particular class of in-

dividuals." Prosser, Torts, p. 266. It follows that violation of such a statute constitutes actionable negligence only as to those persons for whose benefit or protection the statute was enacted. *Routh v. Quinn*, 20 Cal.2d 488, 127 P.2d 1, 149 A.L.R. 215; *King v. San Diego Elec. R. Co.*, 176 Cal. 266, 168 P. 131; and see 19 Cal. Jur. p. 635. But clearly section 16827 of the Health and Safety Code was enacted for the protection of any person lawfully on or about the premises, and Miss Nunneley came within that category.

[4] However, there is the additional issue of whether the purpose of the statutory requirement for a 30 inch parapet is to protect one from the type of accident which is shown by the record in this case. Violation of a legislative enactment by failing to do a required act results in liability only if "* * * the harm which the violation causes is that from which it was the purpose of the enactment to protect * * *." Rest. Torts, sec. 286, comment on clause c.

A well known case in which this rule was applied is *Gorris v. Scott*, 9 Ex. 125, L.R. 1874, which concerned a statute specifying the minimum size of pens upon vessels transporting animals across the ocean. The purpose of the legislation was to prevent sickness likely to result from overcrowding. The plaintiff's sheep were lost during a storm. It was held that the failure of the ship-owner to provide pens did not constitute actionable negligence because loss of the sheep by being washed overboard during the storm "* * * was not contemplated at all by the statute * * *."

More in point is *Indiana & Chicago Coal Co. v. Neal*, 166 Ind. 458, 77 N.E. 850, which concerned a driver of a coal car who was injured while opening the door to the mine. In violation of a statute, no person had been designated to open and close the door. Recovery was denied because the purpose of the statute was to prevent interference with circulation of air and not to guard against injury received by a person who opened such a door.

The same conclusion was reached in *Flynn v. Gordon*, 86 N.H. 198, 200, 165 A.

715, 716, where the court said: "The violation of a statute or ordinance becomes an actionable wrong only when the consequences contemplated by the provision in question have actually resulted from its violation. If none of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him." The decisions of this court are to the same effect. *Satterlee v. Orange Glen School Dist.*, 29 Cal.2d 581, 177 P.2d 279; *Harris v. Joffe*, 28 Cal.2d 418, 170 P.2d 454.

[5] Obviously, the statute upon which Miss Nunneley relies was not enacted for the purpose of protecting her against the type of hazard she encountered. The manifest intention of the Legislature in specifying a minimum height of 30 inches for the parapet of every vent shaft in the roof of an apartment house or hotel was to protect a person lawfully upon the premises from walking or stumbling into the opening. Upon no reasonable theory may it be said that the legislation was designed to guard one from the danger of falling into a shaft by reason of sitting upon the parapet. A wall 30 inches in height presents no more obstacle to sitting upon it than one three inches lower.

[6] Furthermore, no liability can be predicated upon noncompliance with a statutory command if the act or omission had no causal connection with the plaintiff's injury. *Blodgett v. B. H. Dyas Co.*, 4 Cal. 2d 511, 513, 50 P.2d 801; *Wohlenberg v. Malcewicz*, 56 Cal.App.2d 508, 512, 133 P. 2d 12. Otherwise stated, "* * * the act or omission must proximately cause or contribute to the injury". *Hitson v. Dwyer*, 61 Cal.App.2d 803, 808, 143 P.2d 952, 955. In the *Blodgett* case [4 Cal.2d 511, 513, 50 P.2d 803], the plaintiff sustained in-

jury from falling down a stairway which, in violation of an ordinance, was not equipped with a center handrail. In affirming a judgment of nonsuit the court said: "The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial."

The decision in *Burt v. Bank of California Nat. Ass'n*, 211 Cal. 548, 296 P. 68, 69, was based upon the same principle. There the plaintiff charged that the collapse of a building resulted from noncompliance with certain building requirements. In denying recovery, it was held: "Even though the structure failed to comply with the building laws, the trial court might reasonably conclude, as it did, that the sole proximate cause of the damage * * was appellant's negligence in unreasonably and excessively overloading the building, and that such injury and damage would have resulted from such overloading even if the structure had satisfied all building law requirements." To the same effect are: *Dewhirst v. Leopold*, 194 Cal. 424, 229 P. 30; *Williams v. Southern Pacific Co.*, 173 Cal. 525, 160 P. 660; *Thomas v. German Gen. etc. Soc.*, 168 Cal. 183, 141 P. 1186 (defendant had not complied with an ordinance requiring automatic closing devices, but the negligence of a fellow servant in moving the elevator was held to be the proximate cause of plaintiff's injuries); *Kauffman v. Machin Shirt Co.*, 167 Cal. 506, 140 P. 15; *Skaggs v. Wiley*, 108 Cal. App. 429, 292 P. 132 (statutory requirement as to speed of vehicle must be the proximate cause of the accident); *Provin v. Continental Oil Co.*, 49 Cal.App.2d 417, 121 P.2d 740 (improper construction of loading rack not the proximate cause of collision on highway where tank truck made a U-turn after backing from the loading rack).

Unquestionably, the cause of Miss Nunneley's injuries was not the fact that the parapet was three inches lower than required by statute. No evidence was offered to prove that had the wall been 30 inches in height the mattress would not have been placed upon it, or that at the

higher level the dangerous condition would have been more apparent. Nevertheless, the jury was instructed as follows: "Health and Safety Code, sec. 16827. Parapet or rail at roof line. 'A parapet or rail at least thirty inches in height shall be constructed at the roof line of every vent shaft in an apartment house or hotel so that no person may walk or fall into the shaft.' Conduct which is in violation of Section 16827 just read to you constitutes Negligence *per se*." (Instruction 15.) "If you find that defendant Gladys Peterson Brickel violated the statute requiring the parapet around the light well to be of minimum height, her negligence is thereby established. But before plaintiff may recover you must further find that the negligence of such defendant was the proximate cause of plaintiff's injury and that plaintiff was not guilty of contributory negligence and that plaintiff was an invitee (or licensee) as to the part of the premises where she was injured." (Instruction 30.)

[7] For the reasons stated, these instructions should not have been given. However, Miss Nunneley contends that when a complaint is in two or more counts and the evidence is sufficient to sustain a judgment upon one of them, error which affects the other count is immaterial. She relies upon *Shields v. Oxnard Harbor Dist.*, 46 Cal.App.2d 477, 491, 116 P.2d 121, 130, in which the court said: "A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict."

The instructions make no distinction between the two counts of the complaint. In the first count it was alleged, among other facts stated as establishing general negligence, that the Brickels maintained a vent shaft only 27 inches in height. In the second count, Miss Nunneley asserted that, contrary to the provisions of the Health

and Safety Code, the parapet was less than 30 inches in height. The instruction that if Gladys Peterson Brickel violated the statute "* * * her negligence is thereby established * * *" is applicable to the evidence presented as tending to prove the cause of action pleaded in either count. For this reason, the Brickels contend that, although the jury found against both the owner and the manager of the hotel, there is no way of determining whether responsibility was laid upon each of them because of general negligence, or violation of the statute.

[8] However, the instructions relating to the provisions of the Health and Safety Code referred only to the conduct of Gladys Peterson Brickel. It must be assumed that the jury understood the instructions and correctly applied them to the evidence. *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 P. 976; *Dermer v. Pistoresi*, 109 Cal.App. 310, 293 P. 78; *Robinson v. McKnight*, 103 Cal.App. 718, 284 P. 1056. It follows that the verdict against Charles F. Brickel, the manager of the hotel, was based upon the evidence relating to general negligence. There is no contention that the evidence in that regard is insufficient to support a verdict against either of the Brickels. Therefore, the implied finding of general negligence upon the part of Charles F. Brickel, being supported by the evidence and unaffected by the instructions concerning the requirements of the Health and Safety Code, fully justifies the verdict and judgment against him.

[9] The evidence of general negligence is also sufficient to establish the liability of Gladys Peterson Brickel, as the owner of the property. Otherwise stated, the jury could have found Mrs. Brickel liable for the injuries sustained by Miss Nunneley upon the cause of action for general negligence, the evidence as to that charge being applicable to her conduct as well as to that of her husband. Under these circumstances, the giving of Instructions 15 and 30 did not result in a miscarriage of justice. Cal. Const. Art. VI, sec. 4½.

The ground of attack upon the order allowing the jurors to view the place where

the accident occurred is that they might have found the appellants guilty of negligence because barricades and supporting pipes had since been placed around the top of the roof. However, when inspecting the premises the trial judge told the jurors: "This is the roof that has been referred to, * * * and there are some changes since the time of the accident. Those changes are to be entirely disregarded by you. They have nothing whatsoever to do with the accident." After pointing out the changes which had been made, he continued, "The fact that any changes have been made does not mean that there is any intimation upon the part of the defendants or any of them, that the condition was dangerous at the time of the accident, nor to be considered by you for any purpose whatsoever. You are to consider the condition as it existed at the time of the accident. * * * Is that clear to all of you?" The jurors replied in the affirmative.

[10, 11] The question as to whether the jury should be allowed to view the premises where an accident occurred is governed by section 610 of the Code of Civil Procedure, and is committed to the sound discretion of the trial judge. An appellate court will not reverse a judgment because of a ruling in that regard unless the record clearly shows an abuse of that discretion. *Brown v. Lemon Cove Ditch Co.*, 36 Cal. App. 94, 171 P. 705; see also *People v. Pompa*, 192 Cal. 412, 422, 221 P. 198. In the present case the order allowing inspection of the roof was fully justified and the rights of the appellants were carefully protected.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concur.

CARTER, J., concurs in the judgment.

TRAYNOR, Justice.

I dissent.

I agree that the trial court's instructions concerning negligence per se were erroneous. I do not agree, however, that the error was not prejudicial.

If there are two independent grounds upon which a verdict may have been based, erroneous instructions as to one ground will not justify reversal if it clearly appears that the verdict was based upon the other ground. *Oettinger v. Stewart*, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221. Thus, there need be no reversal if such other ground is established as a matter of law, *Clement v. State Reclamation Board*, 35 Cal.2d 628, 220 P.2d 897, as, for example, by "facts that are admitted as proved beyond controversy", *O'Meara v. Swortfiguer*, 191 Cal. 12, 17, 214 P. 975, 977. If the evidence with respect to such other ground is substantially in conflict, however, it is impossible to determine whether the jury based its verdict thereon or relied instead upon the ground upon which they were erroneously instructed. It is settled that in such a case the error is prejudicial. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 P. 36; *O'Meara v. Swortfiguer*, 191 Cal. 12, 214 P. 975; *Oettinger v. Stewart*, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221; *Huebottter v. Follett*, 27 Cal.2d 765, 167 P.2d 193; *Edwards v. Freeman*, 34 Cal.2d 589, 212 P.2d 883; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 220 P.2d 897; *Galloway v. United Railroads*, 69 Cal.App. 770, 232 P. 491; *Criswell v. Pacific Electric Railway Co.*, 48 Cal.App.2d 819, 120 P.2d 670.

In the present case, although the issue of negligence per se was improperly submitted to the jury, there was evidence of other negligence which, if believed, would support a verdict for the plaintiff. The other alleged acts of negligence were inadequate lighting, improper placement of the mattress over the vent shaft, and absence of warning signs. As to each of them, however, there was a sharp conflict in the evidence. The jury may have rejected these claims of negligence and relied solely upon the court's instructions that the height of the parapet constituted negligence per se. Under these circumstances, we should reverse the judgment.

It is contended, however, that the instructions concerning negligence per se referred only to Mrs. Brickel and that it

necessarily follows from the verdict against Mr. Brickel that the jury found him guilty of general negligence. It is argued further that since he was the manager of the hotel and acting within the scope of his employment, his negligence is imputed to his principal, Mrs. Brickel, so that she too can be held liable without reliance on negligence per se.

An examination of the erroneous instructions reveals that they did not refer to Mrs. Brickel exclusively.

Instruction No. 15 reads as follows: "Health and Safety Code, 16827. Parapet or rail at roof line. 'A parapet or rail at least thirty inches in height shall be constructed at the roof line of every vent shaft in an apartment house or hotel so that no person may walk or fall into the shaft.' Conduct which is in violation of Section 16827 just read to you constitutes negligence per se."

Instruction No. 30 reads as follows: "If you find that defendant Gladys Peterson Brickel violated the statute requiring the parapet around the light well to be of minimum height, her negligence is thereby established. But before plaintiff may recover you must further find that the negligence of such defendant was the proximate cause of plaintiff's injury and that plaintiff was not guilty of contributory negligence and that plaintiff was an invitee as to the part of the premises where she was injured."

Clearly No. 15 is not limited to Mrs. Brickel, and No. 30, while referring only to her, does not exclude Mr. Brickel and may be viewed as illustrative of the way in which No. 15 was meant to be applied. There is nothing in the pleadings, in the evidence, or elsewhere in the instructions to the jury to suggest that plaintiff or the trial court considered Mr. Brickel to be any less responsible for the violation of the statute than Mrs. Brickel. Neither of the defendants constructed the building, and therefore the statute could apply only to the operation of the hotel—conduct for which Mr. Brickel, as manager, was as responsible as his wife (*Restatement, Agency* § 355), and the complaint was so framed.

If the trial court had charged that "residing in Santa Ana is negligence per se," the error would have affected both defendants. This error would not be corrected as to Mr. Brickel by a later instruction that "if you find that defendant Gladys Peterson Brickel resides in Santa Ana, her negligence is thereby established"—such an instruction would serve rather to illustrate the general rule already given. The instructions in the present case are analogous, and it must be concluded that both defendants were prejudicially affected by them.

SPENCE, J., concurs.

Rehearing denied; TRAYNOR and SPENCE, JJ., dissenting.



36 Cal.2d 575

JOSEPH et al. v. DREW et al.
L. A. 21481.

Supreme Court of California, in Bank.
Dec. 27, 1950.

Rehearing Denied Jan. 25, 1951.

Action by Oscar G. Joseph and Graeme Joseph, individually and doing business as Joseph and Joseph, against Florence Drew, and others, to recover reasonable value of architectural services. The defendants filed a cross complaint. The Superior Court, Los Angeles County, A. W. Ashburn, J., rendered judgment for the defendant on the cross complaint, and orders were entered denying a new trial and plaintiffs' motion to vacate the judgment, and the plaintiffs appealed. The Supreme Court, Spence, J., held that blueprint plan submitted to city building department and bearing names of licensed architects who were members of partnership of which a non-architect was also a member was "instrument of service" within statute requiring names of architects forming partnership with non-architect to appear on all "instruments of service," and hence architects could recover for architectural services rendered defendants, notwithstanding that defendants did not see blueprint.

Purported appeal from order denying new trial dismissed and judgment and order denying motion to vacate the judgment reversed with directions.

Prior opinion 215 P.2d 80.

1. Licenses ⇨39.40

Licensed architects could form partnership with licensed building contractor who was not licensed as architect, and partnership was not required to procure license to do business, and architects as members of partnership could perform architectural services. Business and Professions Code, §§ 5536, 5539, 7000 et seq., 7029, 7031.

2. Licenses ⇨39.40

The words "instruments of service" in statute requiring name of architect forming partnership with non-architect to appear on all "instruments of service" must be interpreted according to their use and understanding in the profession. Civ.Code, §§ 13, 1645; Code Civ.Proc. §§ 16, 1861; Business and Professions Code, § 5539.

3. Evidence ⇨594

The uncontradicted testimony of witness to a particular fact may not be disregarded but should be accepted as proof of the fact. Code Civ.Proc. § 1844.

4. Evidence ⇨594

Uncontradicted testimony of licensed architect as to architectural profession's generally accepted meaning of statutory term used by legislature as a term peculiar to the profession could not be arbitrarily disregarded. Code Civ.Proc. § 1844; Business and Professions Code, §§ 5537-5539, 5586.

5. Licenses ⇨39.40

Blueprint plan submitted to city building department and bearing names of licensed architects who were members of partnership of which a non-architect was also a member was "instrument of service" within statute requiring names of architects forming partnership with non-architect to appear on all "instruments of service," and hence architects could recover for architectural services rendered defendants, notwithstanding that defendants did not see blueprint. Business and Professions Code, § 5539.

6. Licenses ⇨39.40

Licensed architects seeking recovery from defendants for architectural services which architects, as members of partnership containing member who was not an

architect, personally rendered defendants, were not required to notify defendants that the other member of partnership was not a licensed architect. Business and Professions Code, §§ 5537-5539.

7. Licenses ⇐39.40

The identification of members of partnership composed of two licensed architects and a non-architect and use of word "architects" in advertising and in telephone directory was not designation of non-architectural member of partnership as an architect in violation of statute relating to architectural partnerships. Business and Professions Code, § 5539.

8. Appeal and error ⇐110

An order denying motion for new trial is non-appealable.

Hindin, Girard, Lewis & Green, Los Angeles, for appellant.

Aaron Sapiro, Los Angeles, for respondent.

SPENCE, Justice.

This case presents for consideration the propriety of the trial court's denial to plaintiffs of recovery for the reasonable value of architectural services rendered to defendants. The determinative issue in adjudication of the validity of plaintiffs' claim is the purport of the state licensing requirements for the practice of architecture. Plaintiffs maintain that the law does not preclude the enforcement of their right to compensation; and the record, in the light of the pertinent statutory provisions, sustains plaintiffs' position.

Plaintiffs are architects licensed to practice in California. Prior to October 12, 1946, they had an associate, P. B. Fletcher, who was a licensed building contractor but not an architect. Under the name of Joseph, Fletcher and Joseph, a copartnership, the three men rendered architectural and building contracting services to the general public. Fletcher died on October 12, 1946, and thereafter plaintiffs proceeded to liquidate the partnership, continuing in business under the name of Joseph and

Joseph and limiting their activities to the performance of architectural services.

During the existence of the partnership, defendants retained the firm to prepare plans and specifications for the construction of several proposed buildings. From time to time defendants paid the partnership on account of such services a total sum of \$1,254.50. Plaintiffs brought the present action to recover the balance remaining due. By their answer defendants denied all liability and urged, as a separate defense, that since Fletcher was not an architect, "plaintiffs were not legally competent or entitled to accept or collect any fees" for architectural services performed "as members of the [partnership]." Defendants also filed a cross-complaint, seeking recovery of the money they had paid on account.

Upon the trial, plaintiffs conceded that their advertising and other contacts with the general public having reference to the partnership name, carried the words "Architectural and Mechanical Engineering," and that the firm was listed in the telephone directory as "Architects." From the exhibits introduced at the trial, it appears that the partnership was simply designated "Joseph, Fletcher and Joseph, Architecture-Engineering" upon the many drawings, plans, and specifications submitted by the partnership to defendants but that the blueprint plan submitted to the City Building Department carried the added descriptive identification as follows: "O. G. Joseph, Architect and Civil Engineer; Graeme Joseph, Architect; License C-483, C-583, and 6382." All of the architectural work done for defendants was actually performed by plaintiffs, licensed architects. It was stipulated and the court found that the partnership rendered architectural services to defendants of the reasonable value of \$4,644. However, the court further found that the firm was not entitled to collect any compensation for such services and gave judgment in favor of defendants on their cross-complaint for the money they had paid on account. Plaintiffs have appealed, urging that the trial court erred in its refusal to recognize the validity of their claim.

The following provisions of the Business and Professions Code are pertinent to the issue of the legality of plaintiffs' claim. Section 5536 declares it a "misdemeanor, punishable by * * * fine * * * or by imprisonment * * * or by both * * *, for any person, without a certificate, to practice architecture in this State or to advertise or put any sign or card or other device which might indicate to the public that he is an architect or that he is qualified to engage in the practice of architecture." Section 5539 provides: "This chapter does not prevent an architect from forming a partnership with persons who are not architects, but the name of the architect shall appear as the architect on all instruments of service and in no case may the other members of the partnership be designated as architects."

Plaintiffs do not dispute the settled rule in this state, enunciated in *Wood v. Krepps*, 168 Cal. 382, at page 386, 143 P. 691 at page 692, as follows: "[W]hen the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public * * *, the imposition of the penalty amounts to a prohibition against doing the business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void." But, as plaintiffs argue, an analysis of the factual situation here shows that this case does not come within the purview of the cited rule.

[1] Plaintiffs, as licensed architects, were expressly authorized to form a partnership with an unlicensed person, and such association or firm was not required as such to procure a license for the doing of business. Sec. 5539. Accordingly, the licensing requirements applicable to the practice of architecture must be differentiated from the provisions governing the business of a building contractor, Business & Professions Code, ch. 9, § 7000 et seq., whereby an additional partnership license is necessary for its lawful pursuit of the contracting

business, sec. 7029, and a clear failure to so comply with the law will preclude its recovery of compensation for the work and services performed while so unlicensed, sec. 7031. See *Loving & Evans v. Blick*, 33 Cal.2d 603, 607, 204 P.2d 23. Here plaintiffs were certificated architects pursuant to the statutory regulation, sec. 5536, and as members of the firm so individually licensed "to practice architecture", they concededly performed for defendants all the architectural services here involved. So distinguishable is the line of cases on which defendants rely, where an unlicensed architect sought compensation for architectural services rendered and the claim was denied because of a failure to comply with the statutory law. See *Force v. Hart*, 209 Cal. 600, 605, 289 P. 828; *Payne v. DeVaughn*, 77 Cal.App. 399, 403, 246 P. 1069; *Jones v. Wickstrom*, 92 Cal.App. 292, 295-296, 268 P. 449; *Meyer & Holler v. Bowman*, 121 Cal.App. 112, 114-115, 8 P.2d 936; *Baer v. Tippet*, 34 Cal.App.2d 33, 35, 92 P.2d 1028; *Cash v. Blackett*, 87 Cal.App.2d 233, 237, 196 P.2d 585.

[2] Nor does it appear that in its business dealings with defendants, under authority of section 5539, the partnership failed to meet the statutory requirement of identifying the architects in the firm on "all instruments of service". In aid of the court's interpretation of these words according to their use and understanding in the profession, Civ.Code, §§ 13, 1645; Code Civ.Proc., §§ 16, 1861; 23 Cal.Jur., § 125, p. 750, plaintiff Oscar Joseph, as a duly qualified and competent witness, testified as follows: That the term "instruments of service" has a generally accepted meaning when used in connection with the architectural profession; that as so used the term refers to the "final" plans and specifications "utilized for the actual construction of the building" as distinguished from "preliminary" sketches and drawings. Upon this basis of differentiation, he designated the above-mentioned blueprint submitted to the City Building Department as the "final" document carrying the required "legend" in identifying plaintiffs as the licensed architects in the partnership. No effort

was made to impeach this witness and his testimony stands uncontradicted in the record. Code Civ.Proc., § 1844.

[3, 4] It is the general rule that "the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact." 10 Cal.Jur. § 362, p. 1143; *In re Estate of Warner*, 167 Cal. 686, 690, 140 P. 583; *Hynes v. White*, 47 Cal.App. 549, 552, 190 P. 836. While there are exceptions to this rule, the fact to which the witness testified here concerned the generally accepted meaning of a phrase when used in connection with the architectural profession. Under such circumstances, the rule is peculiarly applicable for if it was claimed that the witness did not speak the truth, contrary evidence concerning such generally accepted meaning would have been readily available through any of the numerous members of that profession, and yet none was called.

[5] Defendants nevertheless argue that the term "instruments of service" should be construed as an "all-inclusive" phrase, covering plans, drawings, specifications and other data relating to the practice of architecture—in short, all written instruments issued by the architect. But the definition of this term was an issue before the trial court, and the only evidence offered on its interpretation was that introduced by plaintiffs as above recited, whereby it was declared to have an "accepted meaning," according to the "custom of [the] profession," to refer to a "final instrument as distinguished from a preliminary sketch," and the blueprint submitted by the partnership to the City Building Department, with the "legend" identifying its preparation by plaintiffs as licensed architects, was so differentiated from the "preliminary" working papers. A reading of the code sections cited by the parties wherein the term in question appears, Business & Professions Code, §§ 5537, 5538, 5539, 5586, does not militate against plaintiffs' contention that the legislature used it as a "term peculiar to the architectural profession." Accordingly, the uncontradicted evidence introduced by plaintiffs in

establishing its restricted meaning in relation to architectural services "can not be arbitrarily disregarded." *Fidelity & Casualty Co. v. Abraham*, 70 Cal.App.2d 776, 782, 161 P.2d 689, 692; see, also, *Gomez v. Cecena*, 15 Cal.2d 363, 366, 101 P.2d 477. As the term is so defined, the partnership satisfied the condition imposed by said section 5539 by designating the names of the architects, together with their license numbers, upon the final blueprint. While the court found, pursuant to the testimony of defendant John Drew, that defendants had not seen such blueprint, the cited statute did not require the partnership to so exhibit it, and its omission in this regard cannot avail defendants here.

[6] Defendants also argue the significance of the partnership's claimed non-compliance with the requirement of section 5537, by failing to notify them "in writing" that Fletcher, as a member of the partnership furnishing the plans and specifications to defendants, was not a licensed architect. But that section does not purport to have application here. Rather it appears as a condition relating solely to "uncertificated persons" who seek the enforcement of their compensation claim for architectural services which they have performed, and providing for such recovery if the requisite notice is given to the recipient of the services. See *Baer v. Tippet*, supra, 34 Cal.App.2d 33, 39-40, 92 P.2d 1028. Here plaintiffs as licensed architects seek recovery only for architectural services which they, as members of the partnership, personally rendered to defendants; and neither is any claim made that the unlicensed member, Fletcher, performed any architectural services for defendants, nor is compensation sought therefor. The partnership, formed under authority of statute, had only to meet the conditions so expressly imposed: (1) identifying on "all instruments of service" the members of the firm who were architects and (2) "in no case" designating "the other members * * * as architects" sec. 5539. Under such circumstances, the cited section appears to be complete in itself as a statutory regulation governing the authorized business entity, and there would

be no ground for engrafting therein a condition having reference to a different factual situation, sec. 5537.

[7] No purpose would be served by section 5539 in authorizing licensed architects to form a partnership with an "unlicensed person" unless it was intended to permit just such business dealings as the partnership conducted with defendants here. While the partnership used in its advertising the full firm name of "Joseph, Fletcher and Joseph," accompanied by the words "Architectural and Mechanical Engineering," and while the partnership was listed in the telephone directory as "Architects," it does not seem reasonable to conclude that such mere identification of the firm's membership and the scope of the firm's services should be held to amount to the designation of the unlicensed person, Fletcher, as an architect within the meaning of section 5539. It has been said of the original act regulating the practice of architecture, Stats. 1901, p. 641: "The invasions it makes on constitutional rights are not to be carried farther than is necessary to protect the public from the evils intended to be removed, unless the language compels such meaning and such effect is reasonably calculated to secure the legitimate objects for which the power is exercised." *Binford v. Boyd*, 178 Cal. 458, 462, 174 P. 56, 58. Applying the same principles in the interpretation of the present statutes, there appears to be nothing in the language which compels the conclusion that plaintiffs should be denied recovery for the reasonable value of the services which they, as duly qualified architects under the state licensing law, have performed for defendants. Accordingly, plaintiffs are entitled to recover the reasonable value of their architectural services as found by the trial court to be \$4,644, less the credit of \$1,254.50 paid on account by defendants, or \$3,389.50.

[8] It therefore appears appropriate to reverse the judgment with directions, and consistent therewith, to reverse the order denying plaintiffs' motion to vacate said judgment, from which order plaintiffs have likewise appealed. Plaintiffs' purported appeal from the order denying their motion

for a new trial should be dismissed, as such order is non-appealable. 2 Cal.Jur. § 34, pp. 173-174.

The purported appeal from the order denying a new trial is dismissed. The judgment and the order denying the motion to vacate the judgment are reversed, with directions to the trial court to enter judgment in favor of plaintiffs in the sum of \$3,389.50, with interest.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

SCHAUER, J., concurs in the judgment.

CARTER, Justice (concurring).

I concur in the judgment of reversal, as I can see no valid distinction between the position taken by plaintiffs in the case at bar and the legal theory advanced in my dissenting opinions in the cases of *Loving & Evans v. Blick*, 33 Cal.2d 603, 617, 204 P.2d 23, and *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628, 633, 204 P.2d 37. The attempt by the majority to distinguish the case at bar from the last cited cases is so tenuous and hypertechnical that it amounts to the splitting of hairs.



36 Cal.2d 504

**HILDEBRAND et al. v. STATE BAR
OF CALIFORNIA.**

S. F. 18050.

Supreme Court of California, in Bank.

Dec. 20, 1950.

Proceedings by three attorneys to review a recommendation of the Board of Governors of the State Bar of California that the attorneys be disciplined for violation of the Rules of Professional Conduct of the State Bar. The Supreme Court held that participation by the attorneys in a plan under which a labor union established a legal aid department as a service to its members in procuring experienced personal injury attorneys to prosecute damage claims, and under which the attorneys were paid on a con-

tingent fee basis violated the Rules of Professional Conduct of the State Bar, but that in the absence of any prior decision that it was improper for attorneys to participate in such a plan, the proceeding would be dismissed without disciplinary action.

Proceeding dismissed.

Carter and Traynor, JJ., dissented.

Attorney and client $\hookrightarrow$ 32, 56

Participation by attorneys in a plan under which labor union established legal aid department as a service to its members and their families in procuring lawyers experienced in personal injury law to prosecute damage claims on a contingent fee basis violated Rules of Professional Conduct of the State Bar, but where there was no prior decision that it was improper for attorneys to participate in such a plan disciplinary proceedings would be dismissed. Rules of Professional Conduct of State Bar, rules 2, 3; Pen.Code, § 182.

Clifton Hildebrand, Oakland, in pro. per., and Sheridan Downey, Jr., Los Angeles, for petitioners.

Eugene D. Williams Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioners are attorneys, Hildebrand having been admitted to practice in 1925, Bills in 1923, and McLeod in 1935. By this proceeding they seek a review of the recommendation of the Board of Governors of The State Bar that they be disciplined for the violation of Rule 2, section a (commonly known as the "solicitation" rule) and Rule 3 (generally referred to as the "ambulance chasing" rule) of the Rules of Professional Conduct of The State Bar of California. 26 Cal.2d 32. The disciplinary action arose out of petitioners' representation of injured railroad men on claims against railroad companies, pursuant to a contract with the Brotherhood of Railroad Trainmen designating them as regional counsel for the Brotherhood—Hildebrand having acted alone in such ca-

capacity beginning in 1933, then joined by Bills sometime prior to 1940, and by McLeod in 1942.

By the notice to show cause petitioners were charged with forty-one separate acts of solicitation of professional employment; a general "conspiracy" for the purpose of soliciting and obtaining employment as attorneys, including the employment of others to procure such employment for them, with "runners and cappers" acting for them in violation of section 182 of the Penal Code, and "dividing * * * attorneys' fees with persons not attorneys," and "knowingly accepting * * * professional employment" offered to them as an incident of the activities of such persons; and specific instances of compensation of certain named persons not licensed to practice law for their solicitation of employment on behalf of petitioners.

Petitioners filed a written answer in denial of all the charges, and in addition urged as affirmative defenses: (1) that the proceeding was "brought to serve private purposes and private spites" of the railroad companies, *Peck v. State Bar of California*, 217 Cal. 47, 17 P.2d 112; *Burke v. State Bar*, 218 Cal. 143, 21 P.2d 577; *Herrscher v. State Bar*, 4 Cal.2d 399, 49 P.2d 832; and (2) that petitioners' methods of practice and activities had been approved by decisions from this and other jurisdictions, *Hildebrand v. State Bar*, 18 Cal.2d 816, 117 P.2d 860; *Ryan v. Pennsylvania R. Co.*, 268 Ill.App. 364; *In re Seidman*, 228 App. Div. 515, 240 N.Y.S. 592.

Numerous hearings were held before the local administrative committee running from May through August, 1948, during the course of which an amendment was made to the notice to show cause whereby (1) the "conspiracy" count was expanded to include specific reference to petitioners' acceptance of "professional employment" as "incident to the activities * * * of the Brotherhood of Railroad Trainmen, an association that for compensation, controlled, directed and influenced such employment"; and (2) a new count was added describing the legal aid services rendered by the Brotherhood to its injured members

and petitioners' connection therewith. Following petitioners' denial of these later added charges at the subsequent hearings, and argument and submission of the matter, the committee on December 1, 1948, made findings and conclusions adverse to petitioners. In this regard it will suffice to say that the committee sustained the charges of petitioners' solicitation of professional employment in more than twenty separate cases; petitioners' compensation of some six persons acting as "runners" or "cappers," and as their agents, in obtaining employment for them; and petitioners' knowing acceptance of employment through the legal aid services of the Brotherhood of Railroad Trainmen in directing the handling of injury claims by its members against the railroads. Upon such findings the committee recommended suspension from practice of the law for varying periods against petitioners—Hildebrand for four years, Bills for two years, and McLeod for one year.

Thereafter the record was submitted to the Board of Governors, which body, after full argument and consideration of the matter, made its own findings affirming substantially the conspiracy and solicitation findings of the committee both as to petitioners' procurement of professional employment through the activities of individuals operating as "runners" or "cappers" for petitioners, as well as through the contractual undertaking with the Brotherhood of Railroad Trainmen. However, in passing upon the separate charges of solicitation, the Board of Governors stated that such instances of alleged misconduct "dissociated from [the] basic arrangement" with the Brotherhood and "standing alone" would fail "to make out a case of solicitation" in that "in practically every such case, standing alone, there was either a proper reference or a proper contact made by the attorneys within the holdings of cases such as *Hildebrand v. State Bar*, 18 Cal.2d 816, 117 P.2d 860," and it "is only when these individual cases are viewed in the light of their relationship to the central arrangement and in the light of the evidence bearing upon the charges of conspiracy * * * that they acquire significance." With such

limitation of the controlling factor in this disciplinary proceeding against petitioners, and after a detailed recital of the prevailing contractual arrangement between petitioners and the Brotherhood of Railroad Trainmen whereby the latter "channeled" the injury cases of its members to petitioners for prosecution, the Board of Governors concluded that petitioners were "guilty * * * of violations of Rule 2, section a, and Rule 3 of the Rules of Professional Conduct" but reduced the degree of discipline to be imposed upon petitioners according to the following recommendation—that "Hildebrand be suspended from the practice of the law * * * for a period of four months" and that "Bills and * * * McLeod be publicly reprovved by the Court."

It appears from a full examination of the record herein that the Board of Governors properly narrowed the fundamental issue of professional misconduct to petitioners' participation in the basic plan of the Brotherhood of Railroad Trainmen in providing legal services for its members. Accordingly, the basic plan must be carefully analyzed with respect to its operation and effect in relation to the particular Rules of Professional Conduct here involved.

Rule 2, section a, reads: "A member of The State Bar shall not solicit professional employment by advertisement or otherwise." 26 Cal.2d 32. Rule 3, so far as here pertinent, provides: "A member of The State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor, except with a person licensed to practice law, shall he directly or indirectly share compensation arising out of or incidental to professional employment; nor * * * knowingly accept professional employment offered to him as a result of or as an incident to the activities of any person not so licensed or of any association or corporation that for compensation controls, directs or influences such employment * * *." 26 Cal.2d 34.

There is no conflict in the evidence concerning the basic plan. It appears that in 1930 the Brotherhood of Railroad Trainmen established a Legal Aid Department as

a service to its members and their families in procuring lawyers experienced in personal injury law to prosecute damage claims against the railroad companies, at charges which would be somewhat less than the usual percentage of contingent fees in such cases. Regional counsel was designated in each territorial zone, and the employment of such counsel was urged or strongly recommended to the injured members and their families. As part of this Legal Aid Department, there was also established an investigation service with investigators assigned to report on the facts of an accident case and obtain evidence thereon pertinent to the presentation of the damage claims.

The plan originally called for a written contract on a 20% contingent fee basis, with the agreement on the part of the attorney to turn over one-fourth of that amount, or 5%, to the Brotherhood for maintenance of the Legal Aid Department. Contracts were to be executed directly between the designated regional counsel and the injured claimants on forms approved by the Legal Aid Department, and such counsel was required to advance all necessary court costs, expert witness fees, expense of medical examinations, and like expenditure items. These expenses were to be deducted from the amount of recovery before a division would be made of the net sum between the lawyers and the claimants. As here pertinent in the time period involved, Hildebrand, who had been acting alone as regional counsel in this state for the Brotherhood since 1933, was joined in the enterprise by Bills sometime prior to 1940 and by McLeod in 1942; and together they undertook by contractual arrangement with the Brotherhood to render legal services to its members in pursuance of the basic plan. Meanwhile it appears that a change was made in the contingent fee provisions so that the claimant was required to sign two contracts covering an aggregate contingent fee of 25%—one contract calling for 19% to the attorney for legal services and the other for 6% to the Brotherhood for the maintenance of the Legal Aid Department, with its investigating service. Then as of June 15, 1946, this fee proce-

dure was superseded under an arrangement with the Brotherhood permitting the attorneys to handle the cases on a flat 25% basis but requiring them to pay the investigators, members of the Brotherhood's staff, on a *quantum meruit* basis for their services.

A realistic appraisal of this basic plan compels the conclusion that it offended recognized standards of professional conduct in providing the means whereby solicitation of the employment of petitioners was effected on a wholesale basis in violation of Rule 2, section a. While the members of the Brotherhood were not compelled to employ regional counsel for the handling of their lawsuits, they were subject to continuous and strong recommendation from the Brotherhood to do so through its journal publications and circulars to the members, as well as by personal visits from officers of the Brotherhood locals advising the injured railroad men and their families to avail themselves of the benefits furnished by the Legal Aid Department, embracing selected investigating and legal services. The compensation to be received by regional counsel for their representation of injured railroad men or their families was all predetermined according to the basic plan with the Brotherhood, and the client's signing of the contracts calling for legal and investigating services on the 19% and 6% contingent fee basis was no more than a ratification of the Brotherhood's arrangement with the designated regional counsel. There is no question from the record but that petitioners knew exactly how their professional employment by injured railroad men was being solicited for them through the Brotherhood's activities, and they were willing to perform the desired legal services at a substantially reduced contingent fee rate in the belief that the volume of business to be directed to them through such solicitation would warrant such financial consideration. From such aspect it is apparent that the solicitation in question had its "origin in the mind[s] of" petitioners pursuant to the common course of action arranged with the Brotherhood, see *People v. Levy*, 8 Cal.App.2d Supp. 763, 769, 50 P.2d 509, and

as parties to such agreement, petitioners should be held accountable for the results of their participation in the preconceived general scheme.

Rule 3 of the Rules of Professional Conduct, *supra*, expressly proscribes the remuneration by an attorney of another for "soliciting or obtaining professional employment for him," and likewise denounces an attorney's knowing acceptance of employment as a result of the "activities of * * * any association or corporation that for compensation controls, directs or influences such employment." It is clear from the record that the Brotherhood has been remunerated and compensated for soliciting, directing and influencing the employment of petitioners by its members. In the first place for its participation in the common course of action, it appears that the Brotherhood under the two-contract contingent fee arrangement—the 6% allowance for investigation and the 19% allowance for legal services, which was the procedure followed for a great deal of the time here pertinent—discharged a sizable deficit (\$100,000) which had accrued over the years in the beginning of the Legal Aid Department's operations when the investigating services were furnished free to the members, and, in addition, built up a reserve of "approximately \$80,000.00." But furthermore, it cannot be said that the reference to remuneration and compensation in Rule 3 envisages only the receipt of money as distinguished from other advantages or benefits that may accrue from an employment undertaking as is here involved. Thus (1) it was a matter of concern to the Brotherhood that the lawsuits of its injured members be handled by experienced lawyers, and the basic plan with petitioners was designed to provide legal services for its members at what might be termed "wholesale rates"; and (2) such service would reasonably constitute an inducing cause for attracting membership in the Brotherhood and the payment of dues thereto. In the light of these considerations, it appears indisputable that the ethical standards envisaged by Rule 3, *supra*, have been violated by petitioners.

Petitioners argue that the Brotherhood's Legal Aid plan has been approved by judicial decision, citing *Ryan v. Pennsylvania R. Co.*, Ill.1932, 268 Ill.App. 364. In that case a regional attorney for the Brotherhood sought to assert a lien for professional service, based upon a contingent fee contract of 20% executed with the injured railroad man, where the railroad company had secretly settled with the client. The railroad company contended that such retainer embodied an illegal contract (1) not only in that the professional employment had been solicited by the Brotherhood (2) but also in the fee-splitting feature inherent in the arrangement in that the compensation for the attorney was in reality only 14% and the remaining 6% was to go to the Brotherhood as its share of the damage recovery. The contract in question was upheld by the appellate court of Illinois for the purpose of the attorney's lien, and accordingly the attorney was awarded 20% of the amount of the settlement. It is true that in reaching such decision, the court fully detailed the "organized plan" in its operative effect upon regional counsel's undertaking personal injury cases for members of the Brotherhood, but such examination of the coordinated activity of the Brotherhood and regional counsel was correlated with the processes of the Legal Aid Department as a service feature to the Brotherhood's members in securing legal services at a minimum fee coincident with the competent investigation of reported injury claims. In so discussing the facts from the standpoint of the benefits afforded the Brotherhood and its members in the assertion of their legal rights rather than from the standpoint of the proprieties of the lawyer in maintaining professional standards, the Illinois court concluded that it "would not be justified in holding that the contract on which the [attorney's] claim is based 'was secured by unlawful and unethical solicitation and fee-splitting.'" 268 Ill.App. at page 379.

The distinct premise of the *Ryan* decision is precisely noted in the case of *In re O'Neill*, D.C.E.D.N.Y., 1933, 5 F.Supp. 465, a disciplinary proceeding for the alleged

infraction of the ethical standards of the New York State Bar Association relative to "stirring up litigation." There in passing upon the Brotherhood's basic arrangement with regional counsel for the handling of injury claims of Brotherhood members, the court noted that "During the progress of [the] proceeding" the original contingent fee arrangement between "the [attorney], his client and the Brotherhood" (calling for a single contract for a 20% fee with the attorney, who "turned over one-quarter [thereof] to the Brotherhood") was "somewhat altered in form—as the result of an intimation judicially imparted at preliminary hearing—so that now the [attorney] procures two contracts, one to secure his 15 per cent. contingent fee, and the other whereby the client employs the Legal Aid Department of the Brotherhood" to do the investigating work on his claim, and "agree[s] * * * to pay it, in accordance with its plan, five per cent. (5%) of the net settlement, verdict or recovery." 5 F.Supp. at page 467. With regard to this ostensible change in the contractual relations of the parties, the court pertinently continued, 5 F.Supp. at page 467: "We can see no difference in principle between the use of two contracts and one, where the purpose is to secure for the Brotherhood one-quarter of the contingent fee as a contribution to the Legal Aid Department of which the investigator is a representative." Then after noting the further professional standard of the New York State Bar Association declaring that the "professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer" and so destroys the latter's independence of function with the former, the court rejected the attorney's claim that "the practice in question" might be justified "because of what was written in the case of *Ryan v. The Pennsylvania Railroad Co.*," with this observation, 5 F. Supp. at pages 467-468: "The basis of [that] decision was that the contract was not contrary to public policy, and that the Brotherhood was engaged in rendering an enlightened service to its members * * * [but that] is not the question upon which

this court must pass, which has to do only with the infraction of its rules. * * *

It is our conclusion that the [attorney's] unprofessional conduct as indicated has been clearly established, and invites the censure of the court, which is hereby recorded."

Petitioners argue that the contingent fee arrangements here made between the parties are not vulnerable to the prevailing objection in the O'Neill case because the contract in favor of the Brotherhood for 6% of the net recovery was presented to the client not by the attorney but by a representative of the Brotherhood, so that the attorney concerned himself only with his own contract for the 19% allowance. In fact, petitioners admit that this new procedure in handling the two contracts was adopted as the result of the discussion and criticism expressed in the O'Neill case. But the censurable premise of the divided contingent fee contract remained the same. There was no change in the substance of the entire transaction as emanating from the Brotherhood's Legal Aid Department for the coordinated purpose of supplying to the members the services of investigators and legal counsel. Contracts for the two services were made dependent one upon the other, for, according to the record, petitioners were unable to cite any instance where the injured member ever executed a contingent fee contract with the Brotherhood for the investigation of his case and yet did not at substantially the same time execute a contingent fee contract for legal representation. In short, the two contracts constituted but one overall transaction involving the division of compensation between regional counsel and the Brotherhood as a fee-splitting device contrary to Rule 3 of the Rules of Professional Conduct and the requirement that an attorney dissociate himself in his professional employment from control by a lay intermediary or organization.

Petitioners claim that their conduct was approved by this court in the case of *Hildebrand v. State Bar*, 1941, 18 Cal.2d 816, 117 P.2d 860, 867 where a "charge * * * of solicitation of professional employment"

made against petitioner Hildebrand, acting as regional counsel in the representation of an injured railroad man under the auspices of the Brotherhood's Legal Aid Department, was dismissed as not "sufficiently supported by the evidence"—the so-called "Bishop Matter." 18 Cal.2d at pages 830, 834, 117 P.2d at page 869. A reading of that opinion, however, clearly shows that the disciplinary issue there resolved related only to alleged misconduct as correlated with the charge of solicitation of the one case in question, and did not purport to pass upon the general charge of "solicitation of professional employment" pursuant to the basic plan of the Brotherhood in procuring its members to employ designated regional counsel as part of the services rendered by the Legal Aid Department. As so distinguished, the Hildebrand case is not a judicial determination of the precise disciplinary consideration here argued—the propriety of petitioners' contractual relationship with the Brotherhood as a part of the basic service plan of the Legal Aid Department to its members, when attacked as a general overall solicitation of legal employment contrary to established professional standards.

There is no merit to petitioners' further claim that any fee-splitting criticism to which the divided contingent fee contract might be subject is no longer a factor for consideration here, since that arrangement was superseded in June, 1946, by the single contractual stipulation of a 25% contingent fee running wholly in favor of the attorney, who paid therefrom the Brotherhood's investigators on a *quantum meruit* basis. Obviously, in the determination of this disciplinary proceeding petitioners must be held accountable for the practices which existed during the period that they were charged with misconduct. Moreover, under both situations as to fee arrangements the general "channeling" of legal work to petitioners continued as a prevailing procedure embraced in the Brotherhood's undertaking with petitioners. Likewise immaterial is the fact that as of October 15, 1949 petitioner Hildebrand's appointment as "regional counsel for the Brotherhood of Railroad Trainmen" was canceled and termi-

nated. While there may no longer be a "basic contractual arrangement" with the Brotherhood as a present disciplinary problem it is petitioners' prior actions as heretofore discussed which must be examined in the light of the charge of professional misconduct. Nor does the worthiness of the Legal Aid Department as an enterprise established by the Brotherhood to render valuable services to its members in providing the means for appropriate presentation of their damage claims, *In re O'Neill*, supra, D.C., 5 F.Supp. 465, or the manner in which the charge of misconduct on the part of petitioners was made to The State Bar obscure the essential issue of petitioners' alleged violation of professional standards by reason of their participation in the basic plan of the Brotherhood as a general scheme for the solicitation of professional employment among members of the Brotherhood.

Petitioners' acts as here assailed in relation to Rule 2, section a, and Rule 3 of the Rules of Professional Conduct, supra, cannot be condoned as consistent with the ethical proprieties exacted of members of the bar in this state. However, in view of the somewhat divergent implications found in the cited cases concerning the Brotherhood's basic plan, and in the absence of any prior decision in this state holding that it was improper for petitioners to participate in such a plan in the manner above described, it is our conclusion that the ends of justice will be served by dismissing the present proceeding without disciplinary action, thereby permitting this opinion, as the first expression of the views of this court upon the subject, to serve prospectively as a guide to the members of the profession generally, rather than to serve retrospectively to the detriment of petitioners.

The proceeding is dismissed.

CARTER, Justice.

I dissent.

I concur in the judgment of dismissal, but dissent from the holding of the majority that petitioners have violated Rule 2, section (a) and Rule 3 of the Rules of

Professional Conduct of the State Bar of California.

Before discussing the mode of operation of the Brotherhood and petitioners with reference to the legal aid services here involved, it is necessary to examine the background that led to the arrangement between them. It appears that the Brotherhood of Railroad Trainmen is an organization of railroad employees. Those employees agreed that it was advisable to provide some means whereby they could more efficiently handle cases of railroad workmen who were injured in the course of their work. Such claims are certainly not "damage actions" in an ordinary sense for they arise under the Federal Employers' Liability Act of Congress, 45 U.S.C.A. § 51 et seq. That act was designed for the protection of railroad employees engaged in interstate commerce who otherwise were left to common law remedies which were wholly inadequate. This act filled the need that workmen's compensation acts accorded to other workmen and is buttressed by the Safety Appliance Act of Congress, 45 U.S.C.A. § 1 et seq. These acts, however, lack the informality of procedure characteristic of the workmen's compensation acts, as the claims arising thereunder are prosecuted in the courts rather than before a commission and, hence, qualified counsel, as well as competent investigators, are indispensable. The Brotherhood here involved is an organization composed of the persons who are protected by the Federal Employers' Liability Act, *supra*, and their employers are subject to its provisions. Hence there is a manifest community of interest between the employees and their organization, which justifies the latter in the procurement of legal and investigation services, all of which directly ties in to the rights and remedies established by the Federal Employers' Liability Act. Thus, we do not have a case where the purpose, motive and result is the stirring up or exciting of litigation. Nor do we have a situation where hirelings are used to obtain clients for an attorney who would otherwise have no contact with them. Much less is there any splitting of fees or knowingly obtaining clients for a com-

pensation. It is nothing more than a proper joining of forces for the accomplishment of a proper legal objective of mutual protection.

The arrangement between petitioners and the Brotherhood at the time pertinent as outlined by the majority opinion is that the Brotherhood and petitioners agreed that the latter were to be counsel for a certain geographical area and be available to handle cases for employee claimants—members of the Brotherhood who suffered industrial injuries in that area. For that service, the contract with the claimant was, one agreeing to pay 6% of any recovery to the Brotherhood for its investigation services, and the other to pay 19% to petitioners as their fee for handling the prospective action to recover on the claim. The Brotherhood urged its members to take advantage of the service, although they were not required to do so, and petitioners knew that the members were so urged.

If such a plan subjects the attorney with whom the arrangement is made to disciplinary action for solicitation, as the majority holds, then a rule has been established that will have more far reaching effects than any ever before stated by this Court. The ramifications are innumerable. The rule will apply to other professional fields where a similar arrangement must be held to constitute solicitation and, therefore, forbidden. Merely scratching the surface uncovers the universal provision of liability insurance policies under which the insurer agrees to defend the insured in any legal action arising under such a policy and retains control over that litigation, including the employment of an attorney. The fees of the attorney are paid by the insurer out of the premiums it receives from the insured. The insurer advertises for and solicits business—the sale of its policies. It would be folly to suggest that the attorneys employed by such insurers do not know that such is the practice, and it is common knowledge that some attorneys, while not on a salary-employee basis with the insurer, have an arrangement whereby they are regularly retained to defend the insurer's insureds. The situation is not distinguishable from the instant case except

possibly it may be said that this is a stronger case from the standpoint of professional ethics. Is this Court going to discipline all attorneys who are employed by insurance companies to represent their insured?

Reference may also be had to legal aid bureaus for indigent persons. Such bureaus urge the use of the services offered, and the attorney rendering the service knows of such solicitation, yet no one questions the practice. True, the attorney may give his time without charge, but practicing law free is nevertheless practicing law.

It is a matter of common knowledge that such state-wide organizations as contractors' associations, merchants' associations, cattlemen's associations, etc., employ attorneys to represent such organizations and furnish advice to individual members of such organizations on matters of general and common interest, and that under the arrangement between these organizations and the attorneys employed by them, such attorneys handle cases for individual members of such organizations who may be referred to such attorneys by representatives of such organizations on a fee arrangement agreed upon between such organization and the attorneys so employed, and if the problem involved in any such case is of general or common interest to the members of the organization, the latter will pay a portion if not all of the fee and expenses incident to the handling of such a case. It is obvious that under such an arrangement the representative of such organization solicits the member to take his case to the attorney for the organization, and the representative of the organization is paid out of funds derived from the contributions of members thereof. This is a common practice and I have never heard of it being attacked as unethical or a violation of the Rules of Professional Conduct of the State Bar of California. Under the rule announced in the majority opinion, any attorney employed by such an organization who accepts employment from a member of such organization, who was referred to such attorney by the paid representative of such organ-

ization, would be guilty of unprofessional conduct and subject to discipline for a violation of the rule of professional conduct here involved.

In the medical practice field we have such organizations as the Ross-Loos plan (25 Cal.L.Rev. 95) where doctors have joined in a plan to give medical care for persons at a fixed amount. Patient members of such a plan are probably solicited. There are countless other such arrangements. See, *California Physicians' Service v. Garrison*, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306. Colleges and universities commonly supply medical care for their students and a fee is charged therefor. The attendance of such students may have been solicited.

The application of the rule announced in the majority opinion will destroy all of the foregoing plans and systems, as well as many others. I cannot believe that the rules of ethical conduct have any such purpose or design. The essential object of the instant plan is *not to obtain clients for an attorney*. It is to enable the organization (the Brotherhood) to assist its members in a matter of vital concern to them. It does not urge its members to avail themselves of the services in order to bring business to the counsel, or to "stir up" litigation. It is a method by which an attorney may be employed at a lesser fee, one whose special qualifications are previously determined. Certainly the attorney is not soliciting business any more than would an attorney who agreed to represent a whole group of persons. The Brotherhood is not soliciting for him. It does not care whether he gets business and profits thereby. It is primarily concerned with assisting its members or, phrased otherwise, it is nothing more than a group of persons who are interested in protecting themselves in the event of injury. It is merely incidental that in so doing a benefit results to the attorney.

The entire field must be examined in this matter rather than summarily brushing aside many organizations and arrangements which are serving a definite social need. The needs and policy underlying the plan of the Brotherhood is very perti-

ment. The majority opinion states: "Nor does the worthiness of the Legal Aid Department as an enterprise established by the Brotherhood to render valuable services to its members in providing the means for appropriate presentation of their damage claims * * * obscure the essential issue of petitioners' alleged violation of professional standards by reason of their participation in the basic plan of the Brotherhood as a general scheme for the solicitation of professional employment among members of the Brotherhood." I cannot agree with the foregoing declaration, as it must be remembered that here the court is *not applying a legislative enactment over which it has no control and with the wisdom of which it cannot be concerned*. On the contrary, it is supreme in the field of attorney-disciplinary matters. *Brydon-jack v. State Bar*, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; 9 Cal.Jur. Ten Yr. Supp., Practice of Law, secs. 4, 40-42. It is not merely mechanically interpreting and applying a rule of ethics over which it cannot concern itself. Indeed, it is its duty to examine into the wisdom of the rule, and observe its effect under various circumstances. Particularly it is bound to consider the scope of its application and all the questions of policy necessarily involved in such process. Certainly this Court should not blind itself to the situation existing with respect to the plight of the injured railroad workmen who may be ignorant of their rights and fall victims to lay claims agents of railroad companies who are bound by no rules of ethics or professional conduct.

In endeavoring to meet the contention that a violation of the rule requires that the solicitor (the Brotherhood) receive compensation for its solicitation, the majority states: "(1) it was a matter of concern to the Brotherhood that the lawsuits of its injured members be handled by experienced lawyers, and the basic plan with petitioners was designed to provide legal services for its members at what might be termed 'wholesale rates'; and (2) such service would reasonably constitute an inducing cause for attracting membership in the Brotherhood and the payment of dues

thereto." An obvious answer to that argument is that those benefits were not received by the Brotherhood *for obtaining clients for petitioners*. They were received as the incident of the plan to provide competent legal services for its members.

The authorities support the proposition that the arrangement here considered violates no rule of professional ethics. In *Ryan v. Pennsylvania R. Co.*, 268 Ill.App. 364, the same plan was involved. Contrary to the majority opinion, the basis of that case was *not that the contract for attorneys' fees was not against public policy*. The contract was held valid because *there was no breach of ethics by the attorney*. The court, after outlining the Brotherhood's plan, stated: "Respondent contends that 'the appellee is not entitled to an attorney's lien *because the contract on which his claim is based was secured by unlawful and unethical solicitation and fee-splitting*,' that 'the proof showed that there was a well organized plan or scheme by which appellee Attorney Joseph D. Ryan obtained many personal injury cases through the solicitation of the Brotherhood of Railroad Trainmen and its investigators,' and that 'it is clear that appellee Ryan obtained the Meadows case through the unlawful and unethical solicitation by the Brotherhood of Railroad Trainmen and its investigators'; that it 'can see no difference from the standpoint of legality and ethics between an individual ambulance chaser soliciting personal injury claims, and a corporation and its investigators investigating the cases of proposed claimants and influencing said claimants to retain their Regional Counsel.' After a careful consideration of all the facts we are satisfied that *these contentions and arguments are without merit, and we feel impelled to say that the assertion that the Brotherhood, through its legal aid department, is akin to an ambulance chaser and that the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers who made it*. The Brotherhood is a labor organization, composed of men engaged in hazardous occupations and who are banded together for mutual protection and advancement. The

evidence establishes that it organized the legal aid department for the sole purpose of protecting its injured members or their families in the matter of claims growing out of injuries sustained in the course of employment. The argument that the legal aid department was a solicitation scheme by which petitioner 'obtained many personal injury cases' is a *most unfair one* and entirely unwarranted under the evidence. The evidence, *introduced by respondent*, shows clearly the worthy purpose of the department and the necessity for its organization and maintenance. The instant case is an illustration of its benefit to the members * * * Such an arrangement was not unethical." [Emphasis added.]

In *re O'Neill*, D.C.E.D.N.Y., 1933, 5 F. Supp. 465, misinterprets the Ryan case, and fails to give consideration to the true nature of the plan.

Finally, there is no splitting of fees under the plan. The contract for the 6% for investigation fee *runs to the Brotherhood*. The attorney has nothing to do with it. To assume that it is part of his fee is contrary to the facts. The situation is no different than if each member would execute a contract with the Brotherhood that in the event he used the services of the Brotherhood at any time in the future he would pay therefor 6% of his recovery. In either case the relation between that charge and the attorney's fees for his services are wholly independent.

In holding that the Brotherhood cannot arrange with an attorney to represent its members who may suffer industrial injuries when such members are referred to such attorney by a paid representative of the Brotherhood, the majority of this Court have struck a lethal blow at one of the most vital functions of the Brotherhood as a labor organization. It was largely through the effort of the Brotherhood that the Federal Employers' Liability Act was enacted by Congress. This act has been amended many times at the suggestion of the Brotherhood in order to accomplish its ultimate objective of extending the greatest possible measure of protection to railroad workmen engaged in interstate commerce. It is obvious that this objective will be de-

feated unless the Brotherhood may now see that those members entitled to the protection afforded by the act are informed as to what to do to gain such protection. The first step in this direction is the selection of a competent attorney and the ascertainment of the facts which constitute the basis of the claim which the injured workman must assert in order to establish liability for his injuries. The Brotherhood, through its legal aid department, has sought to provide the essential means necessary to secure to its members the protection afforded by the act. In so doing, it has done no more than many other organizations which have employed counsel to protect the interests of its members. In my opinion, such arrangements should not be condemned as unethical. The organization has an interest in the social and economic welfare of its members. It cannot be denied that the social and economic welfare of every railroad workman and his dependents is imperiled when he suffers injury or death in the course of his employment. Any concept of ethics which would deny to such an organization the right to suggest to such injured workman, or his dependents in case of his death, that he or they consult an attorney, is not worthy to be known by that name, and the mere fact that the organization has arranged with such attorney to handle cases for its members on a reduced fee basis should not render such arrangement unethical. The foregoing considerations should dispose of this proceeding as a misguided venture in the field of legal ethics. Petitioners have done no wrong in entering into the arrangement in question with the Brotherhood, and in the handling of cases referred to them by representatives of the Brotherhood pursuant to such arrangement.

The proceeding against petitioners should therefore be dismissed.

TRAYNOR, Justice (dissenting).

In 1929 the Brotherhood of Railroad Trainmen undertook an investigation of the settlements and recoveries its members were receiving under the Federal Employers' Liability Act for injuries incurred in the course of their employment. This in-

vestigation disclosed that the workers were not receiving the full benefits to which they were entitled because of their unfamiliarity with their rights and their frequent premature release of claims at the persuasion of railroad claims adjusters, together with incompetent and overpriced legal assistance. It appeared that the situation would become worse because of a nation-wide drive to suppress ambulance chasing attorneys, who, incompetent or overreaching as they might be, frequently provided the only effective check upon the activities of the claims adjusters. Accordingly, to protect its members both from precipitous settlement of claims and ambulance chasing attorneys, the Brotherhood in 1930 established its Legal Aid Department to acquaint members with their rights, and to investigate accidents to unearth the necessary evidence. It was essential to these purposes to have competent attorneys available at reasonable fees. The Brotherhood therefore secured the agreement of such attorneys throughout the country to accept the cases of injured members at a reasonable contingent fee, with the understanding that the Brotherhood would recommend the attorneys to its injured members who would be free to retain them or not. Thus, a group with a legitimate need for competent legal assistance in a specialized class of cases common to it, solicited the assistance of qualified attorneys at reasonable fees. It is conceded that the members of the Brotherhood have thereby been able to secure adequate legal assistance in presenting their cases under the Federal Employers' Liability Act. The issue is whether the attorneys may participate in the Brotherhood's plan without violating the Rules of Professional Conduct.

Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct

that in other cases would be injurious to the effective discharge of the profession's duties to the public.

It is contended that the Brotherhood's attorneys are violating Rule 2 prohibiting the solicitation of professional employment and Rule 3 prohibiting acceptance of employment channeled to the attorney by an organization "that for compensation controls, directs or influences such employment. * * *" It is necessary to consider against what evils these rules are directed and whether the operation of a plan such as that inaugurated by the Brotherhood involves the danger of such evils.

These rules raise the familiar problems of advertising and ambulance chasing. Advertising has generally been discountenanced by the profession, American Bar Association Canon of Professional Ethics No. 27, as undignified and misleading. Advertising is hardly a measure of competence, given the profession's long standing disapproval of it. Clients who need legal assistance only rarely and are therefore inexperienced in selecting counsel, may be induced by advertising to select unsuitable counsel, with consequent injury not only to themselves but to the reputation of the bar as a whole. See, Llewellyn, *The Bars' Troubles and Poulitices—and Cures?*, 5 *Law and Contemporary Problems* 104, 116.

Direct solicitation by ambulance chasing has led to serious abuses. "The testimony demonstrates very clearly the evils of the system of ambulance chasing. Competition between 'ambulance chasers,' and between 'ambulance chasers' and attorneys, in procuring cases, visits to homes and hospitals to procure retainers at unseemly hours, and when the injured person or the members of his family were in no mental condition to enter into contracts for the engagement of lawyer's services, division of fees with solicitors and procurers, payment of moneys to officials, doctors, and others for help in procuring cases, the use of photographs of checks of amounts of recoveries had, and newspaper clippings showing successes in court, for the purpose

of procuring clients, are all laid bare." *Matter of Gondelman*, 225 App.Div. 462, 233 N.Y.S. 343, 346.

While Rule 2 is directed against the solicitation of professional employment by an attorney, Rule 3 is concerned with the lay intermediary between attorney and client who seeks to profit from the solicitation, control, or influence of professional employment. A profit-motivated lay agency may exert various harmful influences on the profession. It may be more interested in the profit to be derived from legal business than in the best interests of the clients. Thus lay ambulance chasers who solicit cases and then sell them to attorneys are apt to seek out, not the most competent attorney, but the one who will pay the most for a case. It may be more profitable for professional ambulance chasers to operate on a high-volume low-return basis than to consider the best interests of each client. See, *Nationwide War on "Ambulance Chasers"*, 14 *Amer. Bar Ass'n Journal*, 561, 563.

Again, a lay agency may direct its clients to attorneys who will in turn recommend the services of the agency, even though the client may not need them. Thus a trust company in recommending attorneys to draft wills may favor those who recommend trust provisions. See, *Cohen, Fiduciaries and Lawyers*, 7 *Ind.L.Jour.* 295, 306-308, reprinted in *Costigan, Cases on the Legal Profession* (2nd ed.) 364-366. It may not be in the client's interest to incorporate trust provisions in his will, but if the attorney is receiving the business through the recommendation of a trust company, he may be influenced by that fact. A rule prohibiting the acceptance of business channeled to him by a party whose interest in his services may be adverse to those of the clients is justified to insure that the clients' interests are kept paramount.

The lay intermediary may also interfere with the direct attorney-client relationship. Thus, if an association retains an attorney to advise on problems presented by the members, and those problems are communicated to the attorney through the

association, he may be constrained to give advice in the light, not of all the facts, but of only the information thought relevant by the member who requested advice of the association. See, *American Bar Association, Opinions of the Committee on Professional Ethics and Grievances* (1947) No. 98, p. 212.

There are situations, however, when an attorney's association with a lay organization fulfills a legitimate interest of the organization or its members, and presents no risk of conflicting interests or other abuses. Such arrangements may be tolerated even when the lay agency is actively engaged in soliciting business. Liability insurance companies provide in their policies that they will arrange for the defense of any action brought against the policy holder and demand that they shall have the right to do so. By advertising their policies they solicit the legal business that arises from their policy holders' activities. At the same time they arrange with qualified experts in personal injury litigation to represent them and their policy holders in any litigation that arises. These attorneys agree to this representation, knowing that their professional employment will arise from the active solicitation of business by the insurance companies. Such conduct on the part of the attorneys is expressly permitted by Rule 3, for it is accepted as serving the public good. Liability insurance is socially desirable; policy holders and the companies are entitled to adequate legal representation; the sensible way to provide such representation is through regularly-retained experts. There is no risk that clients will be led to incompetent attorneys, and the attorneys are in a position to deal directly with the client when the need for legal services arises. Moreover, the interests of the insurance company and the client will ordinarily coincide, so that there is little danger that the insurance company's attorney will be placed in the position of representing conflicting interests. It has been thought better to make adjustments for the occasional case where the interests of the policy holder and the company conflict,

see, *O'Morrow v. Borad*, 27 Cal.2d 794, 798-799, 167 P.2d 483, 163 A.L.R. 894, than to prohibit the practice altogether.

The Brotherhood's attorneys bear much the same relation to it as the insurance defense attorneys do to the insurance companies. In neither situation do the attorneys themselves solicit professional employment or pay the organizations involved for securing it, even though they reap the benefits of the activities of the respective organizations that bring professional employment to them. Rule 3 recognizes that it is the financial interest of the insurance company that renders the employment of the company's expert attorneys for its policy holders "necessary and proper for the protection of such financial interest." It illustrates a situation where considerations of policy make clear that there are no ethical objections to the channeling of professional employment to experts. Rule 3 and the policy underlying it do not close the door to similar practices in other situations where policy considerations are as strong or stronger in favor of the propriety of group action. Rule 3 requires a financial interest in the outcome of litigation to justify referrals only when the association controls, directs, or influences such referrals for compensation. It is thus designed to preclude attorneys from accepting employment from organizations engaged in the business of providing legal advice for profit. It does not prohibit the acceptance of employment where the referring association makes the referrals, not for compensation, but solely to help its members secure legal assistance.

Bar association committees on professional ethics have recognized that the protection of various social or group interests justifies attorney participation in plans designed to protect the legitimate interests of the group, even though the attorney is retained by a group that recommends his services to its members or others on problems they have in common. Thus it has been considered proper for the National Lawyers Committee of the American Liberty League publicly to offer to defend the constitutional rights of those threatened

by New Deal legislation. "These issues transcend the range of professional ethics." American Bar Association, Opinion of the Committee on Professional Ethics and Grievances (1947) No. 148, pp. 307, 311. Similarly, the same organization has approved the use of expert counsel by trade organizations to assist their members in conducting their businesses within the framework of increasing governmental regulation. Opinion No. 168, p. 340; see also Opinion No. 273, p. 569; Questions and Answers of the Committee on Professional Ethics of the New York County Lawyers Association, Question 47, reprinted in Costigan, *Cases on the Legal Profession*, 2nd ed., 366; *Relation of Lawyers and Lawful Trade Organizations and other Organizations*, Opinion of the Committee on Professional Ethics of the New York County Lawyers Association, reprinted in Costigan, *supra*, 360. These opinions have recognized that in those cases where the members of lay associations have problems in common, it is proper for their associations to arrange for competent legal assistance, even though to carry out the plans the associations must make known to their members the identity of competent counsel. Thus a bankers' association may recommend its expert counsel to its members when they are faced with legal problems peculiar to the banking business, or a medical association may adopt a similar procedure for the benefit of its members.

It does not follow that an attorney may participate in a plan by which the association itself engages in the practice of law. "[A]s the term is generally understood, the practice of the law is the doing or performing [of] services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." *People v. Merchants Protective Corp.*, 189 Cal. 531, 535, 209 P. 363, 365. Corporations and associations of unlicensed

persons are denied the right to practice law: "The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. It is the existence of this essential element as the basis of said relation which has called into being the various statutory regulations governing the admission of attorneys and counselors at law and which embody certain requirements of character, integrity, and learning as the prerequisites of such admission to the right and privilege of practicing law. It is the possession or reputation for the possession of these personal qualifications which constitutes, as a rule, the main inducement for the formation of the personal and confidential relation of attorney and client. The intervention of a corporation between the membership it secures and the attorneys it employs, which corporation can in and of itself possess none of these qualifications, obviously leaves out of view the necessity for their existence. The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary, and divided loyalty to the clientele of the corporation." *People v. Merchants Protective Corp.*, 189 Cal. 531, 539, 209 P. 363, 366; see also, *In re Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15, 32 L.R.A., N.S., 55; *Bulleit, The Automobile Clubs and the Courts*, 5 Law and Contemporary Problems 22.

In the present case, however, it is not contended that the Brotherhood is engaged in the practice of law, and there is no evidence of evils that the Rules of Professional Conduct are intended to guard against. The Brotherhood's plan in no way lowers the dignity of the profession. It does not lead the railroad employees to incompetent

counsel. There is no conflict in the interests of the Brotherhood and its members, and therefore no danger that the attorneys recommended by the Brotherhood will be faced with conflicting allegiances. There is no interference with the direct attorney-client relationship; the members are free to retain or reject the attorneys recommended by the Brotherhood and they deal directly with the attorneys themselves.

Since there is no issue of misconduct other than participation in the basic plan of the Brotherhood, I concur in the judgment dismissing the proceeding.



36 Cal.2d 553

**GILLESPIE et al. v. CITY OF
LOS ANGELES et al.**

L. A. 21405.

Supreme Court of California, in Bank.

Dec. 27, 1950.

Rehearing Denied Jan. 26, 1951.

Ottie Gillespie and others brought action against the City of Los Angeles, a municipal corporation, and the State of California, to recover for deaths of driver and occupants of automobile which went off state highway within city, and fell to bottom of embankment because of alleged dangerous condition of highway, and because of the lack of warning devices. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered a judgment against the city, and the city appealed. The Supreme Court, Traynor, J., held that city was not liable because the State, and not city, had duty to remedy dangerous condition of highway and maintain warning devices, and because city had no duty under contract with the State to remedy such condition or maintain warning devices.

Judgment reversed.

Carter and Schauer, JJ., dissented.

Prior opinion, 213 P.2d 83.

I. Municipal corporations ¶755(2)

A city cannot be liable for a dangerous or defective condition of a public street or highway unless it has authority to rem-

edy the condition. Government Code, § 53051.

2. Municipal corporations ⇨755(2), 798

A city which is without power to correct a dangerous or defective condition of a public street or highway is under no duty to warn of existence of such condition or request those with necessary authority to remedy it. Government Code, § 53051.

3. Automobiles ⇨255

City was not required to remedy dangerous portion of state highway situated within city or to post warnings of dangerous condition, and was not liable, because of failure to do so, for deaths of driver and occupants of automobile which went off highway and fell to bottom of embankment, because of alleged dangerous condition of highway. Government Code, § 53051; Vehicle Code, § 465; Streets and Highways Code, §§ 27, 100, 204.

4. Automobiles ⇨255

Contract between city and state providing that city should perform general maintenance work on all state highways within city limits with exception of Route 156 and Route 205, and that state would maintain state highways from curb line to curb line only, and that there was delegated to city maintenance of areas between curb lines and right of way lines, did not impose on city duty to correct allegedly dangerous conditions on Route 156, which was a mountain road lacking usual curbs and sidewalks of ordinary city street, and therefore city was not liable for deaths of driver and occupants of automobile which went off mountain road and fell to bottom of embankment because of alleged dangerous condition.

5. Contracts ⇨170(1)

Construction given contract by acts and conduct of parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by court.

6. Automobiles ⇨255

Where state engineers and city constructed contract between city and state to

require state to do all maintenance work on portion of state highway situated within city, including the placing of warning signs and safety devices, city was not liable for deaths of driver and occupants of automobile, which went off state highway within city, on ground that contract required city to remedy or warn of alleged dangerous condition of highway. Streets and Highways Code, §§ 114, 116, 203.

7. Automobiles ⇨255

Provision of contract between state and city that maintenance work by city on portions of state highways within city, should be adequate to keep roadway, structures and facilities in safe and usable condition to which they had been constructed or improved, and that provision should be made for constantly making needed repairs to preserve smooth surface, gave no authority to and imposed no duty on city to add additional structures and facilities to state highway, and therefore city was not liable for deaths of driver and occupants of automobile because city did not place warning devices to warn of alleged dangerous condition of highway.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Victor P. Spero, James A. Doherty, and Leonard G. Husar, Deputy City Attys., all of Los Angeles, for appellant.

C. R. Montgomery, Robert E. Reed, Sacramento, Attys., Dept. of Public Works, Division of Highways, State of Calif., amicus curiæ.

Ben C. Cohen, Leo Shapiro and S. S. Hahn, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Route 156 is a state highway extending from Chatsworth to Topanga Beach in Los Angeles County. From Ventura Boulevard in the city of Sherman Oaks west to the Pacific Ocean for about twenty miles through Topanga Canyon, the highway, commonly known as Topanga Canyon Road, is a twisting paved mountain road varying in width from 20 to 24 feet, with 6 to 8 foot shoulders of rock and oil or decom-

posed granite. About .86 of a mile of Topanga Canyon Road lies within the corporate limits of the City of Los Angeles.

On the morning of September 5, 1943, the burned wreckage of a 1933 Hupmobile sedan owned by plaintiff Ottie Gillespie was discovered at the bottom of Topanga Canyon below the part of the highway within the Los Angeles city limits, about 3.2 miles northeast of the junction of Topanga Canyon Road and the Roosevelt Highway at Topanga Beach. In the wreckage were the charred bodies of six people, from nineteen to twenty-four years of age. There were no survivors of the accident and no eyewitnesses thereto.

Plaintiffs, surviving relatives of the victims of the accident, brought this action for wrongful death in the Superior Court of Los Angeles County, joining as defendants the City of Los Angeles and the State of California. The complaint alleged that the accident was caused by defendants' negligence in the design, construction, and maintenance of the highway, in that "said highway is so laid out and constructed as to make it appear that the same is straight and continuous at said point [at which the automobile presumably left the road] when in fact the same prescribes a horseshoe turn or curve, swinging sharply inward and returning to a line approximately even with the line of said highway immediately prior to said abrupt turn * * * the distance from said highway at said point to the bottom of said embankment being more than 150 feet * * * that there were and are no lights, blinkers, or warning signals of any kind or character at the approach to said curve to indicate or disclose the existence thereof * * * that there were and are no fences, guard rails, barriers, barricades or embankments or other safety devices around said curve or the approach thereto to apprise persons of the fact that the said highway curves at said point and does not continue in a straight direction * * * that at said time and place and as a direct and proximate result of the said dangerous and defective condition as aforesaid, the said automobile * * * went off the highway and fell to the bottom of the embankment, at said

point a distance of more than 150 feet." It is plaintiffs' theory that by reason of the alleged negligence of the city and the state in failing to warn approaching drivers of the existence of the curve, the driver of the automobile, while exercising due care for his own safety and that of his passengers, drove straight ahead on the road, not knowing that it curved sharply inward, and plunged off the road to the bottom of the canyon. On the state's motion, a change of venue to Sacramento County was granted. The trial court there sustained the state's objection to the introduction of any testimony and the action was dismissed against the state on the ground that the suit was one against it in its sovereign capacity to which it had not consented. Plaintiffs' motion for retransfer to Los Angeles County for convenience of witnesses was granted. The cause proceeded to trial before a jury against the city, and the jury returned verdicts for plaintiffs aggregating \$110,000. The city appeals from the judgments entered thereon.

The city's principal contention is that it was not legally responsible for the condition of the state highway where the accident occurred because it had no control over, or authority with respect to, the maintenance of the highway. Plaintiffs contend, however, that under the provisions of the Public Liability Act of 1923, 2 Deering's Gen. Laws, Act 5619, now Government Code, § 53051, the city is liable for dangerous or defective conditions in a highway whether or not it has control over it, and that in any event it had enough control over the highway in question to remedy the condition had it so wished.

The Public Liability Act of 1923 provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases *where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition * * * and failed or neglected, for a*

reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." (Italics added.)

[1,2] Although it is clear from the wording of the statute that a city cannot be liable for a dangerous or defective condition of a public street or highway unless it has authority to remedy the condition, plaintiffs contend that the cases of *Shea v. City of San Bernardino*, 7 Cal.2d 688, 62 P.2d 365, *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547, and *Rose v. County of Orange*, 94 Cal.App.2d 688, 211 P.2d 45, establish the rule that even if a municipality is without power to correct a dangerous or defective condition, it is under a duty to warn of its existence or request those with the necessary authority to remedy it. We cannot agree with this contention.

In the *Bosqui* case a viaduct that was part of the system of city streets was allowed to fall into disrepair. The city contended that under an order of the railroad commission, the utility operating the railroad over which the viaduct passed had the sole duty of repair. Far from holding that the city's authority to remedy the condition was not a necessary prerequisite to liability under the Public Liability Act, the court took care to note that the order of the commission did not deprive the city of control over the viaduct or relieve it of its duty to remedy the condition.

In the *Shea* case a city street crossed a railroad track. The city contended that the dangerous condition was caused by the elevation of the rails, over which the railroad commission had exclusive jurisdiction. The court held that the city was under a duty to request the commission to correct the condition or to warn the public of the danger.

In the *Rose* case a county road ran at right angles into a state highway and terminated. There was a dangerous ditch

at the side of the state highway opposite the end of the county road. The court held that even though the county had no power to correct the dangerous condition bordering the state highway, it was under a duty to warn persons on the county road of the danger lying at its end.

Both the *Shea* and the *Rose* cases are thus examples of situations where streets over which the city or county had control were made dangerous by conditions that the local governments could not control. In both cases, however, the city or county had authority at least to warn of the dangers. They had control over their own highways and authority therefore to post warnings along those highways of the dangers created by conditions contiguous thereto.

In the present case, however, the condition of the highway did not make a city street dangerous. The danger lay wholly on the state highway itself. If the city had no authority to remedy the condition of the state highway where the accident occurred it cannot be liable under the terms of the Public Liability Act for failure to do so.

Section 100 of the Streets and Highways Code, in effect in 1943 at the time the accident happened, provided: "The [state] department [of public works] shall have full possession and control of all State highways. * * * The department shall maintain any existing traversable highway which is between the termini of, and approximately on, any route included in the State highway system. * * *"

Section 27 of the same code provides in part:

"As used in the general provisions and in Divisions I and II of this code, 'maintenance' includes:

"(a) The preservation and keeping of rights of way, and each type of roadway, structure, and facility, in the safe and usable condition to which it has been improved or constructed * * *"

"(b) The necessary provision for special safety conveniences and devices. * * *"

"The degree and type of maintenance for each highway, or portion thereof, shall

be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor."

Section 204 provides: "The department shall exercise the same powers and duties with respect to State highways within cities as with respect to other State highways."

[3] Under these provisions the state department of public works, not the city, has authority to remedy dangerous or defective conditions on state highways within the city limits. "The degree and type of maintenance" including "safety conveniences and devices" are to be determined by the state agency. It follows that the city is not liable for dangerous or defective conditions of state highways under these provisions.

It is contended, however, that the city has power under section 465 of the Vehicle Code to post warnings of dangerous conditions existing on state highways. That section provides:

"(a) The State Department of Public Works, Division of Highways, shall place and maintain, or cause to be placed and maintained, with respect to highways under its jurisdiction, appropriate signs and signals as required hereunder, and may respectively place and maintain, or cause to be placed and maintained, such appropriate signs and signals as may be authorized hereunder, or as may be necessary properly to indicate and to carry out the provisions of this code, or to direct or warn traffic upon the highways.

"(b) Local authorities in their respective jurisdictions shall place and maintain or cause to be placed and maintained such traffic signs and, subject to the provisions of Section 466, such stop signs, semaphores and control devices upon streets and highways as may be necessary to indicate and to carry out the provisions of this code or local traffic ordinances or to regulate, warn or guide traffic."

Under these provisions the state department of public works has the duty to post traffic signs and signals on highways "un-

der its jurisdiction;" local authorities "in their respective jurisdictions" have the duty to post such signs and signals on streets and highways. Section 465 of the Vehicle Code and the foregoing sections of the Streets and Highways Code are in *pari materia* and must be construed together. *Ebert v. State of California*, 33 Cal.2d 502, 509, 202 P.2d 1022; *People v. Trieber*, 28 Cal.2d 657, 661, 171 P.2d 1; *In re Porterfield*, 28 Cal.2d 91, 100, 168 P.2d 706, 167 A.L.R. 675; *Southern Pac. Co. v. Railroad Comm.*, 13 Cal.2d 89, 100, 87 P.2d 1055. The state department of public works has "full possession and control" of all state highways, Streets and Highways Code, § 100, including "State highways within cities". Streets and Highways Code, § 204. Such highways are therefore "under its jurisdiction" within the meaning of section 465 of the Vehicle Code. The duty to place and maintain the traffic signs and signals required by that section is expressly placed on the state department of public works. Moreover, it is that department only that determines the degree and type of maintenance including "safety conveniences and devices" for each state highway. Streets and Highways Code, §§ 27, 100. It follows that state highways are not within the jurisdiction of local authorities to control or maintain, and are therefore not "in their respective jurisdictions" under section 465 of the Vehicle Code.

To hold that a state highway, which the state department of public works has "full possession and control of", and for which that department determines the degree and type of maintenance, including safety conveniences and devices, is "in [the] respective jurisdictions" of local authorities would not only create a direct conflict between the two Codes, but would lead to anomalous and unreasonable results. Both subdivisions (a) and (b) of section 465 provide that the respective agencies "shall place and maintain" the required traffic control devices. If two or more agencies had the same mandatory duty, confusion would result when they sought to discharge their duties over the same highway, and the uniformity sought to be achieved by the state highway system would be de-

feated. See, *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 663, 262 P. 334. Moreover, the placement and maintenance of traffic signs and signals is only a part of the general duty to maintain streets and highways in a safe and usable condition. Whether or not there is need for warning signs or signals will frequently depend on what other steps may be taken to render the highway safe and usable. In the present case, for instance, posting a warning sign would be only one of several means that might be adopted to apprise motorists of the curve ahead. Proper maintenance might eliminate the danger altogether, so that no warning would be necessary. It would be unreasonable to conclude that the Legislature intended that the limited part of maintenance involving the placement and maintenance of traffic signs and signals should be treated differently from the problem as a whole.

Plaintiffs contend, however, that the city had both the authority and the duty to correct the allegedly dangerous condition under the terms of a contract between the city and the department of public works whereby the state agency delegated authority to the city. See, *Streets and Highways Code*, §§ 114, 116, 203. The contract in question dealt with the allocation of gas tax funds and was a renewal of biennial agreements between the city and the state containing substantially the same terms dating back to 1934. It provided in substance that the city should perform general maintenance work on all state highways within the city limits with the exception of Route 156, here in question, and Route 205. General maintenance work on these routes was to be done by the state. Plaintiffs nevertheless contend that failure to give proper warning of the curve was the cause of the accident, and that the city should have installed the necessary warning signs or barricades between the curb line and right of way line of the highway, on the ground that responsibility for maintenance of this area was delegated to the city under the terms of a miscellaneous provision of the contract. That provision provided:

"The department will maintain the State highways from curb line to curb line only.

There is hereby delegated to the city the maintenance of the areas between curb lines and right of way lines, except when operations by the department are being conducted thereon in connection with the construction or maintenance work between the curb lines."

The city contends, however, that this provision was not intended to apply to a mountain road lacking the usual curbs and sidewalks of the ordinary city street. It contends also that in referring to maintenance of the area beyond the curb line the parties had in mind such maintenance as might be necessary to make the area itself safe for use, not such maintenance within that area as might be necessary to make the roadway safe and usable.

[4-6] It is clear when the contract is read in the light of the surrounding circumstances that the parties did not intend to apply the quoted provisions to the short section of route 156 that cuts across an outlying corner of the city's territory. The parties did not interpret their agreement as imposing upon the city any duty with respect to the maintenance of Route 156. State engineers testified that the state did all the maintenance work on the highway including the placing of warning signs and safety devices. The "construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court." *Woodbine v. Van Horn*, 29 Cal.2d 95, 104, 173 P.2d 17, 22. The construction placed upon the contract by the parties in the present case is not only reasonable, but a contrary construction would be unreasonable. Route 156 is a mountain road, lacking the sidewalk area whose maintenance could reasonably be separated from that of the roadway. Moreover, less than one twentieth of the mountain section of the highway lies within the city limits. The only access to this section is from the road itself on either end, and the general character of the highway remains unchanged as it passes into and then out of the city limits. It would be unreasonable to conclude that the parties

intended that the state maintain the whole of the highway up to the city limits, then only the pavement for the next fraction of a mile, and then resume maintenance of the whole, leaving to the city the responsibility for maintaining the borders of the road for the fraction of a mile in between.

Even if it is assumed, however, that under the terms of its contract the city was responsible for maintaining the area beyond the traveled portion of the highway, its duty of maintenance was defined and limited by the contract. The maintenance clause provided:

"Maintenance work shall be adequate to keep the roadway, structures, and facilities in the safe and usable condition to which they have been constructed or improved, and provision shall be made for constantly making needed repairs to preserve a smooth surface.

"Maintenance work shall be satisfactory to the department, and should the department at any time consider the maintenance of the State highway routes or any portion of the routes unsatisfactory and inadequate for the traffic needs and conditions thereon, and if the city does not correct the unsatisfactory condition after due notice from the department, the department may enter upon such State highway route and maintain such street with its own forces, and the cost will be defrayed from the $\frac{1}{4}$ cent gas tax allocated for expenditure upon State highways within the city."

[7] Under this provision the city's duty of maintenance was limited to keeping "the roadway, structures, and facilities in the safe and usable condition to which they have been constructed or improved." It was under no duty and it lacked authority to add additional structures and facilities. The department of public works retained the authority under the contract to determine when maintenance beyond keeping the highway in the condition to which it had been constructed or improved was necessary to make the routes satisfactory and adequate for the traffic needs and conditions thereon. There is no evidence that Route 156 was not maintained in the condition to which it was constructed or im-

proved at the time the city first undertook maintenance duties under its contract. Plaintiffs contend, on the contrary, that the curve was dangerous and defective because additional warnings were not provided and that the city is responsible because, after having knowledge of the dangerous condition, it failed to provide them. Under its contract, however, it had no authority to do so.

Since the judgment must be reversed no purpose would be served by considering the appeal from the order denying defendant's motion to vacate the judgment. Accordingly, the appeal from the order denying the motion to vacate the judgment is dismissed.

The judgment is reversed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority hold: (1) That under the law the state has the *exclusive* right to maintain traffic warning devices along state highways and therefore the city having no power to maintain them cannot be held responsible for its failure to do so. (2) That the city did not acquire such authority under its contract with the state. I cannot agree with either proposition.

As to the first proposition, there are two answers. *First*, the statutes correctly construed, confer upon both the city and the state the right to maintain traffic warning signs. The majority rely upon provisions of the Streets & Highways Code, which state that the state shall have full "possession and control" of all state highways within or without cities and shall maintain them, which includes safety devices. Sts. & Hwys. Code, §§ 100, 27, 204. Those provisions do not necessarily mean that the state's authority is *exclusive* and at least, as to *warning* devices, must be read in connection with the provisions of the *Vehicle Code*. Section 465(a) of the latter code first states that the state shall maintain such appropriate signs as may be necessary to warn traffic. Subdivision (b) then reads:

"Local authorities in their respective jurisdictions shall place and maintain or cause to be placed and maintained such traffic signs and, subject to the provisions of Section 466, such stop signs, semaphores and control devices upon streets and highways as may be necessary to indicate and to carry out the provisions of this code or local traffic ordinances or to regulate, warn or guide traffic." (Emphasis added.) The exception referred to (§ 466) deals only with the erection by a city of traffic control signals such as a stop sign or semaphore. It will be noted that the authority of a city extends to "streets and highways" within its boundaries. "'Street' or 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." (Emphasis added.) Vehicle Code, § 81. Thus, where the two provisions are construed together, Sts. & Hwys. Code, and Vehicle Code, supra, that is, the provisions for state and local maintenance of warning devices, both the state and city are clearly given authority to maintain such signs. Indeed the provisions of the Vehicle Code are more appropriately applicable, for they expressly deal with traffic problems and the safety precautions inherent therein, rather than general supervision over state highways.

Second, it is clear that the obligation and duty rested upon the city to request the state to erect signs, or at least, to authorize the city to do so. Having failed to do so, it is liable. That is the square holding in *Shea v. City of San Bernardino*, 7 Cal. 2d 688, 62 P.2d 365. There the dangerous condition existed in a street where it crossed railroad tracks. Although the Railroad Commission had exclusive jurisdiction over such crossings, the court held the city liable on two distinct theories. One, that the city should have placed a warning sign on its street at the approach to the crossing, and on the other, it stated: "In giving consideration to appellant's contention that the city was powerless to remedy the defect, the above-mentioned hypothesis will be assumed to be correct. Nevertheless, the contention is not impressive. It must be remembered that the improvement of

streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city. If the Railroad Commission had the exclusive jurisdiction to order the north track to be lowered, it was the duty of the city at some time during the six-year period to call upon the Railroad Commission to order the rail to be lowered and thus to remove an obviously dangerous condition in the street." (Emphasis added.) *Shea v. City of San Bernardino*, supra, 7 Cal.2d at page 692, 62 P.2d at page 367. It follows therefore that the city here is liable under the rule in the *Shea* case.

On the second proposition it is clear that the contract by its express terms provides that the city has control over and the duty of maintaining the highway here involved insofar as the untravelled portion is concerned. It states: "The (state) will maintain the State highways from curb line to curb line only." The warning devices here involved would have been outside the curb line. It is indeed a technical distinction to say, as do the majority here, that that means the city need only keep the area outside the curbs safe for such use as may be made of that area alone without regard to uses which may be made of the highway between the curbs. The warning signs are necessarily within the area under the city's jurisdiction. Therefore, so are the placing of such warning signs. The word maintain as used therein means, as the majority assert in the forepart of its opinion, the maintenance of safety devices. The expression is from curb line to curb line, thus indicating that the contract includes highways where there is not in fact a curb. From curb line to curb line means the travelled portion of the highway. In *re Ives*, 155 App.Div. 670, 140 N.Y.S. 694. If warning devices are required on the area of the right of way outside the curbs for the purpose of warning against some defect therein, it is not reasonable to sup-

pose that the city would have exclusive control of such devices, while the state would have exclusive jurisdiction over the same area for persons staying on the travelled portion of the highway. It is obvious that the city would control said area for the benefit of those using any portion of the highway. Indeed the instant case is typical. The absent warning device would be a white fence along the edge of the right of way which would serve as a safety factor for persons using the travelled or untravelled portion of the highway. The testimony of state highway engineers that the state did all the placing of warning devices does not mean that the state had the exclusive right to do so. The respective duties and responsibilities of the state and city must be ascertained by reading the Code provisions and contract applicable thereto. It is clear from these provisions that the duty rested upon the city to maintain the absent warning devices, and its liability for the accident here involved was, therefore, established.

This case was tried before a most able and experienced trial Judge and a jury. Evidence that the accident was the result of a dangerous and defective condition of the highway is almost free from conflict. The judgment in favor of plaintiffs was affirmed by a unanimous decision of the District Court of Appeal, Cal.App., 213 P. 2d 83. That decision contains a clear and correct statement of the facts and the law applicable thereto. I adopt it as a part of this dissent. The opinion of the District Court of Appeal prepared by Mr. Presiding Justice Minor Moore and concurred in by Justices Emmett Wilson and Marshall McComb is as follows:

"Appeals from six judgments on verdicts against appellant for its negligence in failing to maintain a portion of a state highway resulting in the deaths of six persons, and from the order denying appellant's motion to set aside such judgments.

"In the far reaches of the sprawling city of Los Angeles through the mountainous region that lies to the west of that metropolis, a state highway—Route 156—

lies along a circuitous canyon road. While it extends in a generally westward direction through Topanga Canyon from Ventura Boulevard* to the Pacific Ocean about 20 miles, only .86 of a mile thereof lies within the city's corporate limits. Along this highway an automobile with six occupants proceeded on the night of September 4, 1943. At a curve in the road the vehicle did not follow the pavement, but, instead, continued on a straight course and plunged 150 feet into the canyon below. No one that viewed the tragedy survived to relate who was driving, the rate of speed of travel or the direction in which the car was headed. The only memento of the dire event was the burned wreckage in the sullen depths below. From the evidences of the manner in which the machine left the pavement and tumbled into the gorge and from the applicable presumptions, it was established that by reason of the city's negligence in failing to maintain warning devices and barriers along the right of way of Route 156 the decedent motorists rushed to their deaths.

"The road was surfaced with asphaltic concrete pavement varying in width from 20 to 24 feet with shoulders of rock and oil or decomposed granite from 6 to 8 feet in width. At the scene of the accident there were no barriers, posts, barricades, blinkers, cats-eyes or other warning devices. Neither was there a zigzag line painted on the pavement at the approach to the curve. A center stripe of broken white lines had been painted on the road approximately three months earlier. The average life of such a stripe is 14 or 15 months. The grade was approximately 5.5 per cent and the curve had a radius of approximately 150 feet with similar curves above and below the point of accident. Standard signs such as 'Winding Road' and 'Slow' to a designated safe speed had been installed at points above and below the locus of the accident. There was some evidence that the road was without a dimout area proclaimed by the Western Defense Command.

"Actions by surviving relatives against appellant, sometimes herein referred to as

* A principal state highway running to the north and south.

the city, and the State of California were commenced on the theory that the highway had been defectively designed and that the city and the state had permitted dangerous and defective conditions to exist which caused the accident. After the court at Sacramento held that the amended complaint did not state a cause of action against the state, the action was dismissed as to that defendant. Thereupon, the cause was transferred to the court below in which, after trial, verdicts aggregating \$110,000 were entered against the city.

"As grounds for reversal the city contends:

"(1) The boulevard involved is a state highway and under the exclusive control of the state and therefore the city cannot be liable for neglect of it.

"(2) Since the danger complained of relates to the construction and design of the highway, the agreement to maintain cannot be held to apply to the Topanga Canyon Road.

"(3) Not only was the highway not in a dangerous or defective condition but it does not appear that the condition of the highway was a proximate cause of the accident.

"(4) The trial having been commenced in Sacramento County, its transfer to Los Angeles County for the purpose of resuming and finishing the proceeding was prejudicial error; the Superior Court of Los Angeles County had no jurisdiction to try the cases and enter judgments.

"City Liable Under General Law

"The instant action was instituted under the 'Public Liability Act' of 1923 (Stats. 1923, p. 675; 2 Deering's Gen.Laws, Act 5619.) Section 2 provides ' * * * municipalities * * * shall be liable for injuries * * * resulting from the dangerous or defective condition of public streets, highways * * * in all cases where the governing or managing board of such * * * municipality * * * having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition * * * and failed or neglected * * * to remedy such con-

dition or failed and neglected * * * to take such action as may be reasonably necessary to protect the public. * * *' (Emphasis added.)

"Under the act liability is imposed upon municipalities for injuries to persons or property resulting from dangerous or defective conditions of public streets and highways when the city has notice of the defect and fails to remedy it. (Watson v. City of Alameda, 219 Cal. 331, 333 [26 P.2d 286]; Arellano v. City of Burbank, 13 Cal.2d 248, 254 [89 P.2d 113].) The general rule is that liability exists not only for defects arising after construction but also for improper construction in the first instance. (George v. City of Los Angeles, 11 Cal.2d 303, 308 [79 P.2d 723]; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 219 [82 P.2d 216].) In order to escape liability the city must either eliminate the dangerous condition or protect the public by adequate warning, and the sufficiency of such warning is a question of fact in each case. (Bigelow v. Ontario, 37 Cal.App.2d 198, 205 [99 P.2d 298]; Barsoom v. City of Reedley, 38 Cal. App.2d 413, 419 [101 P.2d 743].)

"The jury by its verdict has impliedly found that a dangerous and defective condition existed, and that appellant had notice thereof but failed to remedy it. Under the act there remains only one other condition precedent to the imposition of liability on the city. The case must be one in which the municipality has 'authority to remedy such condition.' Appellant argues that it did not exercise control over the highway here involved, and therefore is not liable under the act. The act does not require that a municipality *exercise* control over a highway; rather, it imposes liability where the municipality has 'authority to remedy the condition' and fails to do so. The language of the Act of 1923 is sufficient authority for the city under the facts to remove the peril. The authorities relied upon by appellant are not pertinent on this point. They (Watson v. City of Alameda, 219 Cal. 331 [26 P.2d 286]; Perry v. City of San Diego, 80 Cal.App.2d 166 [181 P.2d 98], and Sinclair v. City of Pasadena, 21 Cal.App.2d 720 [70 P.2d

241]) relate only to the question of the sufficiency of the notice to the cities involved that a dangerous and defective condition existed. In the instant case the sufficiency of the notice is attested by the prior accidents at the same place. (*Bigelow v. Ontario*, supra, 37 Cal.App.2d at page 204, 99 P.2d 298; *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal.App.2d 215, 219 [82 P.2d 216].) *Galiano v. Pacific Gas & Electric Co.*, 20 Cal.App.2d 534 [67 P.2d 388], is not applicable. It concerns the liability of an abutting property owner, and not that of a municipality.

"Appellant's contention that a municipality is not liable for dangerous and defective conditions over which it does not exercise control is not supported. If the failure to exercise control were sufficient to avoid liability the whole purport and intent of the Public Liability Act of 1923 could be obviated simply by inertia. The cases cited by appellant are not in point because the applicable statutes specifically relieved the municipalities of liability or because they were instituted against parties other than municipalities. Notwithstanding the Act of 1923 and the authorities last cited, appellant contends that it 'has no supervision or control over route 156 within its city limits.' In support of such contention it cites a number of authorities which on close inspection fail of their purpose. In *Southern California Roads Co. v. McGuire*, 2 Cal.2d 115 [39 P.2d 412], a proceeding in mandamus, the city had by contract with the state undertaken the construction and improvement of a state highway within the corporate limits. After such contract had been executed the petitioner agreed by a writing to do the work. This document fulfilled the requirements of the city charter but did not comply with state law. The court held that such a contract must conform with state law. No question of tort

liability was raised in the case. Neither the proposition there enunciated nor the facts recited can aid in the solution of the question at bar. Merely because the state retains supervisory powers over city sub-contracts, the city is not thereby relieved of obligations imposed upon it by general law. In the cited case the entire work was to be done by the city. In the instant case, all work was to be done by the state with the exception of that done from the curb line to the property line. In the *McGuire* case, supra, the city took the position that it was required to comply with state law. In the instant case, the city takes the position that the general laws of the state did not impose upon it any obligation to erect barriers or warning devices in the area allocated to it by the contract. These contentions are not only inconsistent but the argument of the city finds no support in the *McGuire* case. In *Stadelmann v. City of New York*, 126 App.Div. 352, [110 N.Y.S. 682], the court held the city not liable for injuries sustained by a pedestrian. There is no showing that the road there involved was a state highway. The case sheds no light upon the instant issues. The same is true of *Trotter v. Town of Glenmora*, (La.App.) 2 So.2d 510, which follows the *Stadelmann* decision.

"The City is Liable Under the Contract

"For the purpose of improving and maintaining certain state highways, the state determined about August, 1943, to effect certain projects. In that month the city and the state entered into a written agreement pertaining to the maintenance of certain state highways within the city, including Route 156. In compliance with section 203 of the Streets and Highways Code, the agreement provided for the expenditure of \$7,250 by the Department of Public Works.* The portions of state highway

* "The fund expended on the construction and maintenance of highways is designated 'Motor Vehicle Fuel Fund.' It is raised by levies of 6 cents per gallon on all gasoline fuel distributed in the state. (Rev. & Tax. Code, §§ 7351, 8651). The state treasurer pays it into the State Highway Fund. (Ibid., §§ 8357, 9302). Such fund must be expended for the

maintenance of state highways. (Sts. & Hy. Code, § 188.) The Department of Public Works shall expend an amount not less than the revenue derived from one-fourth cent per gallon tax on such fuel for the improvement and maintenance of state highways within cities. (Ibid., § 203). A municipality may contract with the state for the performance

routes to be maintained under project 97(b) are described as follows: "Route 156, Topanga Canyon Road, from city limits about 2.70 miles north of junction with Route 60 to north city limits near Fernwood Park; a length of approximately 0.86 mile for this portion." The Department of Public Works did not delegate authority or jurisdiction over Route 156 in its entirety to the city. The only specific reference to that highway comes under the heading: '(b) Work by the department.'

"Article VI, Miscellaneous Provisions" of the agreement provides: 'In the event the work of maintaining the state highway routes within the city is being done by the department, the approval of the department shall be secured before any encroachment on the surface or any cut, excavations or openings in the vehicular roadway are permitted. *The department will maintain the State highways from curb line to curb line only. There is hereby delegated to the city the maintenance of the areas between curb lines and right of way lines * * **'

"Appellant advances the proposition that it is not liable for a dangerous condition of property over which it does not exercise control. If by any chance the city is not liable under the Public Liability Act and the decisions heretofore cited, it is liable beyond a peradventure by virtue of its agreement for detriment caused by its neglect to maintain its streets in a reasonably safe condition. Under its contract with the state the liability of appellant is accentuated. In support of its thesis, the city cites *Griffith v. Town of Berlin*, 130 Conn. 84 [32 A.2d 56]; *Gardner v. City of Covington*, 86 Ind.App. 229 [156 N.E. 830]; *Brunacci v. Plains Township*, 315 Pa. 391 [173 A. 329]; *Barnett v. City of Opelousas*, (La.App.) 13 So.2d 788; *Glover v. Town of Ponchatoula*, (La.App.) 17 So.2d 44; *Gabbert v. City of Brownwood*, (Tex.Civ.App.) 176 S.W.2d 344. In no respect do these authorities apply. In none of them was there an agreement between the city and the Department of Public

Works obligating the municipality to maintain a part of the highway in question.

"While 'full control and possession of all state highways is vested in the State Department of Public Works' (Sts. & Hy. Code, § 100) yet the Department of State Highways may delegate to any city the department's powers, duties and authority as to any state highway or any part thereof. (Ibid, § 676; *Southern California Roads Co. v. McGuire*, 2 Cal.2d 115, 123 [39 P.2d 412].)

"Appellant contends that the italicized portions of its contract pertain to the maintenance of sidewalks and parking strips along those streets which are improved and that they can have no reference to a mountain road such as that in Topanga Canyon 'where the only portion of the right of way improved for travel and so used is the roadway designed and maintained by the State for vehicular travel.' But the unambiguous language of the contract clearly gives to the city the right and obligation to maintain those portions of the highway extending outward from the curb line to the right of way lines and by its contract the city was in that area obligated to do whatever was essential to make the highway reasonably safe for travel at all times. That the trial court adopted such thesis is evidenced by the fact that it instructed the jury that the pleadings admitted that by the agreement the city was authorized to maintain the areas between curb lines and right of way lines. This instruction was correct since appellant had attached a copy of the agreement to its answer as a part thereof. Having admitted the execution and validity of its own contract appellant is in no position to deny the significance of its plain provisions.

"Thus by contract not only did the city acquire the right to erect warning signs and barriers upon those portions of the highway outside the paved road but thereby its duties under the Public Liability Act were enlarged. There is no reasonable ba-

of the work within its corporate limits, (ibid., § 202) and in respect to the proportion of the expenses of such improvement and maintenance of a highway to

be borne by the respective parties, and such highway may be located in whole or in part within the limits of the contracting city." (Ibid., § 130).

sis for appellant's contention that it lacked power to do the acts essential to the maintenance of the .86 mile on Route 156 as a safe highway. The fund under control of the Highway Commission was available in sufficient amount to make it safe. By the contract the city was required to 'maintain the highway from curb line to the right of way line.' And even though the language of the contract did not require the city to perform any work upon the paved portion, a reasonable construction would require appellant either to paint zigzag white stripes on the pavement at approaches to curves or to keep barriers outside the pavement wherever a dangerous condition existed so near the pavement as to be a peril, or to post warning signs. Having failed to do those things, even assuming appellant's contention that it lacked power or authorization to do so, it was nevertheless not relieved of the responsibility to warn persons lawfully using the highway that a dangerous condition existed. (*Shea v. City of San Bernardino*, 7 Cal.2d 688, 693 [62 P.2d 365]; *Rose v. County of Orange*, 94 Cal. App.2d 688 [211 P.2d 45].) A municipality may not ignore a hazard to travelers within its borders on the ground that it lacks jurisdiction to act. (*Shea v. City of San Bernardino*, supra, 7 Cal.2d at pages 692, 693, 62 P.2d 365.) There was no evidence adduced at the trial that the city had urged the department to remedy the condition at the place of accident. Having failed to take action itself under a contract which empowered it to act, and having failed to urge action on the part of the department which appellant contends had the sole power to act, the city cannot now assert that it was not delinquent in its duty to the public.

"Maintenance

"It is next argued that the posting of adequate warning signs and erection of guards and barriers is not a matter of maintenance, but of construction and therefore the agreement did not require the city to erect such devices. The answer to this contention is found in section 27 of the Streets and Highways Code: '* * * "maintenance" includes * * * [t]he nec-

essary provision for special safety conveniences and devices.'

"Other Issues

"Over objection evidence was admitted to show efforts on the part of the city to induce the state to construct projects on other portions of Route 156 out of the available fund. Appellant contends that its admission was prejudicially erroneous. The record discloses that the evidence was admitted to show that such a procedure was available to the city to procure the improvement of the portion of Route 156 here involved. That the city was interested in the condition of other parts of the highway and failed to take an interest in that portion within its own boundaries was proper evidence to enable the jury to determine whether the city had been delinquent in its duty to the public. Since 'the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested,' (*Shea v. City of San Bernardino*, supra, 7 Cal.2d at page 693, 62 P.2d 365) its failure to take an interest therein is best demonstrated by its interest elsewhere. No valid reason appears why the city could not have requested authority from the department to act and have requested its share of the gasoline tax fund with which to erect such guard rails and warning devices as would have removed the death trap which took the lives of the decedents. Even if the evidence was inadmissible, it is not shown how it proved prejudicial to appellant's cause, and without prejudice, the error, if any, is not ground for reversal. (Const. art. VI, § 4½.)

"Damages Not Excessive

"The damages awarded were not excessive. Ottie Gillespie was awarded \$20,000 for the death of her youngest son, her sole support. Ila and Patrick Gillespie, the widow and minor son of Doyle Gillespie, were awarded \$30,000 for the loss of the husband and father. The value of the proof of domestic infelicity in their home was a matter for the jury's appraisal as well as all other factual issues. The husband earned in excess of \$3,000 per annum

while the expectancy of Ila exceeded 43 years and the minority of Patrick exceeded 18 years. The joint award to them was not excessive. (See *Sherman v. Southern Pacific Co.*, 34 Cal.App.2d 490 [93 P.2d 812]; *Weiland v. Southern Pacific Co.*, 34 Cal.App.2d 500 [93 P.2d 1023]; *MacDonnell v. Southern Pacific Co.*, 17 Cal.App.2d 432 [62 P.2d 201].) Petra Perez Oveso, Evelyn Russell, Charles Bittner and Mr. and Mrs. Smith were awarded \$15,000 respectively for the deaths of their minor children. In the case of each of these plaintiffs, ample proof was adduced showing the contributions by the decedent to his parents and his loyalty to and affection for them. On these matters the findings of the jury in the absence of error are conclusive. *Hunton v. California Portland etc. Co.*, 64 Cal.App.2d 876 [149 P.2d 471, 150 P.2d 221], cited by appellant on the excessiveness of the verdicts is not in point. The father was a young and successful businessman. The possibility that the deceased son would ever have supported him was too remote.

"A large award for the loss of a loved one does not in and of itself establish that it is the result of prejudice or passion. Compensation for loss must be fixed in view of the purchasing power of the dollar at the time of the loss and not by its power of 20 years ago. Today the dollar's value in purchasing power is not to exceed 60 per cent of its value in 1940. The value of an award is not to be 'estimated in the numerical quantum of recompense but in its comparative ability to furnish the necessities of life.' (*O'Meara v. Haiden*, 204 Cal. 354, 366 [268 P. 334, 60 A.L.R. 1381]; *Butler v. Allen*, 73 Cal.App.2d 866, 867, 870 [167 P.2d 488]; *Brown v. Boehm*, 78 Cal.App.2d 595, 603 [178 P.2d 49].) Not only is loss in dollars and cents to be considered in fixing damages, but also loss of comfort, society and protection. Therefore, no yardstick as to amount can be utilized. (*Holder v. Key System*, 88 Cal.App.2d 925, 940 [200 P.2d 98].) In the instant case it cannot be said that the compensation awarded for the loss of minor child or husband was unduly generous.

"The Court Had Jurisdiction

"Appellant's final contention is that the Superior Court of Los Angeles County was without jurisdiction to try the cause. The action was originally filed in that county but was removed to Sacramento County on motion of the state where it was stipulated between plaintiffs and the state: '* * * that since said defendant desires to present to the above-entitled court the defendant's contention that the complaint fails to state a cause of action, and since both parties desire to determine said point without inconveniencing a large number of witnesses by preparing at this time for the trial of the entire cause, it may be deemed that the first witness has been sworn and that the said defendant has seasonably objected to the introduction of any testimony whatever on the grounds that the complaint fails to state a cause of action against the defendant State of California, and that thereupon the matter may be argued and submitted to the court.' The objection of the state was sustained and a judgment of dismissal as to the state rendered. The cause was then transferred by the court to Los Angeles County on the ground of convenience of witnesses under subdivision 3 of section 397 of the Code of Civil Procedure. Appellant asserts that the trial had actually commenced in Sacramento County and that it was therefore improperly discontinued and transferred to another county.

"It is the prevalent practice to rule upon a general demurrer before receiving evidence of the allegations. Upon the state's objection to any evidence the issue of law was raised as to the sufficiency of the complaint. The Sacramento court did not consider the merits of respondents' cause of action against appellant but simply determined as a matter of law that the facts alleged in the second amended complaint were insufficient to constitute a cause of action against the state. That ruling having adjudicated with finality respondents' claims against the state, it was correct practice to deal with the matter as though respondents had filed the action at first in the Sacramento court against the city only. No

pertinent authority is cited for the proposition that the court could not thereafter transfer the cause to another county for the convenience of witnesses. What else could the Sacramento court have done since the only interested parties remaining in the action were residents of Los Angeles County and their witnesses resided there? To have denied the demand for removal would have been an injustice to all the litigants.

"All the issues presented by this appeal were duly considered by the trial judge during the course of the trial. The question of jurisdiction was considered on the hearing of appellant's motion to set aside the judgments. No prejudicial error appears with respect to any judgment or in the order denying appellant's motion to set aside the judgments.

"The judgments and the orders are affirmed."

In view of the foregoing, I would affirm the judgments.

SCHAUER, J., concurs.

Rehearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.



101 Cal.App.2d Supp. 907

DUSOLD et al. v. JOHNSTON.

No. 161359.

Appellate Department, Superior Court,
San Diego County, California.

Dec. 7, 1950.

Action by Ed Dusold and others against Richard B. Johnston to recover sum deposited with defendant under a lease. The Municipal Court, City of San Diego, Ronald Abernethy, J., rendered judgment for defendant, and the plaintiffs appealed. The Superior Court, County of San Diego, Burch, J., held that the memorandum under which the deposit was made, was insufficient to create a valid lease.

Judgment reversed, and entered for plaintiff.

1. Frauds, statute of ☞113(3)

The identification of the term of the lease, its beginning and ending, and the

rental and time and places of its payment are substantive and essential in a lease or an agreement for a lease. Civ. Code, § 1624, subd. 4.

2. Frauds, statute of ☞158(3)

A substantive portion of an agreement required to be in writing cannot be established by parol evidence. Civ. Code, § 1624, subd. 4.

3. Frauds, statute of ☞138(2)

Where tenants established that lease was unenforceable under statute of frauds, tenants could recover deposit on a common count for money had and received by landlord for use and benefit of tenants.

4. Frauds, statute of ☞158(3)

The sufficiency of a memorandum of a lease as to the substantive portions of the lease had to be determined from the writing, unsupplemented by parol evidence.

5. Frauds, statute of ☞138(2)

Where memorandum of a lease between landlord and tenant, under which tenants were to make a deposit of \$450, was insufficient to establish a valid contract under the statute of frauds, tenants could recover their deposit made thereunder, together with interest from date of the deposit. Civ. Code, § 1624, subd. 4.

6. Appeal and error ☞1176(1)

Where sufficiency of memorandum was a question of law, and no material facts were in dispute, Supreme Court would direct that a judgment be entered for the prevailing parties.

Edwin M. Campbell, National City, for appellants.

Miller, Higgs & Fletcher, San Diego, for respondent.

BURCH, Judge.

Pending negotiations for the leasing of a storeroom, the plaintiffs deposited with the defendant the sum of \$450. By this action they seek its recovery, with interest upon the ground that the negotiations were abortive and that no enforceable contract resulted. Defendant claims a binding ob-

ligation was entered into by the terms of which and because of the breach of the plaintiffs he is entitled to retain the \$450 as damages. Judgment below was for the defendant and the plaintiffs appealed.

From the agreed statement of facts and admissions in the pleadings, it appears that the parties negotiated for a lease for a five year term upon a storeroom in La Jolla. The parties signed the following instrument:

"Received of Burtus S. Finch, the sum of Four Hundred Fifty Dollars (\$450.00), which sum represents the consideration referred to in page one (1) of the Lease covering the tenancy of the store situated at 5734 La Jolla Boulevard, La Jolla, California, and showing Elroy E. and Cecile M. Stevenson, husband and wife and E. and Naomi DuSold, husband and wife, as Lessees.

"Richard B. Johnston

"August 17, 1949

Richard B. Johnston, Lessor

"Should the abovenamed Lessees fail to enter into said Lease as abovementioned, on or before September 15, 1949, the undersigned here understands and agrees that the above-described consideration of Four Hundred Fifty Dollars (\$450.00) shall, at the option of the Lessor abovenamed, be retained by Lessor, as liquidated damages.

"(x) Burtus S. Finch

(x) Helen Finch"

"August 17, 1949

It is conceded that Burtus S. Finch was acting for and on behalf of the lessees and was duly authorized.

On September 14, 1949, the plaintiffs demanded of the lessor return of the \$450 deposit. In the interim between the writing and the demand, the defendant had prepared and submitted to the plaintiffs an unsigned form of lease containing some twenty-three paragraphs of covenants and obligations incident to the term, use, rent, repairs, taxes, fire insurance, assignment and subletting, termination by bankruptcy, liability for damages, yielding possession, holding over, attorney's fees, damage for broken pipes, condemnation, forfeiture and remedies, notices, and making time of

the essence, none of which covenants and provisions are evidenced in the writing other than a proper description of the premises to be leased. The prepared lease was never executed, and the lessees never acquired possession.

At the trial, parol evidence was introduced tending to show that the defendant exhibited to the plaintiffs during the negotiations a copy of an executed lease to other lessees for a different term upon an adjoining store owned by the defendant in the same building.

[1,2] Since the lease was to be for a term of more than one year, the transaction came within the provisions of section 1624, subdivision 4 of the Civil Code. The defendant contends that the writing, supplemented by the parol evidence, created an enforceable contract which was breached by the plaintiffs to his damage, and that the judgment is supported accordingly. Plaintiffs contend the signed instrument is wanting in the necessary elements of an agreement for a lease, or an option for a lease. Further, that the written memorandum is insufficient to satisfy the statute of frauds, section 1624, subdivision 4 of the Civil Code. We are of the opinion that plaintiffs are correct in their contention. While the memorandum has a sufficient description of the property to be leased, and the names and identification of the parties, lessor and lessees, it is totally lacking in identification of the term, its beginning and ending, or of the rental and the time and places of its payment. These latter elements are substantive and essential in a lease or an agreement for a lease. *Friedman v. Bergin*, 22 Cal.2d 535, 539, 140 P.2d 1; *Ellis v. Klaff*, 96 Cal.App. 2d 471, 216 P.2d 15; *Wineburgh v. Gay*, 27 Cal.App. 603, 150 P. 1003; *Rohan v. Proctor*, 61 Cal.App. 447, 214 P. 986; *Enlow v. Irwin*, 80 Cal.App. 98, 251 P. 658; *Re-Statement of Contracts*, 207; *Williston on Contracts* (1936) Vol. 2, pp. 1618, 1619, 1645. Notwithstanding some implications to the contrary in *Wineburgh v. Gay*, *supra*, *Enlow v. Irwin*, *supra*, and *Beckett v. City of Paris Dry Goods Co.*, 14 Cal.2d 633, 96 P.2d 122, only if the in-

strument executed on August 17 contains the material terms of the contract is the same enforceable. *Fritz v. Mills*, 170 Cal. 449, 150 P. 375; *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88; *Friedman v. Bergin*, supra, 22 Cal.2d at page 537, 140 P.2d 1; *Ellis v. Klaff*, supra, 96 Cal. App.2d at page 477, 216 P.2d 15. If a substantive portion of the agreement could be established by parol evidence, the objective of the statute would be frustrated. *Craig v. Zelian*, 137 Cal. 105, 106, 69 P. 853. The reference to an existing lease in the writing signed by the defendant is a fiction tacitly admitted by the pleadings in that the lease, unsigned and unexecuted, was prepared after the writing. There is no such ambiguity as could be resolved by exhibiting the executed lease for defendant's adjoining store in the circumstances here.

[3] It is true that in pleading their facts in the first cause of action the plaintiffs do not specifically set up the statute of frauds as the ground for recovery, but their second cause of action is on a common count for money had and received by defendant for the use and benefit of plaintiffs. The case, however, was tried below on the theory of a binding contract breached by the plaintiffs to defendant's damage. Upon the pleadings, therefore, and the theory upon which the case was tried, plaintiffs have established their right of recovery. *Ellis v. Klaff*, 96 Cal.App.2d 471, 216 P.2d 15; *Enlow v. Irwin*, 80 Cal. App. 98, 251 P. 658; *Martin v. Hall*, 219 Cal. 334, 26 P.2d 288. We quote from *Martin v. Hall*, supra, 219 Cal. at page 338, 26 P.2d at page 289: " * * * by virtue of the fact that the alleged agreement is unenforceable appellant has stated a cause of action for recovery of the sum of \$5,000, which he alleges he paid respondent for a lease and which respondent still retains." And again on 219 Cal. at page 339, 26 P.2d at page 290: "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, * * *"

In *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84 which was an action against an administrator and heirs of a decedent to recover on an oral promise of decedent, unenforceable by reason of the statute, the Court says that the plaintiff was not entitled to recovery on the contract by virtue of the statute of frauds, but the Court held that his pleading stated a cause of action for the recovery of the reasonable value of his services.

In *Ellis v. Klaff*, supra, 96 Cal.App.2d at page 475, 216 P.2d at page 18 the Court said: "Conceding that the bar of the Statute of Frauds is being asserted for the first time upon the appeal, we nevertheless are constrained under the particular circumstances to exercise our discretion to consider the matter. See *Solorza v. Park Water Co.*, 86 Cal.App.2d 653, 195 P.2d 523."

[4,5] In view of our conclusion that the statute of frauds argued on appeal controls the proper disposition of the case; that the sufficiency of the memorandum as to the substantive portions of the proposed contract must be determined from the writing, unsupplemented by parol evidence, we direct that the judgment be reversed. Further, since the sufficiency of the memorandum is a question of law and that no material facts are in dispute, we direct that judgment be entered for the plaintiffs for \$450, with interest from September 14, 1949. See *Perkins v. Cowles*, 157 Cal. 625, 108 P. 711, 30 L.R.A.,N.S., 283; *Pacific Sewer Pipe Co. v. U. S. Fidelity & Guaranty Co.*, 185 Cal. 515, 197 P. 332; *Meyer v. Johnson*, 7 Cal.App.2d 604, 46 P.2d 822; *State Mutual Building & Loan Ass'n v. County of Los Angeles*, 30 Cal.App.2d 383, 86 P.2d 372.

Judgment is reversed. Let judgment be entered by the trial court for plaintiffs for \$450 with interest from September 14, 1949.

TURRENTINE, P. J., concurs.

GLEN, J., deeming himself disqualified, did not participate in the hearing or decision.

101 Cal.App.2d 480

**STANDARD OIL CO. OF CALIFORNIA
v. HOUSER.****Civ. 18012.****District Court of Appeal, Second District,
Division 2, California.****Dec. 28, 1950.**

Standard Oil Company of California, a corporation, brought an action against V. C. Houser to recover from defendant as surety under instrument whereunder defendant guaranteed payment, when due, of all charges of plaintiff oil company for account of a specified corporation engaged in carrying freight by air. The Superior Court of Los Angeles County, Walter R. Evans, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Wilson, J., held, *inter alia*, that the instrument did not limit the guarantee of credit extended on sales by concerns other than plaintiff to sales pursuant to terms of credit cards issued by plaintiff to the corporation.

Judgment affirmed.**1. Guaranty ⇨36(5)**

Instrument whereunder defendant guaranteed payment, when due, of all charges of plaintiff oil company for account of named corporation engaged in carrying freight by air, of whatever nature, and including all charges pursuant to terms of credit cards issued by plaintiff to corporation, which cards by terms could be used to purchase specified merchandise sold at plaintiff's station and at stations supplied by other companies named therein, did not limit guarantee of credit extended on sales by concerns other than plaintiff to sales pursuant to terms of credit cards.

2. Principal and surety ⇨59

Contract of suretyship is governed by rules applicable to interpretation of other contracts. Civ.Code, § 2837.

3. Principal and surety ⇨59

The intent of parties to contract of suretyship is ascertained, first, by resort to contract itself, and if intention of parties cannot be ascertained with certainty from contract, resort may be had to

surrounding circumstances to determine its meaning, but if contract is so precise and express that there can be no doubt as to intention of its terms, the court cannot do otherwise than follow declared intention of the parties. Civ.Code, § 2837.

4. Principal and surety ⇨74

A surety obligation is to be deemed unconditional unless its terms import some condition precedent to liability of surety. Civ.Code, § 2806.

5. Guaranty ⇨38(1)

A future liability of surety's principal, under successive transactions, is called a "continuing guarantee". Civ.Code, § 2814.

See publication Words and Phrases, for other judicial constructions and definitions of "Continuing Guarantee".

6. Guaranty ⇨36(1)

Where surety was unconditional guarantor of all of plaintiff's charges for account of surety's principal, liability of surety was coextensive with liability of principal, and admission of surety that a *prima facie* case had been made against principal by plaintiff for charges for account of principal was an admission of surety's liability.

7. Principal and surety ⇨156

Limitations, conditions precedent, and exoneration are affirmative defenses in action against surety and are not available to surety unless pleaded. Code Civ.Proc. § 437.

8. Evidence ⇨89

In action to recover from surety under instrument whereunder defendant guaranteed payment, when due, of all charges of plaintiff oil company for account of named corporation engaged in carrying freight by air, including charges pursuant to terms of credit cards issued by plaintiff to corporation, which cards by terms could be used to purchase specified merchandise upon their presentation, wherein presumption that ordinary course of business had been followed as regarded requirement that credit cards be presented at time of delivery and that delivery receipts be given, was not contradicted, presumption established *prima facie* that cre-

dit cards were presented and delivery receipts given. Code Civ.Proc. § 1963, subd. 20.

9. Evidence ⇨89

A "rebuttable presumption" is a species of evidence which, standing alone, will support a finding even against contradictory evidence produced by the other party.

See publication Words and Phrases, for other judicial constructions and definitions of "Rebuttable Presumption".

10. Guaranty ⇨90

In action against surety who guaranteed payment of all of plaintiff's charges against corporation, wherein question was obligation of corporation, whatever was evidence against corporation was evidence against surety. Code Civ.Proc. § 1851.

11. Evidence ⇨376(1)

In action against surety who guaranteed payment of all of plaintiff's charges against corporation, books of account of plaintiff and corporation were admissible in evidence under statute to establish the making of sales to corporation by plaintiff where there was evidence of authenticity of such books. Code Civ.Proc. §§ 1953e-1953h.

12. Appeal and error ⇨1012(1)

In action against surety who guaranteed payment of all of plaintiff's charges against corporation, weight of evidence relative to whether sales were made to corporation by plaintiff was for trial court as trier of facts.

McLaughlin & Casey, Los Angeles, for appellant.

Lawler, Felix & Hall, Los Angeles, for respondent.

WILSON, Justice.

The principal question presented in this action relates to the construction of a written guaranty signed by defendant, which is the basis of the judgment rendered against him from which he has appealed. He admits the execution of the document but disputes liability thereunder. The guaranty reads as follows:

"Los Angeles Calif. 9/18 1947

Station Date

"Standard Oil Company of California

"Gentlemen:

"For value received, the undersigned hereby guarantees the payment, when due, of all your charges for the account of

Eagle Air Freight,

"Residing at Lockheed Air Terminal—Burbank, (hereinafter referred to as the 'Customer'), of whatever nature, and including all charges pursuant to the terms of Credit Cards issued by you to said Customer, for goods sold and delivered on or after this date. The undersigned hereby waives diligence, demand and notice from you or on your part. This guaranty is a continuing one and shall remain in force until you receive, at your Los Angeles office, written notice of the termination thereof from the undersigned, and for such further time after the receipt of such written notice of termination as Credit Cards issued by you prior to such notice to said Customer shall be outstanding and shall by their terms entitle the person in possession thereof to purchase goods upon the credit of said Customer.

"Dated 9-18, 1947 V. C. Houser

"Address 3200 Durand Dr.,

"2 Credit Cards only —

"L. A. 28, Cal."

After the execution of the guaranty plaintiff issued two credit cards to Eagle Air Freight which read in part as follows, the omissions relating to matters not relevant to this action:

"This credit card may be used by the customer named hereon to purchase authorized merchandise and services * * * sold at Standard Stations, Inc., Chevron Gas Stations, and airports supplied by Standard Oil Company of California.

"This card may also be used to purchase petroleum products * * * at dealers, service stations, and airports supplied by other companies named on the inside hereof. * * *

"The license number of vehicle or airplane taking delivery must be entered on the delivery receipt at time of sale. Card must be presented at time of delivery.

"* * * Should the customer permit any other person to have this Card, the customer agrees to pay for all purchases furnished such person hereunder * * *."

The assignment of errors upon which defendant relies is thus stated in his brief:

"1. The guaranty of credit extended on sales by concerns other than respondent was limited to sales pursuant to the terms of the credit cards. The trial court, therefore, erred in awarding a recovery on account of such sales where they were not shown to have been made upon presentation of such credit cards.

"2. There was no competent evidence of any sales to Eagle Air Freight or of any indebtedness which might create a liability under the guaranty."

Eagle Air Freight, a corporation, was, until the filing of its voluntary petition in bankruptcy on October 26, 1948, engaged in carrying freight by air in and through several western states and occasionally others; its principal place of business was at Lockheed Air Terminal in Burbank; it owned three freight-carrying airplanes, had three others under charter for a considerable period, and chartered several others from time to time. Under most of the charters Eagle furnished the gasoline; at the time the guaranty was signed defendant was a creditor, stockholder and director of Eagle and was chairman of its board; he acted as president from the latter part of July until the bankruptcy proceedings were instituted.

Prior to September 18, 1947, the date of the guaranty, plaintiff had sold gasoline and oil to Eagle on a cash basis; the guaranty was executed, according to defendant's statement, when he was told it was needed in order that Eagle could save money by buying gasoline on credit.

After the signing of the guaranty and at each quarterly period thereafter plaintiff issued two national credit cards to Eagle, each card bearing Eagle's name and address and the credit card number assigned to its account. The cards were in the form above quoted.

The usual procedure for the sale of gasoline by independent dealers was as follows: At the time of each delivery the dealer made out a delivery receipt in quadruplicate on which was placed Eagle's name and address, the credit card number, the kind and quantity of merchandise purchased, and the price; the person taking delivery signed the dealer's receipt and received a copy of it; the dealer kept a copy and sent the original and one copy to plaintiff. After plaintiff received the original and copy of the delivery receipt it credited the amount shown thereon to the independent dealer and then repriced Eagle's delivery receipts, on which it was entitled to a reduced price based on the quantities purchased at certain airports. Plaintiff then made the appropriate charge against Eagle's account; the original delivery receipts were sent to Eagle, together with a billing invoice. Once each month plaintiff sent to Eagle a statement showing the charges, credits and balance due as shown by plaintiff's ledger. Eagle thus received as a record of its purchases (1) the duplicate delivery receipts furnished by the dealer at the time of delivery, (2) the original delivery receipts sent to Eagle after plaintiff received them, (3) a billing invoice with the original delivery receipts, and (4) a monthly statement showing debits, credits and balance due.

Defendant, while acting as chairman of the board, called and attended meetings of Eagle's directors and visited its offices on other occasions; he appointed his wife as his agent to act for him in the management and control of his interest in the corporation. After the signing of the guaranty she opened a special bank account in their joint names for the purpose of paying the gasoline bills; under the arrangement with Eagle the latter was to pay defendant when purchases were made and he in turn was to pay plaintiff when the statement was received. By this arrangement defendant's wife was to have available money sufficient to pay the monthly statement when rendered; she received money from Eagle, deposited it in the special bank account, and saw the delivery

receipts when payments were made; on her check stubs she recorded the kind or place of gasoline delivery.

After April 12, 1948, Mrs. Houser received no further checks from Eagle, whereupon she wrote to the latter's secretary and treasurer demanding payment in order that she might pay plaintiff, stating "either I have this or I will be forced to close the credit account." Neither defendant nor his wife ever exercised the right reserved in the guaranty to terminate liability under it.

Defendant was president of Eagle at the time its voluntary petition in bankruptcy was filed, and as president verified the petition showing that Eagle was indebted to plaintiff in the sum of \$88,919.50, which exceeded the sum sued for in this action.

Defendant's first specification of error, to wit, that the guaranty of credit extended on sales by dealers other than plaintiff was limited to sales pursuant to the terms of the credit cards, demands a construction of the guaranty. Defendant guaranteed the payment "of all your charges" for Eagle's account "of whatever nature, and including all charges pursuant to the terms of Credit Cards issued by you" to Eagle. The guaranty is "of all your charges * * * of whatever nature." This terminology includes without limitation all charges of any and every kind made by plaintiff against Eagle. The words "including all charges pursuant to the terms of Credit Cards" add nothing to the strength of the guaranty but merely draw attention to and emphasize the fact that defendant, by signing the document, guaranteed not only plaintiff's charges but all charges made pursuant to the credit cards which were authorized to be honored by dealers, service stations and airports named on the inside of the credit cards.

The words "for goods sold or delivered on and after this date" apply likewise to "all your [plaintiff's] charges" and to charges made by other dealers named on the inside of the credit cards.

The endorsement "2 Credit Cards only" was made by defendant at the time he signed the guaranty, his reason being that

since Eagle owned three airplanes, two would always be in service and two credit cards would be sufficient. The record shows and the court found that only two credit cards were in force at any one time.

[1] Defendant's contention that two separate types of sale were covered by the guaranty (1) charges for goods sold by plaintiff, and (2) charges for goods sold by independent dealers pursuant to the credit cards, is untenable. There is nothing confusing, ambiguous or uncertain in the terms of the guaranty. There is no condition precedent that charges must have been made on the credit cards. The reference to such cards was merely a specific inclusion of charges made on such cards as well as other charges against Eagle.

There can be no contention that the credit cards are a part of the guaranty or were regarded by defendant as such since no credit cards were issued until after the guaranty had been signed. Plaintiff determined the terms to be inserted in the cards and defendant did not know what such terms would be when he executed the guaranty. The conditions upon which the cards might be used were subject to change by plaintiff from time to time and at any time. Hence it is manifest that the terms and conditions of the credit cards did not enter into the guaranty.

To defendant's contention that the evidence is insufficient to sustain the findings and judgment for the reason that there is no proof (1) that credit cards were presented at the time gasoline and oil were delivered to the airplanes owned or chartered by Eagle, (2) that delivery receipts were not signed by the pilot to whom delivery was made, there are three answers: (1) Defendant's counsel admitted that "they [plaintiff's counsel] have put on a prima facie case as to Eagle. By putting in the documents, that they put in a prima facie case as to Eagle's liability"; (2) several hundred delivery receipts were introduced in evidence and defendant has not pointed out which, if any, are not properly authenticated; (3) the guaranty covered all plaintiff's charges, and plaintiff made the charges shown by its monthly

statements for goods sold by itself and by independent dealers named in the credit cards.

[2-4] A contract of suretyship is governed by the rules applicable to the interpretation of other contracts. Civ.Code, sec. 2837. The intent of the parties to a contract of suretyship is ascertained, first, by resort to the contract itself, and if the intention of the parties cannot be ascertained with certainty from the contract then resort may be had to the surrounding circumstances to determine its meaning, *Schwab v. Bridge*, 27 Cal.App. 204, 206, 149 P. 603, but if the contract is so precise and express that there can be no doubt as to the intention of its terms the court cannot do otherwise than follow the declared intention of the parties. *Idem.*, 27 Cal.App. at page 207, 149 P. at page 604. "A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety." Civ.Code, sec. 2806.

[5] A future liability of the principal, under successive transactions, is called a continuing guaranty. Civ.Code, sec. 2814. Defendant did not guarantee any specific contract between plaintiff and Eagle but did guarantee all plaintiff's charges for the account of Eagle. In *Sopris v. Continental Manufacturing Corporation, Ltd.*, 6 Cal.App.2d 416, 44 P.2d 615, the appellant guaranteed payment for 50,000 brushes. At the time of the execution of the guaranty a contract for the brushes had not been made. Thereafter the manufacturer and purchaser made a contract for 50,000 brushes specifying price, terms of payment, time and place of delivery. The court held that appellant did not guarantee a specific contract but that the guaranty was general in its terms for the payment of the number of brushes specified in the written guaranty.

In the instant case no sale or contract of sale of gasoline had been made and the credit cards had not been issued. Hence the direct applicability of the *Sopris* case. The quantities, prices, and terms of the agreements of sale from plaintiff to Eagle and from independent dealers to Eagle

were of no concern to defendant since he guaranteed payment of all goods sold to Eagle on credit.

[6] Since defendant was an unconditional guarantor his liability is coextensive with that of Eagle. *Mannix v. Wilson*, 18 Cal.App. 595, 601, 123 P. 981; *Benjamin v. Hillard*, 23 How. 149, 64 U.S. 149, 164, 16 L.Ed. 518, 521. Defendant's admission, therefore, that a prima facie case had been made against Eagle is an admission of his own liability.

[7] Defendant admitted the execution of the guaranty in the terms pleaded in the complaint. He did not plead any limitation, condition precedent, exoneration, or any similar defense. Such matters are affirmative defenses and are not available unless pleaded. Code Civ.Proc. sec. 437; *Blackwood v. McCallum*, 187 Cal. 655, 659, 203 P. 758; *Pacific Mill & Timber Co. v. Massachusetts Bonding & Insurance Co.*, 192 Cal. 278, 285, 219 P. 972; *Hobson v. Metropolitan Casualty Ins. Co.*, 120 Cal. App. 727, 730, 8 P.2d 150.

[8,9] Relying upon the guaranty plaintiff issued two credit cards to Eagle. Defendant contends there is no evidence that the cards were presented at the time of delivery of the gasoline or that receipts were given therefor. Conceding that such proof is necessary, although as we have already stated it was not, it must be assumed that the regular course of business was followed and that Eagle received a copy of the delivery receipt for each purchase of merchandise. Approximately 2,000 delivery receipts were received in evidence; a few did not bear Eagle's name or its credit card number; however, they afforded evidence that they came into plaintiff's hands in the ordinary course of business and the evidence shows that the originals of such delivery receipts were forwarded to Eagle with the monthly statements. The presumption "That the ordinary course of business has been followed", Code Civ. Proc. sec. 1963, subd. 20, remains uncontradicted and therefore has the effect of establishing a prima facie case. *Donovan v. Security-First Nat. Bank*, 67 Cal.App.2d 845, 853, 155 P.2d 856. A rebuttable pre-

sumption is a species of evidence which, standing alone, will support a finding even against contradictory evidence produced by the other party. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 549 ff., 299 P. 529; *Lieber v. Rigby*, 34 Cal.App.2d 582, 584, 94 P.2d 49. Moreover, appellant, through his wife as his agent, was an active participant in and had knowledge of the manner in which gasoline was purchased and knew what the ordinary course of business was and that it was being followed. For a considerable period of time Eagle was required to pay and did pay defendant the amount of purchases made; Mrs. Houser opened a special bank account in which money received from Eagle was deposited and out of which plaintiff was paid when the monthly bills were received, to which were attached delivery receipts from the service stations or airports which sold the gasoline on the strength of the credit cards.

[10] Since defendant guaranteed payment of all charges against Eagle the actual question which the trial court had to determine was the obligation of Eagle. Hence whatever is evidence against Eagle is evidence against defendant. Code Civ. Proc. sec. 1851¹; *Piggly Wiggly Yuma Co. v. New York Indemnity Co.*, 116 Cal. App. 541, 542, 3 P.2d 15; *Butte County v. Morgan*, 76 Cal. 1, 5, 18 P. 115; *Nye and Nissen, Inc. v. Central Surety Ins. Corp.*, 71 Cal.App.2d 570, 575-576, 163 P.2d 100. Therefore defendant's admission of a prima facie case against Eagle is an admission of a prima facie case against him. Eagle's delivery receipts for gasoline and oil are admissions that it received such merchandise, permitted and authorized by the credit cards to be sold to it and that it was received in the ordinary course of business and, pursuant to the authorities last above cited, constitute evidence of defendant's liability.

Since the instrument signed by defendant is not a conditional or qualified guaranty defendant's argument to that effect and

citations relating to such a guaranty are not pertinent.

Defendant contends that plaintiff failed to produce competent proof of any sales, the contention being based on the fact that approximately 2,000 sales slips were received in evidence without proof that they were signed by pilots in the employ of Eagle. Not only is the presumption to be invoked that the ordinary course of business was being followed but defendant admitted a prima facie case against Eagle and evidence was supplied by (1) the manner in which gasoline was sold for use in Eagle's airplanes; (2) plaintiff's books of account which were admitted after their authenticity had been established by their custodian; (3) Eagle's books of account, after like authentication; (4) the evidence of an auditor that he had completely examined and audited plaintiff's books including the delivery receipts and had reconciled them with Eagle's records which were then in the hands of the referee in bankruptcy; (5) Eagle's petition in bankruptcy, sworn to by defendant as its president on October 23, 1948, two days after the commencement of the instant action, in which plaintiff was listed as a creditor of Eagle in a sum greater than the amount sued for in this action and more than the amount of the judgment rendered against defendant.

[11] Since there was evidence of the authenticity of the books of account of both plaintiff and Eagle they were admissible in evidence under the "Uniform Business Records as Evidence Act" found in sections 1953e to 1953h of the Code of Civil Procedure. *Loper v. Morrison*, 23 Cal.2d 600, 608-609, 145 P.2d 1; *Doyle v. Chief Oil Co.*, 64 Cal.App.2d 284, 292, 148 P.2d 915; *Thompson v. Machado*, 78 Cal.App.2d 870, 874, 178 P.2d 838. By reason of the statute last cited, tags prepared by a supply company showing delivery and return of linen were held to be admissible as evidence of the number of pieces of linen delivered to defendant over a period of three years.

1. Section 1851 reads: "And where the question in dispute between the parties is the obligation or duty of a third person,

whatever would be the evidence for or against such person is prima facie evidence between the parties."

Oakland California Towel Co. v. Zanes, 81 Cal.App.2d 343, 345, 184 P.2d 21.

[12] Since under the authorities the delivery receipts and books of account of both plaintiff and Eagle were admissible and were received in evidence, defendant's argument must be deemed to be directed to the weight of the evidence rather than to its sufficiency—a matter which should have been and no doubt was addressed to the trial court.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



101 Cal.App.2d 491

FORD v. PALISADES CORP.

Civ. 17752.

District Court of Appeal, Second District,
Division 3, California.

Dec. 28, 1950.

Rehearing Denied Jan. 16, 1951.

Hearing Denied Feb. 19, 1951.

Leland M. Ford brought action against Palisades Corporation to recover a broker's commission. A judgment for defendant was entered by Superior Court of Los Angeles County, Alfred L. Bartlett, J., and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence supported findings that plaintiff's written contract as agent to sell realty had terminated prior to sale of property to state, that defendant had made no promise, oral or otherwise, to extend plaintiff's employment or to pay him any commission upon consummation of any sale subsequent to termination of agency agreement, and that any acts engaged in by plaintiff subsequent to termination of agency agreement were voluntary and unauthorized in so far as defendant was concerned.

Judgment affirmed.

I. Appeal and error ⇨989

Where findings are attacked for insufficiency of evidence, power of District Court of Appeal begins and ends with a determination as to whether there is any

substantial evidence to support the findings.

2. Brokers ⇨36(1)

Evidence supported finding that plaintiff's written contract as agent to sell realty had terminated prior to sale of property to state, that defendant had made no promise, oral or otherwise, to extend plaintiff's employment or to pay him any commission upon consummation of any sale subsequent to termination of agency agreement, and that any acts engaged in by plaintiffs subsequent to termination of agency agreement were voluntary and unauthorized in so far as defendant was concerned, so that plaintiff was not entitled to recover commission. Civ.Code, §§ 1624, subd. 5, 1698; Code Civ.Proc. § 1973, subd. 5.

3. Brokers ⇨48

Unless failure to secure purchaser upon terms proposed and within time provided is due to negligence, fraud or fault of owner, a real estate broker may not recover upon his contract for commissions.

4. Brokers ⇨49(1)

A broker can only recover in accordance with terms of his employment.

5. Brokers ⇨43(2)

The time limited in written contract giving realty broker exclusive agency to sell real estate could not be extended by oral agreement. Civ.Code, §§ 1624, subd. 5, 1698; Code Civ.Proc. § 1973, subd. 5.

6. Brokers ⇨43(2)

Where agreement to pay broker's commission was unenforceable because of statute of frauds, broker could not recover reasonable value of time or money laid out under the agreement. Civ.Code, §§ 1624, subd. 5, 1698; Code Civ.Proc. § 1973, subd. 5.

7. Brokers ⇨43(2)

Where plaintiff failed to bring about a sale of realty within period during which he had exclusive agency under written contract, and he did not have an agreement in writing authorizing or employing him as agent or broker after termination of the agreement, plaintiff could not recover reasonable value of his services performed

prior to, nor for activities after, a date on which his written authority expired. Civ. Code, §§ 1624, subd. 5, 1698; Code Civ. Proc. § 1973, subd. 5.

8. Jury ☞13(1)

A right to a trial by jury does not exist where gist of the action is for enforcement of a right cognizable only in equity.

9. Jury ☞13(14)

The question of estoppel to plead statute of frauds made by complaint was an equitable issue, and trial court did not err in trying the issue of estoppel without a jury.

10. Jury ☞28(16)

Oral consent to waiver of jury must be entered in the minutes or the docket. Code Civ. Proc. § 631, subd. 3.

11. Jury ☞28(16)

Where findings specifically stated that plaintiff "consented to the discharge of said jury", and reporter's transcript showed precisely that plaintiff waived a trial by jury by oral consent, the statutory requirement of record showing of consent to waiver of jury trial was met. Code Civ. Proc. § 631, subd. 3.

Edgar F. Hughes, Raymond Tremaine,
Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Myers,
Pierce Works and John Whyte, all of Los
Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action to recover a broker's commission.

September 18, 1944, plaintiff and defendant entered into an agreement in writing which read:

"Mr. Leland M. Ford
15821 Sunset Boulevard
Pacific Palisades, Calif.
Dear Sir:

"In consideration of the services to be rendered by you, we hereby agree to employ you as our agent for the period ending September 6, 1945, to find a purchaser

for the so-called beach property, owned by this corporation, consisting of approximately 2411 feet, located on the Roosevelt Highway immediately west of the Will Rogers State Beach, in the City of Los Angeles, legal description of which is attached hereto, and we hereby grant you the sole and irrevocable right to sell said property within said period for the sum of one hundred and seventy five dollars (\$175.00) per lineal foot.

"In the event said property is sold within said period, we agree to pay you a commission of 10% of the sales price.

"The sale of the property in any event shall be subject to the approval of the holders of the majority of the outstanding stock of the corporation, and we shall have no liability to you, nor to any purchaser, unless such sale is so approved.

"It is understood that you shall not, without our prior written consent, assign this agency or any of your rights thereunder."

August 22, 1945, the parties extended the terms of plaintiff's employment and modified the agreement of September 18, 1944, by a writing which read: "This will confirm that at a meeting of the Board of Directors of this corporation, held on August 7, 1945, a motion was passed extending for seven (7) months the exclusive agency agreement on the 2411 feet of beach frontage owned by this corporation, given to you on September 18, 1944, and originally expiring on September 6, 1945, subject to the elimination of any stated sales price; all other terms and conditions to remain the same."

The term of plaintiff's employment under the writings expired April 6, 1946. Defendant sold the property to the State of California on October 1, 1947. The complaint alleged that the period of employment was extended by oral agreement and facts which plaintiff claims estop defendant from invoking the statute of frauds. The answer pleaded the statute of frauds. Civ. Code, secs. 1624, subd. 5, 1698; Code Civ. Proc. sec. 1973, subd. 5.

The court found: The employment of plaintiff as set forth in the writings. The employment terminated on April 6, 1946, and was not thereafter renewed or extended.

Plaintiff at all times after April 6, 1946, was, and he knew he was, without authority to represent defendant. Defendant made no promise, oral or otherwise, to extend plaintiff's employment or to pay him any commission upon the consummation of any sale subsequent to April 6, 1946. Plaintiff did not rely upon any such promise. On June 21, 1946, plaintiff requested defendant to extend his employment. The request was denied by defendant on August 9, 1946, and plaintiff was notified to that effect on August 10, 1946. Activities engaged in by plaintiff with reference to the subject property, or the sale thereof, subsequent to April 6, 1946, were voluntary and unauthorized insofar as defendant is concerned. The state was not ready or able either to consummate the purchase of the property or to negotiate as to price at any time prior to August, 1947. Plaintiff neither found nor produced the state as a purchaser ready, willing and able to buy the property upon terms acceptable to defendant. Plaintiff was not the procuring cause of the sale which was ultimately negotiated by defendant at a price of \$225 a front foot. Defendant neither waived the expiration date fixed in the writing nor is it estopped to deny such waiver or otherwise. Defendant did not become, and is not, indebted to plaintiff for services rendered. The causes of action asserted by plaintiff are barred by the statute of frauds.

[1] The claim is that the findings from which the court concluded that defendant is not estopped to invoke the statute of frauds are unsupported by the evidence. The claim is groundless. The appeal is argued at great length in appellant's briefs as though we were the trier of fact. Our power begins and ends with a determination as to whether there is *any* substantial evidence to support the findings. *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 370, 210 P.2d 757.

Mr. Esberg, president of defendant, Mr. Malouf, vice-president, and Mr. Smith, a director, were the active representatives of defendant in the effort to sell the property to the state. The State Park Commission is the agency of the state charged

with the acquisition of ocean beaches. Pub. Resources Code, sec. 5015. Plaintiff was at all times aware of the necessity of a written agency agreement. About a week before April 6, 1946, he told Mr. Smith that his contract was about to expire, that he could not collect a commission without something in writing, and that he should have an extension. Mr. Smith did not say anything about keeping the agency alive but told plaintiff to write to the board of directors, which he did on June 21, 1946. Plaintiff talked to Mr. Malouf in April, 1946, about extending his authority. Mr. Malouf asked him if he had talked to Mr. Smith. Plaintiff replied that he had, and that Mr. Smith had suggested he write to the board and "it seemed like a pretty good thing to do."

Mr. Esberg told plaintiff on August 10, 1946, that the board had decided not to renew his contract, and that plaintiff then said, "That is too bad, I don't think that is fair," something to that effect. Then he said, "Well, now, listen, Esberg, the State Commission has a meeting slated for the 15th of next month at which I feel quite sure this thing is going to be put over, and do you object to my going to that meeting?" I said, "Mr. Ford, I have no objection to your doing anything you want, you are free, white, and 21, but you don't go there as a representative of the company, if you go there you go of your own volition." So he said, "How about my commission, Esberg?" I said, "Well, listen, Mr. Ford, the question of your commission is a matter that you will have to depend entirely upon the attitude and sense of fairness and decency of the Board of Directors, I can make you no promise, I am not in a position to do so if I wanted to, and you will have to depend entirely on what the attitude will be after the sale goes over." Plaintiff said, "I am going to be a good fellow, I will help you fellows any way I can." The treasurer of defendant who was present at this conversation testified that "Mr. Ford asked about his commission in case of a sale of the property to the State, and Mr. Esberg told him he had no authority to extend or to promise him anything, he would have to rely totally on

the judgment of the board of directors as to whether he would be compensated if and when the property was sold." Plaintiff's testimony as to this conversation was to the same effect.

Plaintiff testified that on a number of occasions after August 10, 1946, he asked Mr. Smith and Mr. Malouf for a written extension. He was not given one. The State Park Commission had a meeting on January 31, 1947. A few days before the meeting, plaintiff called Mr. Malouf and asked whether he thought he (plaintiff) should attend the meeting. Mr. Malouf testified he told him "he no longer represented the corporation so I couldn't tell him to attend the meeting as our agent, and I wouldn't, but what he would do as a private citizen was up to him, the Park Board meetings were public, and anybody could attend them." Plaintiff replied, "Well, I will go to the meeting anyway."

Mr. Malouf and Mr. Smith each testified that he did not at any time tell plaintiff that his written agreement should or would be extended; or that he was not to worry about his commission; or that his commission would be paid whether he had a writing or not; or that there was no reason why his extension should not be granted; or that the company would give him an extension; or that he could trust the company with reference to the matter of his commission or of obtaining an extension; and that he did not ask plaintiff to do anything on behalf of the corporation after April 6, 1946. Mr. Smith also testified that on June 19, 1946, he told plaintiff that he (plaintiff) was "through with the company"; and that about August 10, 1946, plaintiff "informed me that Mr. Esberg had informed him the corporation had denied an extension. * * * I said, 'Yes, that is right.' And he says, 'Well, Andy, I have had forty-four lawsuits on commissions. * * * And I expect to get a commission on this deal.' I said, 'Lee, you have no agreement, you have made no sale.' And he says, 'Well, I will sue the corporation.'" Prior to the January meeting of the State Park Commission, plaintiff called Mr. Smith and said he wanted to go to the meeting. Mr. Smith told him "he didn't represent

the corporation, he had no authority whatever, if he did go he did it on his own as a citizen and a taxpayer," and "I told him that he was not to go on our behalf to the January 31st meeting, he did not represent us, he had no authority to act for us, the Board of Directors had denied him any authority to act on behalf of the Palisades Corporation." From time to time after April 6, 1946, plaintiff called Mr. Smith and asked what was going on. Mr. Smith told him, "Well, Lee, I don't know why you are working, you have no authority, you do not represent the Palisades Corporation."

The State Park Commission held a meeting in July, 1947. Mr. Esberg testified, "[W]e were at this meeting, and before the meeting Mr. Ford came up to me and said, 'Esberg, I think I want to address the Park Board about this matter.' I said, 'Listen, Mr. Ford, I hope you won't do it, because if you address the Park Board as purporting to be a representative of the Palisades Corporation, I will feel obliged as president to get up and tell the Park Board that you don't represent the Palisades Corporation, so I hope you don't make that necessary.'" Mr. Esberg also testified that the only conversation he had with plaintiff about "the commission" was the one he had on August 10, 1946.

[2] The related evidence adequately supports the findings. The court was also warranted in inferring that plaintiff did not rely on any asserted promise or statement of the representatives of defendant; that he was merely a volunteer in any activity he engaged in after April 6, 1946. On a number of occasions beginning about a week prior to April 6, 1946, he importuned Mr. Smith and Mr. Malouf for a written extension, thus negating any idea of reliance on asserted oral promises or statements. From August 10, 1946, plaintiff repeatedly threatened defendant with suit unless his commission was paid in full.

Our comment in *Riesenberg v. Riesenberg*, 97 Cal.App.2d 714, 218 P.2d 577, 578, is applicable: "What [plaintiff] asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary

findings of our own. There is much evidence which would have supported contrary findings. That the trier of fact rejected that evidence does not impeach the soundness of his conclusions. [Plaintiff] has failed to establish any greater grievance here than [he] might in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the opposite party. Such a choice between two permissible views of the weight of the evidence is not error."

The complaint contains a count for the reasonable value of services performed. Defendant argues that he is entitled to recover on this count. The contention cannot be sustained. Plaintiff testified to services performed before and after April 6, 1946. The court found that as to each and all of his activities after April 6, 1946, he "was acting solely as a volunteer," and that after that date he "was wholly without authority to act for, represent or deal for or on behalf of defendant, either as broker or agent with reference to the or any sale of said property or otherwise; nor did he do so," and that he knew he was without such authority. The sale to the state was consummated on October 1, 1947. Payment of a commission was conditioned on the bringing about of a sale prior to April 6, 1946. Obviously plaintiff was not entitled to recover on any theory of performance of the written agreements. Further, as the court found on substantial evidence, the state was at no time prior to August, 1947, ready or able to purchase the property. And, as the court found, plaintiff did not, as he alleged, find or produce the state as a ready, willing or able purchaser at any time. Nor did he induce the purchase by the state. The sale to the state was negotiated by defendant itself.

[3-7] Unless the failure to secure a purchaser upon terms proposed and within the time provided is due to negligence, fraud or fault of the owner, a real estate broker may not recover upon his contract for commissions. *Rosenfeld v. Miller*, 1 Cal.2d 206, 209, 33 P.2d 1013. The implied finding necessarily is that the failure to sell

to the state within the time fixed by the written agreements was not due to the negligence or fraud or fault of defendant. The finding is supported by the evidence. A broker can only recover in accordance with the terms of his employment. *McGill v. Fleming*, 32 Cal.App.2d 601, 604, 90 P.2d 341. The time limited in the contract cannot be extended by an oral agreement. *Rice Lands etc. Co. v. Blevins* 61 Cal.App. 536, 542, 215 P. 402. Where an agreement to pay a broker's commission is unenforceable because of the statute of frauds, he cannot recover the reasonable value of time or money laid out under the agreement. *White v. Hirschman*, 54 Cal.App.2d 573, 575, 129 P.2d 430; *Colburn v. Sessin*, 94 Cal.App.2d 4, 6, 209 P.2d 989. Defendant's agreement with plaintiff was to pay a commission in the event the property was sold within the period which expired April 6, 1946. The agreement expired by its own terms. In view of the fact that plaintiff did not bring about a sale within that period, and that he did not have an agreement in writing authorizing or employing him as agent or broker after April 6, 1946, he cannot recover the reasonable value of his services performed prior to, nor for activities after, that date.

[8,9] Plaintiff claims that he was wrongfully deprived of a trial by jury. He demanded such a trial. At the opening of the trial and before the impanelment of the jury, defendant moved for a trial to the court without a jury of the equitable issue of estoppel to plead the statute of frauds. Ruling on the motion with the right to renew during the trial was reserved. The cause proceeded to trial for 2½ days when defendant renewed the motion. The motion was granted. Counsel for plaintiff then said: "Well, in view of your Honor's ruling, we cannot see any good purpose in retaining the jury, and we will consent that the jury be excused." The court then discharged the jury and the trial was resumed and completed by the court sitting without a jury.

The gist of plaintiff's action is equitable. He alleged the making of the written agreements and that the sale was not consum-

mated until October 1, 1947. He did not allege that he produced a purchaser ready, willing and able to buy the property within the period fixed by the written agreements. The only basis of recovery was his allegation "that by reason of the above alleged facts, defendant waived the expiration date of the written exclusive contract and is estopped to deny such waiver, and is also estopped to accept the fruits of plaintiff's labor without paying the plaintiff therefor." The question of estoppel to plead the statute of frauds made by the complaint is an equitable issue. *Sellers v. Solway Land Co.*, 31 Cal.App. 259, 266, 160 P. 175. See also *Halsey v. Robinson*, 19 Cal.2d 476, 482, 122 P.2d 11. There is no right to a trial by jury where the gist of the action is for the enforcement of a right cognizable only in equity. *Mesenburg v. Dunn*, 125 Cal. 222, 223, 57 P. 887; *Smith v. White*, 215 Cal. 204, 206, 8 P.2d 1030; *Connell v. Bowes*, 19 Cal.2d 870, 123 P.2d 456; *Woolsey v. Woolsey*, 121 Cal.App. 576, 581, 9 P.2d 605; *Olson v. Foster*, 42 Cal. App.2d 493, 497, 109 P.2d 388; *Bixby v. Hotchkis*, 58 Cal.App.2d 445, 454, 136 P.2d 597. The court did not err in trying the issue of estoppel without a jury.

[10, 11] Trial by jury may be waived by oral consent, in open court, entered in the minutes or docket. Code Civ. Proc. sec. 631, subd. 3. It has been held that the oral consent must be entered in the minutes or docket. *People v. Metropolitan Surety Co.*, 164 Cal. 174, 178, 128 P. 324. In the latter case, it was said that the purpose of the requirement was to furnish record evidence of a consent which would otherwise merely rest on parol proof. In the present case, the findings specifically recite what took place, and state that plaintiff "consented to the discharge of said jury." We think this was sufficient compliance with the statute. Further, the reporter's transcript shows precisely that plaintiff waived a trial by jury by oral consent. Cf. *Farnsworth v. Hunter*, 11 Cal.2d 27, 32, 77 P.2d 840. The purpose of the statute was served. Assuming, without deciding, that, as appellant argues, the limitation of time fixed in the writings may be waived by the seller

continuing with the deal, through the same broker, after the expiration of the time stated in the writings and that plaintiff was entitled to a trial by jury on the question of waiver, it is clear that he voluntarily consented to the trial of that question by the court without a jury.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



**In re COLLIAS' ESTATE.
COLLIAS v. COLLIAS et al.**

Civ. 17773.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Hearing Granted Feb. 15, 1951.*

Proceeding in the matter of the estate of Cris Collias, deceased, wherein Argirios T. Collias, also known as Argirios Collias, filed a petition for distribution, opposed by Efstathios Collias, and others. The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered a decree of distribution, and Efstathios Collias and others appealed. The District Court of Appeal held that a will naming nephew as executor and giving residue to nephew and stating that it was testator's desire and wish that nephew "will give half of my estate to my nearest relative heir in Greece instructing him or her to distribute half of my estate in equal shares to all my close relatives in Greece" required distribution of one-half of estate to nephew and remaining one-half to nephew in trust for use and benefit of testator's closest relatives in Greece.

Decree affirmed as modified.

Wilson, J., dissented.

I. WILLS @467

A wish or request of the testator for the distribution of his estate directed to his executor is a command and should be complied with by the probate court.

* Subsequent opinion 233 P.2d 554.

2. Wills Ⓒ675

A will naming nephew as executor and giving residue to nephew and stating that it was testator's desire and wish that nephew "will give half of my estate to my nearest relative heir in Greece instructing him or her to distribute half of my estate in equal shares to all my close relatives in Greece" required distribution of one-half of estate to nephew and remaining one-half to nephew in trust for use and benefit of testator's closest relatives in Greece.

Marshall & Farnham by O. E. Farnham,
Long Beach, for appellants.

No attorney for respondent.

McCOMB, Justice.

This appeal is from that portion of a decree of distribution reading as follows, "that in pursuance of and according to the provisions of the Last Will and Testament of said decedent and by operation of law, the property hereinafter described, and all other property belonging to said Estate, whether described herein or not, be distributed to Argirios T. Collias, also known as Argirios Collias."

The last will and testament of decedent named Argirios Collias executor of the estate and in addition contained this provision:

"All the rest and residue of my estate, of every kind and description, and wherever situated, I give, devise and bequeath unto my nephew Argirios Collias a resident of Long Beach, California at the time this instrument is signed. It is my desire and wish that my nephew Argirios Collias will give half of my estate to my nearest relative heir in Greece instructing him or her to distribute said half of my estate in equal shares to all my close relatives in Greece * * *."

Question: Did the court err in distributing all of the residue of decedent's estate to Argirios T. Collias?

[1] This question must be answered in the affirmative. A wish or request of the testator for the distribution of his estate directed to his executor is a command and

should be complied with by the probate court. (In re Estate of Lawrence, 17 Cal. 2d 1, 7, 108 P.2d 893; In re Estate of Miles, 72 Cal.App.2d 336, 343, 164 P.2d 546.)

[2] In the instant case the facts fall squarely within the foregoing rule. Argirios Collias was the executor of the estate and the will expressed a wish that half of his estate be divided equally among his close relatives in Greece by the executor.

Therefore the decree of distribution is amended by striking out the portion thereof set forth above and substituting in lieu thereof, "that in pursuance of and in accordance with the last will and testament of said decedent and by operation of law, the property hereinafter described, and all other property belonging to said estate, whether described herein or not be distributed one half to Argirios T. Collias, also known as Argirios Collias, and one half of said estate to Argirios Collias in trust for the use and benefit of decedent's closest relatives in Greece."

As thus modified the decree is affirmed.

MOORE, Presiding Judge.

I concur.

Keeping in mind the paramount rule that a will is to be construed according to the intention of the testator as expressed therein the mandatory character of the bequest of one half of the testator's estate to his "nearest relative heir" in Greece readily appears. When such words as wish and desire are used in direct reference to the estate they are imperative and not precatory. When a wish is expressed for the disposal of the estate to him who is named as executor it is to be construed as mandatory. "All expressions indicative of his wish or will are commands." In re Lawrence's Estate, 17 Cal.2d 1, 7, 108 P.2d 893, 896; In re Estate of Tooley, 170 Cal. 164, 166, 149 P. 574; In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; In re Miles Estate 72 Cal. App.2d 336, 164 P.2d 546.

Some of the cited authorities and others did not result favorably to a holding that a trust had been intended. Results differ

according to the intent which must be divined from the language used, the punctuation employed and the situation of the testator at the time of his authorship. To illustrate, in the Marti will, supra, a definite gift of his estate to his wife was made by the testator; in paragraph 2 he appoints her executrix with power of disposition. He came to a complete stop. In a separate paragraph he expressed his "desire" that one half of the property bequeathed to the wife "shall be devised by her to my relatives." It was therefore not imperative that the widow devise the property to her husband's relatives. A similar condition obtained in the Tooley will, supra, with like result. In re Estate of Miles, 72 Cal.App.2d 336, 337, 164 P.2d 546, 548 the testator left all his estate to wife Flora, "She to act as executor without bond." Having thereby disposed of his estate the testator proceeded to express the wish that "in a reasonable time she give to Adele my daughter \$500.00 and to Kenneth my son \$100.00." Having bequeathed the estate to his wife he merely indulged in wishful thinking on behalf of his children. Such a wish was precatory and without legal effect.

In the will here involved the aged Greek having nominated his nephew Argirios as executor he bequeathed the entire residue of his estate to the same nephew and proceeded to wish that Argirios "will give *half of my estate* to my nearest relative heir in Greece instructing him or her" etc. The testator's desire to share his possessions with all his close relatives in Greece indicates not only that he holds in fond remembrance those amongst whom he spent his early years in the homeland but also that his love is for them no less than for Argirios who was with him at the last. His desire that the nephew "will give" denotes a dispositive attitude. He places the burden of transfer on the nephew because of some fancied taxes or possible losses that might attend a wide distribution of his estate in Probate. If he had contemplated that Argirios would have possession of the estate for an indefinite period, he would not have wished him to "give half of my estate." He must have known that

a transfer of half of his estate by the nephew would not likely have been possible if Argirios should keep the entire residue for an indefinite period. After the lapse of a reasonable time it would have been the estate of Argirios or it would have been so wasted that one half of testator's residue could not be found. The only way he could make a gift of one half of the residue was to do it forthwith or at least to hold it intact in trust for the close relative. A reasonable construction of the will should lead to no conclusion other than that the testator intended to impose an imperative obligation upon his executor and that he left no instruction whereby the nephew either as personal trustee or as executor may exercise a discretion in delivering half of the estate to the relative in Greece.

WILSON, Justice.

I dissent.

This court is bound by the decisions of the Supreme Court. It is without power to overrule them, and that is just what the majority has essayed to do by their decision in this case. Mr. Justice McComb, not attempting the impossible has not endeavored to distinguish contrary opinions, and Mr. Presiding Justice Moore has tried in vain to point a difference between the effect of the will under consideration in this case and those in the decisions hereinafter discussed.

The majority decision, if it is given any future notice at all, makes for confusion, doubt and uncertainty in the law where clarity and intelligence should prevail.

It is the rule that the intention of a testator must be given effect if it is possible to ascertain such intention from the language of the will. Nevertheless, the books are full of cases in which the intention may be read between the lines but because the lines themselves have ineptly or inaccurately articulated the testator's desire the will has failed to accomplish the intended devolution of the estate.

The manner in which the testator in the instant proceeding chose to express his "desire and wish" has the same effect and

accomplishes the same result as the wills in *Re Estate of Marti*, 132 Cal. 666, 61 P. 964, 64 P. 1071, and *In re Estate of Miles*, 72 Cal.App.2d 336, 164 P.2d 546, both discussed in the concurring opinion of Mr. Presiding Justice Moore. A comparison of the wills in those cases with that in the instant case will readily demonstrate that the Presiding Justice's endeavor to find a differentiating feature has been futile.

In *Re Estate of Marti* the decedent bequeathed all his property to his wife. He designated her as executrix. He "desired" that one half the property should be bequeathed by his wife "to my relatives." In *Re Estate of Miles* the testator likewise left his entire estate to his wife. He nominated her as executrix. He said "It is my wish" that she give certain sums of money to his children. In each will the testator "came to a complete stop," to use the language of the Presiding Justice's concurring opinion, after stating his bequest and another "complete stop" after naming the executrix. Following the second stop he expressed his desire concerning the disposition to be made of a part of the estate by the devisee after she had received her bequest. In the instant case the testator devised all his property to his nephew. "He came to a complete stop." He then expressed his "desire and wish" that his nephew give half the estate to his "nearest relative heir in Greece." Here, as in the *Marti* and *Miles* cases, title to the property passed to and became vested in the devisee. It was the latter's property to do with as she or he pleased and was beyond the control of the dead hand of the testator.

In both the *Marti* and *Miles* cases it is said that a request, desire or wish for the disposition of the estate addressed to the executor is a command. In neither of those cases nor in the instant case was the desire or wish directed to the executor as such, but to the devisee who in all three cases was also the executor. In the *Marti* and *Miles* cases it was held that the wish thus expressed was precatory and that the persons whom the testator "desired" eventually to receive a part of his estate were not entitled to enforce fulfillment of the wish expressed in the will.

In *Re Estate of Tooley*, 170 Cal. 164, 149 P. 574, 575, the testator left all her property to her daughter and provided that if the latter died leaving neither husband nor children the testator desired that any property that should be left be divided equally among her brothers and sisters. An executor was not appointed. The court sanctioned the *Marti* case saying "there is here no trust" and that in the sense in which the words were used in that case the second clause of the will was addressed to the executor. The court reaffirmed the *Marti* case in its declaration that a desire if directed to the estate, to the executor or to the law is dispositive and if to the devisee is precatory. The court held that the second paragraph of the will was not directed to the devisee at all but was a clear statement that upon her death the property was to go to the testator's brothers and sisters. In the instant case the entire estate is bequeathed outright and unconditionally to the testator's nephew. Then said the testator "It is my wish and desire that my nephew will give half of my Estate" etc. This wish is directed to the devisee as such and not in any sense to the executor, to the estate or to the law.

If the position of the various sentences and clauses of the document is important, as the Presiding Justice seems to indicate in his opinion, although to me it does not seem so, it should be pointed out that in the *Marti* case the bequest and the appointment of the executrix are in one paragraph and the testator's "desire" is in another. In the *Miles* case the bequest, appointment of executrix and "wish" are all in one paragraph. In the instant case the bequest and the "desire and wish" are in a paragraph headed "Item II" while the nomination of the executor is in the following separate paragraph designated as "Item III." The bequest to the nephew passed the entire estate to him and the request for disposition of one half of it was addressed to him as devisee and not to the executor. The instant case is even stronger against the theory of the majority of this court than the cases above cited.

The fact that the nephew is both devisee and executor brings the case directly with-

in the rulings of the Marti and Miles cases, since in each of them the wife was both sole devisee and executrix.

The order distributing the estate to Argirios Collias should be affirmed.



101 Cal.App.2d 226

KELLIHER v. KELLIHER (two cases.)

3 Civ. 7679, 7696.

District Court of Appeal, Third District,
California.

Dec. 19, 1950.

Rehearing Denied Jan. 18, 1951.

Hearing Denied Feb. 15, 1951.

A. E. Kelliher brought an unlawful detainer action against Bessie L. Kelliher. The Justice's Court, San Joaquin County, rendered a judgment for plaintiff and defendant appealed. The Superior Court, San Joaquin County, George F. Buck, J., reversed the judgment and ordered the case to be transferred to the Superior Court and plaintiff was granted a summary judgment from which defendant appealed. The District Court of Appeal, 217 P.2d 429, Peek, J., reversed the summary judgment and remanded the cause. The District Court of Appeal, Peek, J., on petition of both parties for rehearing, held that plaintiff's affidavit was insufficient to justify granting plaintiff a summary judgment.

Summary judgment for plaintiff reversed and cause remanded.

1. Forcible entry and detainer §43(6)

Where justice's court rendered judgment for plaintiff in unlawful detainer action, although it lacked jurisdiction, Superior Court, on defendant's appeal, was not required to dismiss the proceeding but could reverse judgment and have case transferred to Superior Court, and could proceed to head cause as an original proceeding.

2. Judgment §185

Summary judgment for plaintiff is proper only if affidavits in support of plain-

tiff's motion state facts that, if proved, would be sufficient to sustain judgment in plaintiff's favor, and defendant does not by affidavit show such facts as may be deemed by judge hearing motion sufficient to present a triable issue of fact.

3. Judgment §185

In unlawful detainer action brought under statutory provision that a person in possession of realty may be removed where he, or a person under whom he claims, has duly sold the realty, and title under sale has been duly perfected, plaintiff's affidavit which contained no averment of facts relative to sale of realty by defendant as alleged in complaint was insufficient to justify granting plaintiff a summary judgment. Code Civ.Proc., § 1161a, subd. 4.

4. Evidence §317(1)

In unlawful detainer action plaintiff could not testify as to a conveyance between defendant and plaintiff's grantor about which plaintiff had no personal knowledge. Code Civ.Proc., § 1161a, subd. 4.

5. Forcible entry and detainer §6(2), 29(1)

While broad question of title cannot be raised in an unlawful detainer action, plaintiff must prove acquisition of title to extent required by statutory provision that a person in possession of realty may be removed where he or a person under whom he claims has duly sold the realty, and title under sale has been duly perfected. Code Civ.Proc. § 1161a, subd. 4.

6. Forcible entry and detainer §29(1)

Where unlawful detainer action is brought under statutory provision that a person in possession of realty may be removed where he or a person under whom he claims has duly sold the realty, and title under sale has been duly perfected, plaintiff must establish a sale of realty and a title perfected under such sale before recovery can be allowed. Code Civ.Proc., § 1161a, subd. 4.

Lafayette J. Smallpage, Harold J. Willis, Stockton, for appellant.

Forrest E. Macomber, Stockton, for respondent.

PEEK, Justice.

Upon petition of both parties, and because the appeal was heard originally before only two members of the court, a rehearing was granted and the cause set for reargument. After further consideration the court is convinced that the conclusion reached in our previous opinion properly disposes of the issues raised herein, and for that reason we adopt the opinion heretofore rendered except as modified herein:

The present controversy had its inception in an unlawful detainer action filed in the Justice's Court of O'Neal Township, San Joaquin County, by plaintiff, the divorced husband of the defendant.

By his complaint plaintiff alleged that on July 9, 1947, the defendant was the owner and occupant of certain described real property; that on said date she conveyed all of her right, title and interest in the said property to Raymond E. Kelliher [a son of plaintiff and defendant] who agreed to permit the defendant to remain in possession as a "tenant in sufferance" without the payment of rent; that on April 13, 1948, Raymond E. Kelliher and his wife conveyed the property to the plaintiff; that on June 2, 1948, the plaintiff served the defendant with a three day notice to surrender possession of the premises; that defendant refused to comply with said demand and that the monthly value of the rents and profits of the premises was the sum of \$100.00. The complaint prayed for restitution of the premises and damages for the rents and profits of the premises. Defendant's general and special demurrer was over-ruled, whereupon she answered denying that she had conveyed all of her right, title and interest in the property to Raymond E. Kelliher, that he agreed to permit her to remain in possession as a tenant in sufferance without the payment of rent or that he was the owner of the property or entitled to the possession thereof and alleged that the monthly rental value of the rents and profits were in excess of \$100.00. The remaining allegations

of the complaint were admitted. In addition to the foregoing denials and admissions the answer alleged as an affirmative defense that on July 9, 1947, the defendant conveyed her interest in the property to Raymond E. Kelliher for the sole and specific purpose of enabling him to borrow funds by mortgaging the premises; that he allegedly agreed to re-convey the property immediately after the execution of the mortgage but that he breached the agreement by conveying the property on April 13, 1948 to the plaintiff herein, who allegedly had notice of the agreement and that plaintiff gave no consideration therefor.

The case was tried in the Justice's Court and resulted in plaintiff obtaining a judgment for the possession of the property, damages, and costs. Said court immediately thereafter issued a writ of restitution under which the defendant was evicted from the premises. Defendant then filed her notice of appeal from said judgment to the Superior Court in San Joaquin County specifying therein that the appeal was taken on questions of both law and fact. Following the setting in the Superior Court, but prior to the determination on the merits, the defendant moved for a hearing on the question as whether or not on the facts the Justice's Court had jurisdiction to try the case in the first instance and whether or not the Superior Court had jurisdiction to try the case do novo. The motion was based upon the ground that the jurisdiction of the Justice's Court was limited by section 112 of the Code of Civil Procedure to actions wherein the rental value of the property is \$100.00 per month or less and that while the complaint alleged that the rental value was \$100.00 per month or less the defendant's answer denied the allegation. Said motion in addition stated that if the court should decide that the Justice's Court lacked jurisdiction defendant would move that the case be dismissed upon the ground that the lack of jurisdiction precluded said court from trying the case on the merits, that the judgment of the Justice's Court be vacated and set aside and that a writ of restitution issue to restore defendant to possession.

At the conclusion of the hearing on the aforesaid motion the Superior Court reversed the judgment of the Justice's Court and directed the Clerk of the Superior Court to remit the papers and documents in connection with the appeal to the Justice's Court. The order further directed the Justice's Court to suspend all proceedings in connection with the case and to transfer the case to the Superior Court together with all papers, documents, etc. in connection therewith, which was done.

The Superior Court thereafter granted permission to defendant to file an amended answer and cross-complaint and defendant did so. The amended answer in general contained the same admissions and denials as the previous answer, except that it alleged defendant's eviction from the premises under the writ of restitution issued by the Justice's Court, and as additional affirmative defenses alleged that the plaintiff failed to comply with Section 209 of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, 50 U. S.C.A. Appendix, § 1899, and that a tenancy at will rather than a tenancy in sufferance was created by the parties which had not been terminated by the three day notice.

Prior to the trial in the Superior Court upon the issues raised by the complaint and amended answer, the plaintiff moved said court for a summary judgment on the grounds that there was no defense to said action and there was no issue of fact involved. Defendant's affidavit in opposition thereto alleged that there were various issues of fact. The matter came on for a hearing before the court and at the conclusion thereof judgment was entered for plaintiff decreeing that he was entitled to the possession of the property plus damage and costs.

Defendant's first contention on appeal is based upon the proposition that since the Justice's Court had no jurisdiction the Superior Court on an appeal on questions of both law and fact was likewise without jurisdiction and therefore the latter court had no alternative but to dismiss the action.

[1] In so contending defendant fails to distinguish the hearing on her appeal in the

Superior Court and the subsequent hearing which was an original proceeding in that court. In other words, while the jurisdiction of the Superior Court on appeal from the Justice's Court was properly raised on appeal in the Superior Court the rule contended for by defendant has no applicability to the present proceeding since it is an appeal from an original proceeding in the Superior Court. As stated in *Redlands High School Dist. v. Superior Court*, 20 Cal. 2d 348, 125 P.2d 490, 492: "After an appeal to the superior court from a judgment in a justice's court as provided in Code of Civil Procedure, sections 973-982, no further appeal to the higher courts of the state exists in cases such as the present one under our constitutional and statutory provisions. Const. art. VI, §§ 4, 4b, 5; Code Civ. Proc. §§ 973-982; 6 Cal. Jur. 10 Yr. Supp. 699-701."

Even if such were not the well established rule we cannot agree with defendant's contention that following the determination by the Superior Court of the jurisdictional question raised in her appeal from the Justice's Court that the Superior Court could only dismiss the proceeding. Such a contention is no less "circuitous, dilatory and vain" to-day than it was more than fifty years ago when the Supreme Court in the case of *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 141, 37 P. 196, aptly applied those adjectives to a similar contention of the defendant and appellant therein. It may be added that the basis for the refusal of the court in the Hart case, as in the earlier case of *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 P. 562, to follow such an interpretation of section 838, now section 396 of the Code of Civil Procedure, under which those cases were decided, is more controlling now than it was then. Especially is this true since that section has been supplemented by section 396 of the Code of Civil Procedure, and as the Code Commissioner's notes state, one of the principal reasons therefor was the elimination of any vestige of the excessively technical rule as contended for by defendant herein.

Since it is our conclusion that following the transfer back to the Superior Court

that court could proceed to hear the cause as an original proceeding, it remains to be seen whether or not the granting of plaintiff's motion for a summary judgment was proper under the circumstances.

Plaintiff's affidavit in support of said motion narrated the allegations of his complaint, described with particularity the real property involved, referred to the transfer of his interest therein subsequent to the filing of his action, and to the provisions of said transfer wherein he agreed to deliver possession to his grantees, incorporated by reference all "documents of conveyance and written agreements" on file in the proceeding, and concluded with the allegations that all of the facts set forth were true of his own knowledge and that he would so testify if called as a witness.

Defendant's affidavit in opposition merely alleged that it was untrue that there were no issues of fact, that to the contrary, her first amended answer raised "several issues of fact, and issues of law based upon issues of fact not referred to in the Affidavit of Plaintiff"; that she had a good defense to said action; and that she had personal knowledge of the facts set forth and would so testify if called as a witness.

[2] As the Supreme Court stated in the recent case of *Coyne v. Krempels*, 36 Cal.2d 257, 223 P.2d 244, 246, a "Summary judgment for plaintiff is proper only if the affidavits in support of his motion state facts that, if proved would be sufficient to sustain judgment in his favor, and defendant does not 'by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.'" Code of Civ. Proc. sec. 437c; See also *Hardy v. Hardy*, 23 Cal.2d 244, 143 P.2d 701; *Gardenswartz v. Equitable Life Assur.Soc.*, 23 Cal.App. 2d Supp. 745, 750, 68 P.2d 322.

Applying the rule as stated in the *Coyne* case to the situation presented herein, it becomes apparent the affidavits of plaintiff are insufficient. The record shows that his action was instituted under the provisions of section 1161a, subdivision 4, of the Code of Civil Procedure, which provides that a person in possession of real property may

be removed "Where the property has been duly sold by him, or a person under whom he claims, and the title under the sale has been duly perfected."

[3,4] Our examination of plaintiff's affidavit has disclosed no averment of fact relative to a sale of the premises by defendant as alleged in his complaint. Even if it be assumed that the phrase "documents of conveyance and written agreements" on file which plaintiff used to incorporate in his affidavit the instruments relative to his transaction with his grantees, was broad enough to include the agreement between his grantor and the defendant, nevertheless said affidavit would still be insufficient since that matter was not within plaintiff's personal knowledge and hence he could not give competent testimony thereon. See *Gardenswartz v. Equitable Life Assur. Soc.*, supra.

By reason of our conclusion that the plaintiff's affidavit is not "sufficient to sustain judgment in his favor", *Coyne v. Krempels*, supra, it becomes unnecessary to discuss at length the apparent insufficiency of defendant's affidavit "to present a triable issue of fact". *Coyne v. Krempels*, supra.

[5,6] While the broad question of title cannot be raised in an unlawful detainer action, it should be observed that to the extent required by said section 1161a, plaintiff must prove acquisition of title. Where, as here, the action is brought under subdivision 4 of said section 1161a, plaintiff must establish a sale of the property and a title perfected under such sale before recovery can be allowed. *Hewitt v. Justice's Court*, 131 Cal.App. 439, 21 P.2d 641; *Nineteenth Realty Co. v. Diggs*, 134 Cal. App. 278, 25 P.2d 522; *Cheney v. Trauzettel*, 9 Cal.2d 158, 69 P.2d 832; *Higgins v. Coyne*, 75 Cal.App.2d 69, 170 P.2d 25; *Berkeley Guarantee & Loan Ass'n v. Cunningham*, 218 Cal. 714, 24 P.2d 782.

By reason of our determination that under the circumstances the summary judgment was improper and that the cause must be remanded for further proceedings, it is unnecessary to discuss the questions raised by the defendant's remaining contention

relative to the question of damages as being unauthorized and by plaintiff's appeal from the order re-taxing costs.

For the foregoing reasons the summary judgment in favor of plaintiff is reversed, plaintiff's appeal from the order re-taxing costs is dismissed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

ADAMS, P. J., and VAN DYKE, J.,
concur.



101 Cal.App.2d 396

CHURCH v. HEADRICK & BROWN et al.
Civ. 14379.

District Court of Appeal, First District,
Division 2, California.

Dec. 26, 1950.

Rehearing Denied Jan. 25, 1951.

Hearing Denied Feb. 19, 1951.

Action by Walter M. Church against Headrick & Brown, a copartnership, consisting of Bern Headrick, Sr., and Russell Brown, and others for damages arising from personal injuries sustained by plaintiff while assisting in unloading a large steel girder at the plant of defendant Butler Manufacturing Company. The Superior Court in and for the County of Contra Costa, C. O. McDonald, J., entered judgment for plaintiff against named defendants and named defendants appealed. The District Court of Appeal, Schottky, J., held that the evidence sustained implied finding of jury that injury to plaintiff was due to an overt act of negligence on part of defendants and that this negligence was the proximate cause of plaintiff's injury.

Affirmed.

1. Appeal and error §931(1), 1010(1)

Before an appellate tribunal is justified in reversing a judgment upon ground of insufficiency of evidence, it must appear from record that, accepting full force of the evidence adduced, together with every inference favorable to prevailing party which

may reasonably be drawn therefrom, it still appears that law precludes prevailing party from recovering a judgment.

2. Negligence §134(1)

In action for damages for personal injuries sustained by plaintiff while assisting in unloading a steel girder, evidence was insufficient to compel findings that plaintiff on his own act voluntarily, and with knowledge of the danger, placed himself in a position of danger and assumed all risk arising therefrom.

3. Negligence §32(2.3, 2.15)

Where plaintiff rode with operator of a truck to property of defendants where girder on truck was to be unloaded, and plaintiff was not an employee of either defendants or the owner of truck, plaintiff was not an invitee, but a licensee.

4. Negligence §32(2)

Generally, in cases involving injury resulting from active conduct, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on land is known or should reasonably be known to owner or possessor.

5. Negligence §134(11)

In action for damages sustained by licensee while assisting in unloading a large steel girder at defendants' plant, evidence sustained implied finding of jury that injury to licensee did not result from a defective condition of the premises, but that such injury was due to an overt act of negligence on part of defendants.

6. Negligence §134(11)

In action by a licensee to recover for damages for personal injuries sustained while assisting in unloading a large steel girder at defendants' plant, evidence sustained implied finding of jury that negligence on part of defendants was proximate cause of licensee's injury.

7. Negligence §119(1)

In order to maintain an action for damages based on wrongful act or neglect of another, plaintiff must allege and prove that wrongful act of defendant was a direct and proximate cause of injury.

8. Negligence ⇨134(8, 11)

In action by a licensee for damages sustained by him while assisting in unloading a large steel girder, evidence sustained implied findings of trial court that defendants were negligent in putting a cradle sling on girder when they should have put a choke sling on it, that this negligence caused girder to tilt when binder was released and that there was a direct connection between the tilting of the girder and the flying up of the handle that struck licensee.

9. Negligence ⇨135(1)

In action by a licensee to recover damages sustained by him while assisting in unloading a large steel girder at defendants' plant, evidence sustained implied finding of jury that licensee was not guilty of contributory negligence.

10. Negligence ⇨131

Evidence of precautions taken after happening of an accident is not permissible to show a negligent condition at time of accident.

11. Appeal and error ⇨1170(7)**Negligence** ⇨131

In action by a licensee for damages sustained by him while assisting in unloading a large steel girder, where one of defendants' employees was permitted without objection to testify as to how girder was unloaded from truck after the accident, error, if any, in allowing employee of co-defendant to describe how girder was unloaded after the accident and what type of slings were used, was not prejudicial. Const. art. 6, § 4½.

12. Trial ⇨27

The admission of models and of testimony of experiments is largely within discretion of trial court.

13. Trial ⇨27

In action for damages sustained by plaintiff while assisting in unloading a large steel girder from a truck, trial court did not abuse its discretion in permitting an experiment with a model of girder.

Tinning & DeLap, J. Vance Porlier, Richmond, for appellants.

Russell F. King, Richmond, for respondent.

SCHOTTKY, Justice pro tem.

Respondent sued several groups of defendants for damages arising from personal injuries sustained by him while assisting in unloading a large steel girder at the plant of defendant Butler Manufacturing Co. at Richmond, California. The jury returned a verdict for \$47,500 against Bern Headrick Sr. and Russell Brown, copartners doing business as Headrick & Brown, and Thomas Goff their employee. A motion for judgment notwithstanding the verdict was denied. A motion for new trial was denied, and this appeal was then taken from the judgment by Headrick and Brown only.

We shall summarize the factual situation as disclosed by the record.

The girder in question was 81 feet 7½ inches long, 4 feet 1¾ inches high, 26 inches wide and weighed approximately 13 tons. Attached to one side of it was a catwalk built of lumber which, with other gear attached to it, weighed approximately 3 tons. When respondent was injured the girder and catwalk rested on a semi-tractor and dolly, one end on the semi-tractor (on a "bolster") the other end on the dolly with a considerable part of it overhanging the rear of the dolly. The girder was destined to become a traveling crane to be set up under the roof of defendant Butler Manufacturing Company's factory building over 50 feet above the floor, extending from one side wall of the building to the other, and set on tracks running longitudinally from one end of the building to the other. The "semi" and its dolly (both called, for short, the truck) belonged to defendant Thomas Rigging Company, and defendant Alfred Dalzell was its driver.

The girder had been purchased by Butler Manufacturing Company from defendant W. J. Ferris, who was in the machinery business in Oakland under a contract which obligated Ferris to deliver it to the Butler

factory in Richmond. Ferris contracted with defendant Thomas Rigging Company to haul the girder first from the Ferris plant in Oakland to the plant of defendant Osborn Manufacturing Company in San Leandro (where the girder was to be extended in length 13 feet), and to then haul it from the Osborn plant to the Butler factory in Richmond.

On April 1, 1948, Osborn had finished the work of adding to the girder and it was ready for its final trip. Early that morning defendant Dalzell was preparing to start for San Leandro with his semi-tractor and dolly. Respondent, who had theretofore worked for defendant Thomas Rigging Company, showed up at the Thomas yard at Emeryville looking for work but was told at the office that there was nothing for him that day. Dalzell knew respondent from his former employment with Thomas, and while Dalzell was putting gasoline in his truck he saw respondent waiting around. When Dalzell drove away for San Leandro respondent climbed aboard the truck and after they were under way he asked Dalzell his destination and was told San Leandro. As respondent put it, he went along as company. There is no contention by respondent that he was in the employ of defendant Thomas Rigging Company at any time that day.

At the Osborn plant the girder was lifted by Osborn's crane onto Dalzell's truck. It was part of Osborn's contract with Ferris to do this. In so lifting it a "choke" sling was used, and the task of lifting it and setting it down on the semi-tractor and dolly was safely accomplished by the defendant Moller who was an employee of Osborn's. It was set on Dalzell's truck on the level "on an even keel", resting on its 26 inch side. The testimony shows that in handling a piece of equipment of this type the sling around it cannot be released until the girder has been securely fastened to the truck. The process of securing it to the truck, so the testimony shows, is the responsibility of the teamster, and so after it was set on the truck by Moller, Dalzell went about the task of securing it to the semi-tractor and dolly. This was done by

(the semi-tractor) and two around the rear unit (the dolly), the chains being rigged around the load belt-fashion. On each chain was a binder, the function of which is to tighten or "cinch" the chains so there is no slack whatever left in them.

As already appears the four chains were rigged around the load, two on the front unit of the truck, two on the rear unit. The chains were around the metal part of the load (excluding the wooden catwalk) belt-wise. The two front chains were about 4 feet apart and the two rear chains were about 4 feet apart. The chains ran over the top of the girder, and came down at an angle of about 45 degrees to the side of the truck and then presumably underneath the truck. On each chain, on the right side of the load, and near the top thereof, was the metal binder with a handle thereon. The function of the handle is to cinch or tighten the chains by leverage, and whenever the handles do not exert sufficient leverage to take all slack out of the chains, a pipe longer than the handle is used to exert leverage. Pipes 4 or 5 feet long were used for this purpose by being slipped over the handles (being longer than the handles there was more leverage).

In adjusting the load at the Osborn plant for its final trip to Richmond the pipe method was resorted to, and Dalzell while using the pipe on the handles of the binders had respondent (a large, heavy man) aid him by adding his weight and strength in getting the utmost of pressure on the handles and thus tightening the chains around the metal part of the load. On the trip from San Leandro to Richmond Dalzell stopped the truck and in examining the chains found one of them somewhat loosened. He tightened it with respondent's aid and resumed the trip.

Arriving at the Butler plant the truck was driven to a point within the reach of the crane which was to hoist it from the truck. The truck was headed to the east, which left the dolly toward the west, the right side of the truck (the side on which were the binders) was to the south and the left side of the truck (the side on which was the catwalk) was to the north.

We have already noted that in loading a girder of this type the sling cannot be removed from the load until the chains have been cinched up taut. By the same token in unloading it, the chain binders cannot be released until the sling for unloading the girder has been put around the load. This was done under the direction of defendant Thomas Goff, an experienced rigger and an employee of appellants. He put on a so-called "cradle" sling, not a choke sling as had been used in loading it at Osborn's. Goff put on the sling and signalled to the crane operator aloft, to slowly hoist, just enough to take the strain off the truck but not enough to do more than that. Obviously this was so that when the binders were released and the chains loosened the load would be safely within the grasp of the sling.

Such was the situation when Goff indicated to Dalzell that the time had come to release the chain binders.

It is probably evident from what has been said respecting the process of tightening the chains sufficiently to hold this 16 ton load securely on the truck during a 15 mile trip from San Leandro to Richmond that the tension on the chains was something to be reckoned with. There is no dispute in the evidence with respect to such tension. Respondent had assisted with the tightening of the chains by the added leverage of pipe plus handle, and had had experience as a teamster in hauling loads which had to be secured to the truck by chains and binders, although he testified that he had never before worked on a load of this type.

He testified that in releasing the binders one could not take hold of the handles thereof. The procedure was to put one's hand underneath the handle and "flip" it up, otherwise (if grasped) it would break one's arm such was its force when the tension was released. In flipping the handle one had to stand well back to avoid its impact.

When Goff indicated that the binders would be released Dalzell released the two on the rear end of the load without incident. Dalzell then asked respondent to release the two on the front end. Respond-

ent climbed onto the semi-tractor, standing on the lower part of the girder where he had foothold. With his back to the cab of the truck he flipped the handle of the binder nearest the cab with his hand as indicated and the handle flew up without doing any damage and apparently fell back of its own weight into a flat position. This left but one chain under tension. With his back still to the cab he bent over to release the remaining binder (about 4 feet to the rear of the one he had already released) and as he flipped the handle of that (second) binder the handle of the first binder (already released and recumbent) flew up for the second time. He was in its way and it hit him on the head and knocked him from the truck onto the ground causing the injuries for which he sues. He was thrown away from the truck, toward the south. With the tension of the last binder thus released the load tilted to the left (northerly) on the catwalk or heavy side, in the direction opposite to that in which respondent was thrown.

Respondent admitted that he had flipped these two chain binders "as a favor" to Dalzell, the truck driver. Dalzell had asked him to do so. He was not an employee of anybody at the time. He had come on the truck for the ride and to keep Dalzell company. He testified, moreover, that he thought he could learn something by going on the trip.

Additional facts will be hereinafter set forth in discussing the various contentions made.

[1] Appellants, in an able and exhaustive brief, contend that the state of the record is such that the verdict in favor of respondent is unsupported by the evidence. It is a familiar rule that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed

most strongly against the party against whom the judgment is rendered. Every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. Evidence favoring the prevailing party must be accepted as true by the appellate tribunal and contradictory evidence must be disregarded. Bearing in mind this familiar rule, which, we are constrained to state, is too often not properly evaluated by counsel who insist upon arguing the weight of conflicting evidence before an appellate tribunal, we shall proceed to discuss the points urged by appellants herein.

Appellants first contend that "the respondent by his own act in voluntarily assisting in unloading the girder which he knew to be a dangerous operation assumed all the risks arising therefrom."

Appellants quote the general rule concerning assumption of risk as stated in Cal.Juris. as follows:

"One who, for purposes of his own, voluntarily places himself in a position of danger, assumes the risks ordinarily incident to such a position, and must exercise a quantum of care commensurate with the additional danger. But such person assumes only those perils which are naturally incident to the position assumed, and not dangers which can come only from the negligent act of another. Thus it is incumbent upon one having knowledge of another's position of peril to use precautions in order to avoid injury, and a person may not contend that, owing to the nature of his business, injury to others as a result of his negligence must result, so that persons who congregate in the vicinity of such business assume the risk. It has been stated that the question of what risks are assumed by one in a perilous position is at most a mixed inference of law and fact." 19 Cal.Jur. pp. 589-590.

They also quote from Restatement of the Law of Torts, Vol. 4 at p. 491, Par. 893: "A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or per-

mit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm."

In *Ziesemer v. McCarty*, 71 Cal.App.2d 378, at page 381, 162 P.2d 857, at page 858, the court said: "The doctrine of assumption of risk presupposes the existence of a dangerous situation or condition, known to the plaintiff, who nevertheless chooses to enter upon or to remain within the area of risk (893 Rest.Torts, p. 491, Vol. 4)."

Appellants argue that the only inference that can be drawn from the evidence is that respondent, with full knowledge of the dangerous situation, voluntarily and unnecessarily placed himself in a position where he could be injured. The implied finding of the jury was to the contrary. We have read the record carefully and are convinced that the determination of this question was for the jury. Appellants lay great emphasis on certain portions of respondent's testimony of which the following quotation is one:

"Q. Now, Walter, tell me this: In your experience where you were operating with chains and chain binders—I will withdraw that. I will ask you if you yourself ever hauled a load where it was necessary to use a crane to lift it off of the equipment? A. Yes, sir.

"Q. And in addition to loads you have carried on your truck you have been in the yards when that operation has taken place, haven't you? A. I don't quite understand the question.

"Q. Well, you say at times when you hauled a load it was necessary to take that load off the truck you were driving with a crane? A. Yes, sir.

"Q. Now, at other times when you have been in yards of your employers, be it Arris-Knapp or Thomas Rigging, or whoever it might be, you have been present at times when you have seen loads unloaded

from trucks by the aid of cranes haven't you? A. Yes, sir, I have.

"Q. All right. And you know that when that operation takes place, the people that are not actually engaged in the unloading get back away from the load. That is the practice, isn't it? A. That is the practice, yes, sir."

"Mr. Richard. I will reframe it and ask this: Wasn't the reason you did that, it was just common sense, that is, you get away from where there might be any danger; that is correct, isn't it? A. Yes, that is correct."

[2] But there is also evidence in the record that while respondent, a young man 24 years of age, had had experience as a teamster and a truck driver, he had had no experience as a rigger; had never hauled this type of load; did not know the type of rigging put on the girder by Goff; had never seen this type of rigging; did not know the girder was side heavy; had never hauled heavy loads that no warning was given him; that he did not know that this particular operation was dangerous. The jury, of course, heard and observed all of the witnesses, including respondent. The jury was fully and fairly instructed as to the doctrine of assumption of risk. If the evidence were susceptible of no other construction than the one appellants have placed upon it, we would be inclined to agree with their contention. But as hereinbefore pointed out we must resolve in favor of respondent every favorable inference which may fairly be deduced from the evidence and we must disregard evidence which merely contradicts such inference. We are, therefore, unable to agree with appellants that the evidence compels a finding that respondent by his own acts voluntarily, and with knowledge of the danger, placed himself in a position of danger and assumed all of the risks arising therefrom.

Appellants next contend that respondent was a trespasser, or at best, a licensee, and that appellants are not responsible for injury resulting from a defective condition of the premises.

[3] In view of the fact that respondent rode into the property of Butler Mfg. Co.,

where the girder was to be unloaded, with Dalzell, the operator of the truck, who was undoubtedly an invitee, it is difficult to understand how he could be considered a trespasser. If under the circumstances here present respondent was not an invitee he was at least a licensee.

[4] The rule as to the duty owed to a licensee by the owner or possessor of premises has been well stated by our Supreme Court in *Oettinger v. Stewart*, 24 Cal.2d 133, page 138, 148 P.2d 19, page 21, 156 A.L.R. 1221, as follows: "In other cases it has been suggested that a duty of ordinary care is not owed to a licensee even though injury resulted from active conduct rather than mere passive condition of the premises. (Citations.) The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from active conduct, as distinguished from condition of the premises, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the owner or possessor. Rest., Torts, § 341; Prosser on Torts [1941], 630; 45 C.J. 803-805. In Prosser on Torts, *supra*, the author explains: 'Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful or wanton injury upon him. As in the case of trespassers, however, an increasing regard for human safety has led to a retreat from this position. It is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee. He must run his train, operate his machinery, or back his truck with due regard for the possibility that the permission given may have been accepted and the guest may be present.' The more recent California decisions have adopted this rule. (Citations.) The cases cited herein suggesting that a lesser standard of care is applicable where injury results from active conduct of the landowner or possessor are inconsistent with the later decisions and must be disapproved." See also *Newman v. Fox West Coast Theatres*, 86 Cal.App.2d

428, 431, 194 P.2d 706; *Lindholm v. Northwestern P. R. Co.*, 79 Cal.App. 34, 40, 248 P. 1033.

Appellants argue that the girder, after the slings had been applied by Goff, the employee of appellant Headrick & Brown, was a condition of the premises. In support they quote the following language from the case of *Brust v. C. J. Kubach Co.*, 130 Cal. App. 152, 161, 19 P.2d 845, 849: "* * * a licensee, or his heirs, as here, can recover damages only for an overt act of negligence on the part of the defendant pursued. Appellants even assure us that an owner is not bound 'to keep his premises safe toward a mere licensee.' How do these matters affect the present case? Here there was no overt act or any act of negligence. The rope by means of which the cable was being lowered simply broke, as we have observed. * * * But the condition of the rope was entirely immaterial to the case of appellants. If it be granted that it was rotten, the circumstance merely indicates that Kubach Company had failed 'to keep its premises safe' as to the licensee."

In the cited case Brust was killed in an accident which occurred during the construction of the Los Angeles City Hall. Kubach was the general contractor. Baker Company was an independent contractor engaged in installing the elevators and Brust was an employee of this company. Kubach allowed the Baker Company the use of a tower and its equipment for the purpose of lowering the elevator motor in place. This work was done by means of 7/8ths inch wire cable which was reeved through two blocks. The blocks were the property of the Baker Company, but the tower, wire cable and all instrumentalities used in lowering the motor, with the exception of the blocks, were the property of and under the general control of Kubach. Brust had been engaged the day before in lowering the motor of his employer Baker Company and the work was completed about 4:30 p.m. of a certain afternoon. On the following day Brust returned to the City Hall building for the purpose of removing from Kubach Company's hoisting instrumentalities the said

hoisting blocks belonging to the Baker Co. He found that he and his men could not have immediate access to said blocks or immediately engage in the physical work of removing them because of the fact that Kubach's employees were then operating Kubach's hoisting instrumentalities in its work. While awaiting an opportunity to reach and remove said hoisting blocks Brust had walked out on to the platform adjacent to said hoisting tower, at the 25th floor of the building when the rope by which said hoisting equipment was then being lowered by Kubach Company's employees, broke or parted, permitting a steel cable, attached to said hoisting instrumentalities to fasten itself about the shoulders and neck of Brust, causing his death.

In the action by Brust's heirs against Kubach Co. the jury returned a general verdict in favor of defendant and also in special verdicts found that Brust was on the platform solely in pursuance of the business of Baker Co.; that the fall of the cable was not due to any defect in defendant's equipment; that the proximate cause of the fall of the cable was the parting of the rope, cause unknown. The judgment was affirmed upon appeal, the court saying in addition to the quotation cited by appellants: "Of course, the Baker Company had the right to the possession of its blocks at some time, but its servants could not take them until permission was given by the Kubach Company, or, at least, until the tower was idle, and they might then perhaps be taken under a permission to be implied under such circumstances. The fact that Brust was 'waiting' is enough of itself to show that he had no business on the platform of the tower. If he chose to 'wait' there, he did so at his own risk. The series of quotations we have taken from appellants' reply brief shows, without looking elsewhere, to our minds, that Brust was a mere trespasser while he stood upon the platform and when his life was wrenched away in such a cruel and heart-rending manner. There is absolutely nothing in the evidence to indicate that at that unhappy moment he was either an invitee or a licensee. Upon such a conclusion we are

bound to affirm the judgment." The court then went on to say that even if it were conceded that at the time of his death Brust was a licensee on the platform the result would be the same so "there was not the slightest showing of any overt act of negligence by the servants of Kubach Company."

Respondent, in reply, asserts the Brust case is easily distinguishable from the instant case, and that appellants are not justified in arguing that the negligent rigging of the girder by defendant Goff preparatory to lifting it from the truck, and which operation had to be temporarily interrupted for the release of the chain binders, was a negligent condition of the property and not an overt act of negligence. Respondent argues that there was a wealth of evidence that a choke sling should have been used instead of a cradle sling and respondent refers to testimony of various witnesses which seems to support this contention. Respondent also sets forth testimony of defendant Goff to the effect that the slipping, or shifting or tilting of the girder could have been prevented by using a choke sling instead of a cradle sling but that he didn't feel it was necessary. Goff also testified that the tilting or turn would occur after the binders were released, if at all; that he gave no warning that the load might tilt or shift or turn in the slings because he didn't expect anything drastic to happen; that he was watching respondent as he released the binders.

[5] The jury was fully instructed as to who are invitees, licensees and trespassers and as to the duties owed to them by the occupiers of premises. The verdict of the jury against appellants carries with it the implied finding that the injury to respondent did not result from a defective condition of the premises but that such injury was due to an overt act of negligence on the part of appellants and defendant Goff. Taking the record as we find it, and resolving in favor of respondent, as we must, every favorable inference which may fairly be deduced from the evidence, we are convinced that the implied finding of the jury upon this issue is supported by the record.

The next contention of appellants is: "Assuming for the purpose of argument that Goff, the employee of Headrick & Brown, was negligent in the manner in which he chose to unload the girder and that the beam did tilt, it was not the proximate cause of the injury."

[6] We have hereinbefore stated we are convinced that the implied finding of the jury that the injury to respondent was due to an overt act of negligence on the part of appellants and defendant Goff is supported by the record. We are likewise convinced that the implied finding of the jury that such negligence was the proximate cause of respondent's injury is supported by the record.

[7] It is, of course, the law, as quoted by appellants from *Johnson v. Union Furniture Co.*, 31 Cal.App.2d 234, at page 237, 87 P.2d 917, at page 919, that: "It is well settled that in order to maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege and prove that the wrongful act of the defendant was a direct and proximate cause of the injury (citing case). In other words, 'To impose liability it is not enough to show that an injury would not have occurred in the absence of a negligent act, but it must be shown that the act was the efficient cause of the injury—the act from which the injury followed in continuous sequence unbroken by any efficient intervening cause. Thus even though one has been guilty of negligence he may still not be liable * * * if such negligence is remote in the chain of causation and did not contribute proximately to the injury'. * * *. And in this connection it is held generally that the word 'proximate' is intended to mean direct or immediate, as opposed to remote * * * care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not * * *. In *Sedgwick on Damages*, 9th ed., vol. 1, p. 200, the rule is stated thus: 'Two entirely independent conditions must

be satisfied. First, to be proximate and entail legal responsibility, a cause must be one but for which the result would not have happened. Second, not only must this test be satisfied, but also this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility.”

Appellants refer to certain portions of the testimony in support of their contention that there was no connection between the tilting or twisting of the load when the last chain binder was released and the flying up of the handle which struck respondent. Respondent in reply refers to testimony of defendant Goff as follows:

“Q. It was not until the second binder, or last binder was released, that the load started to tip toward the left of the catwalk, is that correct? A. That is right.

“Q. Then as you have described, this handle came up and struck Mr. Church?”

“Q. It is true that this handle came up and struck Mr. Church? A. That is right.

“Q. That was not the handle that he was then and there releasing? A. That is right.”

[8] Respondent testified that upon releasing the last chainbinder the girder started to roll away from him and the next thing he knew he was on the ground. Similar testimony appears in the testimony of other witnesses. As is to be expected in a record of nearly 1200 pages there is must conflict in the evidence, but we believe it is fairly inferable from the record that the appellants were negligent in putting a cradle sling on the girder when they should have put a choke sling on; that this negligence caused the girder to tilt when the binder was released; and that there was a direct connection between the tilting of the girder and the flying up of the handle that struck respondent.

We believe that the following remarks of the trial judge upon denying appellants' motion for judgment notwithstanding the verdict are supported by the record: “The court thinks that, without any prejudice against Headrick & Brown, if anybody was negligent in the case it was Headrick & Brown, because they had, what you might

say, the entire control of unloading that. If that beam was not shored up by lumber and it should have been shored up, there wasn't a latent defect, it was a patent defect; it was open to the view of any skilled rigger. If it were necessary to shore that up before it was unloaded, he was there and saw it, and should have shored it up. And, as an expert rigger, a man at least using ordinary care and skill in rigging, he should have known. Everybody else seemed to know, at least, that the beam was side heavy and that a cradle sling would permit it to tilt * * * So, it puts the situation directly up to Headrick & Brown. They were unloading the beam, and they put a cradle sling on it when they should have put a choke sling on. If it should have been shored up, they had the opportunity to shore it up. And in the court's opinion, if there was anybody negligent in this case, that proximately caused the plaintiff's injury, it was your client, Headrick & Brown, and for that reason I deny your motion.”

Appellants next contend that respondent was guilty of contributory negligence as a matter of law. Before discussing this contention we quote the language of our Supreme Court in *Anthony v. Hobbie*, 25 Cal. 2d 814, at page 818, 155 P.2d 826, at page 829: “Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered. The burden of proving contributory negligence is upon the defendant. 19 Cal. Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not, established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence

must point unerringly to that conclusion. (Citations.)"

In view of what we have hereinbefore said relative to appellants' contentions as to assumption of risk, defective condition of the premises and proximate cause, little remains to be said as to appellants' contention that respondent was guilty of contributory negligence as a matter of law.

Appellants quote from Restatement of the Law of Torts, Vol. II, ch. 17, sec. 461, p. 1232: "Two meanings of 'voluntary assumption of risk'. This form of contributory negligence is frequently called 'voluntary assumption of risk' * * *"

"This phase is also often used to denote the fact that when the plaintiff enters the land or uses the chattels of the defendant or otherwise associates himself with the defendant's activities, having no right or privilege to do so save that derived from the defendant's consent, the defendant owes him no duty except to warn him of those dangers of which the defendant knows or should know and of which the defendant has reason to expect the plaintiff to be ignorant. Since the defendant is under no duty to warn the plaintiff of dangers which are known or obvious to him, the plaintiff must choose at his own risk whether or not he shall avail himself of the defendant's consent and has no legal ground of complaint against the defendant if his choice proves unfortunate. Thus, by deciding to act upon the defendant's consent with knowledge of the dangers involved therein, the plaintiff may not improperly be said to have assumed the risk."

Appellants argue that there was no duty on their part to warn respondent as they had no reason to believe that respondent was ignorant of the danger attendant upon raising the girder and releasing the chain binders. They assert that appellants were entitled to presume that respondent understood and appreciated the danger attendant upon releasing the chain binder handles. Upon this point the comment of the trial judge in denying appellants' motion for a new trial is interesting:

"Now, you have a situation here where Mr. Church goes out with Mr. Dalzell to

deliver this crane. He gets out there—there is a conflict in the testimony—Mr. Church says he went up there to unload—untie the chains at the request of Mr. Dalzell, Junior. * * * We must assume that because the implied verdict of the Jury shows that, that Dalzell, Junior, requested Church to get up and release those chains. Now, insofar as your client (appellants) is concerned, it is immaterial as to them whether he was a volunteer or whether he wasn't. He was there; they could see what he was doing. The rigger (Goff) putting the rigging on that beam at that time was an experienced rigger. It is true that the evidence shows that Church had some experience as a teamster, but a rather limited experience. He had moved some heavy equipment. He was observed by the Jury. You could see in a way—the Court could see that he was what you would call a big lunk-head * * * he thought he was a real teamster, and he wanted to make a hit with Dalzell for the purpose of getting a job; that was what he was primarily interested in. As a matter of fact, he was what you would call a green teamster. He didn't have a lot of experience in that line of work."

"If it was the proper thing for him to stand on that wheel and release that chain binder—if that was the custom of the business, just the minute he got on to that flange, your clients should have seen he was a green pea and didn't appreciate the danger he was getting into, and your rigger should have told the crane operator to hold it until he fired him down off of that crane, because they had enough stress on that beam—they had lifted it enough so that when all the chains were undone except the last one, they having lifted it enough to take the slack out of the cable, and there was dynamite tightened up in that last chain, and as men of experience your client should have known that. They saw where the first chain tightener was that he released. They saw where he was standing. They, as men of ordinary conduct and experience, should have told the crane operator to hold it until they fired him down off of there.

"In the Court's opinion the Jury has impliedly found that your client, as men of experience, situated as they were, should have foreseen the fact that this lad didn't appreciate the danger that he was in; that they had the power to avoid that accident; that they, nevertheless, went ahead and permitted him to release the last chain binder knowing the kind of a sling they had there. The Jury impliedly found that as men of ordinary prudence and skill and experience, they should have foreseen what would probably happen to the handle of the first chain tightener that he released, and that the accident was due to the flipping of that handle and not the last handle."

[9] We are satisfied that the question of whether or not respondent was guilty of contributory negligence was properly submitted to the jury and that their implied finding is supported by the record.

Appellants next contend the court erred in admitting in evidence testimony that a different method was used in unloading the girder after the accident had occurred.

The record shows that after plaintiff had rested his case and the defense of co-defendants Thomas Rigging Co. and Alfred Dalzell commenced, Alfred Dalzell was called as a witness, and over the objection of appellants, described how the girder was unloaded after the accident and what type of slings were used.

Appellants are correct in stating that the rule is that such evidence is not admissible to show prior negligence.

[10] In 10 Cal.Jur. 829-830, paragraph 115 it is stated: "It is now settled in California, in accordance with the rule generally prevailing elsewhere, that evidence of precautions taken after the happening of an accident is not admissible to show a negligent condition at the time of the accident. Thus evidence is inadmissible to show that defective appliances were repaired after the accident. So too, evidence is inadmissible to show substitution of a safer appliance after an accident * * *. In accord with these principles it has been held that evidence of precautions taken by the defendant after an accident, in the using of other methods of tying his horses, is

not admissible to show a negligent condition at the time of the accident." See also *Anstead v. Pacific Gas & Electric Co.*, 203 Cal. 634, 639, 265 P. 487; *Meyer v. City and County of San Francisco*, 9 Cal.App. 2d 361, 49 P.2d 893.

[11] However, it appears from the record that earlier in the trial the witness Goff was permitted, without objection, to testify as to how the girder was unloaded after the accident, and also that appellants' witness Holeman, after the testimony complained of, under questioning by counsel for appellants also described the procedure used in unloading the girder after the accident. Therefore, in view of section 4½ of Article VI of our State Constitution, we do not believe that the overruling of appellants' said objection, even, if error, would justify a reversal of the judgment. *Madern v. City and County of San Francisco*, 74 Cal.App.2d 742, 169 P.2d 425.

Appellants contend also that the trial court erred in permitting an experiment with a model which had been introduced in evidence for purposes of illustration only. Respondent had prepared a scale model of the girder and upon stipulation of counsel it was stipulated that it was a miniature representation of the girder here involved. Thereafter during the testimony of the witness, the following occurred:

"Mr. King. I think we are getting way off the subject here. Let's simulate two cradle slings—put a cradle sling around this end and one around that end. That would be the ordinary way you would use a cradle sling, isn't that so? A. Yes.

"Q. This, generally speaking, would be the way you would use a cradle sling? A. Yes.

"Q. I want you to grab hold of the end of this bridge girder (model); hold it approximately level; hold it up straight. Now, if you try to lift it up with this cradle sling, what would happen? Let him let go of it and you will see what happens. (Demonstrating.) All right, is that what happens if you try to lift that particular bridge girder in a cradle sling? A. Yes.

"Q. You couldn't possibly load it on a truck that way? A. No.

"Q. You couldn't possibly take it off the truck and lower it down?

"Mr. Porlier. Just a moment. I am going to move to strike all the questions and answers with reference to the demonstration Mr. King has just made, because that Plaintiff's Exhibit 3 was put into evidence for the sole purpose of illustration, and Mr. King's own statement was that so far as the weight was concerned that that was not a model conforming to the weight factors we had in that beam.

"The Court. Well, that is all he was doing was illustrating what would happen.

"Mr. Porlier. But, Your Honor, he was illustrating with reference to weights—he was illustrating with reference to weights. The engineer has testified, if Your Honor please, that in his opinion this beam weighed something in the neighborhood of twelve or thirteen tons, and in his further opinion the catwalk weighed something in the neighborhood of three ton. Now, it is obvious that there is not five times as much weight in this beam as there is in this model catwalk. And when he used this to demonstrate to you—it was stipulated that it should be admitted for the sole purpose of illustration and not for demonstration. Now, that was counsel's own stipulation and it was his offer.

"The Court. There is no argument on that.

"Mr. Porlier. I move to strike the questions and answers pertaining to the weights just given by the witness and by counsel, and I ask that the Jury be admonished to disregard that demonstration, because definitely the weights on this and the effect of the beam on that weight would be entirely different on the ground that it would with that model.

"The Court. Is there testimony in the case by this witness tending to show why the choke sling was used in the first in-

stance and what would happen if the choke sling were not used?

"Mr. King. Yes, there is.

"Mr. Richard. Yes, there is.

"The Court. Motion denied. I recall the testimony. I can't quote the testimony to the jury—that isn't my province, but the Court is denying the motion."

[12, 13] The admission of models and of testimony of experiments is largely within the discretion of the trial court. *County of San Mateo v. Christen*, 22 Cal.App.2d 375, 71 P.2d 88; *Collins v. Graves*, 17 Cal.App.2d 288, 299, 61 P.2d 1198. The jury saw the girder itself and also saw the model, and we do not believe that there was any abuse of discretion on the part of the trial court in refusing to strike out said testimony.

The final contentions of appellants are that the trial court erred in denying their motion for a new trial and their motions for a directed verdict and judgment notwithstanding the verdict.

What we have hereinbefore stated makes it unnecessary to discuss those contentions other than to state that the court did not err in denying each of said motions.

The trial of the instant case occupied ten court days and it was ably tried and bitterly contested. The jury was fully and correctly instructed on the law governing the various questions involved upon this appeal and no prejudicial error appears in the record. Notwithstanding the able and earnest arguments of appellants on this appeal, we are convinced that, taking the record as a whole, and bearing in mind the rule by which an appellate court is governed, the judgment in favor of respondent finds ample support in the record.

In view of the foregoing the judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

101 Cal.App.2d 345

CAHN v. JONES.
Civ. 17670.

District Court of Appeal, Second District,
Division 3, California.

Dec. 21, 1950.

Hearing Denied Feb. 15, 1951.

Action by Gertrude Cahn against Robert S. Jones, also sometimes known as R. S. Jones, for money had and received. The Superior Court of Los Angeles County, Arnold Praeger, J., dismissed the action, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the statute requiring a court to dismiss an action in which the summons had been served and no answer filed, unless plaintiff has caused the judgment to be entered within three years after the service of summons, is mandatory and that the action had to be dismissed.

Judgment affirmed.

1. Dismissal and nonsuit ⚡60(3), 65

Statute providing that no action shall be prosecuted unless summons shall have issued within one year, and be served and return thereon made within three years after commencement of action is jurisdictional in sense that court has no power to excuse delay, nor can court refuse to act merely because party fails to make a motion for dismissal. Code Civ.Proc. § 581a.

2. Prohibition ⚡10(1)

Prohibition is granted to restrain further exercise of jurisdiction.

3. Dismissal and nonsuit ⚡50

Where defendant filed verified answer to plaintiff's amended complaint, and trial was continued by written stipulation of the parties, and defendant demanded a bill of particulars and filed a verified answer to an amendment of the amended complaint, defendant did not waive requirement of statute that court must dismiss an action in which summons has been served and no answer filed, unless plaintiff has caused judgment to be entered within three years after service of summons. Code Civ.Proc. § 581a.

4. Dismissal and nonsuit ⚡71

In action for money had and received in which no personal service of summons and complaint was made on defendant within three years after commencement of action, evidence supported finding that defendant was not absent from the state during that period, and action was properly dismissed. Code Civ.Proc. § 581a.

Sampson H. Miller, Los Angeles, for appellant.

Floyd E. Pendell, El Monte, for respondent.

SHINN, Presiding Justice.

Plaintiff, Gertrude Cahn, appeals from a judgment of dismissal of her action against defendant, Robert S. Jones, on his motion pursuant to the provisions of section 581a of the Code of Civil Procedure.

On November 26, 1945, plaintiff filed her complaint for money had and received, alleging that there was due and owing her the sum of \$14,189. Summons in the action was issued the same day and an affidavit was filed for writ of attachment against certain real property in which defendant had an interest, and levy was made by the Sheriff. There was no personal service of the summons and complaint upon the defendant. Prior to October 21, 1948, the defendant made certain payments on the indebtedness in the sum of \$4,897.44. On October 21, 1948, plaintiff filed an amended complaint and summons was issued on the same day. Personal service of a copy of the amended complaint together with summons was made on defendant March 3, 1949. On March 5, 1949, the defendant filed a verified answer to the amended complaint. The cause was finally set for trial on April 25, 1949, and on that day was continued to May 23rd. On May 17th the trial was continued by written stipulation until June 27, 1949. Prior to that time, plaintiff served on defendant and filed a notice of motion to amend the amended complaint by adding a second cause of action. This motion was heard on June 7, and granted. On June 14, 1949, defendant

demand a bill of particulars; on June 18, defendant filed a verified answer to the amendment to the amended complaint; on June 24, plaintiff filed and served on defendant a bill of particulars; the parties then entered into an oral stipulation to continue the trial until September 30, 1949. On June 29, 1949, the defendant filed a notice of motion to dismiss the action under section 581a of the Code of Civil Procedure; the motion was granted on July 18, 1949.

At the time the action was dismissed, section 581a of the Code of Civil Procedure read as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action * * *. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him. * * *"

Plaintiff maintains that defendant by his conduct (as heretofore set forth) waived personal service of summons and conferred jurisdiction upon the court; that pleas based upon lack of jurisdiction of the person are pleas in abatement and are not specially favored in the law; that defendant, in stipulating to continue the trial un-

til a later date has caused plaintiff to alter her position and thus is estopped to move for a dismissal of the action because of the failure to serve summons upon him within the three year period; that the trial court failed to find upon the controverted issue of defendant's absence for four months from the State and that in the absence of such a finding no valid judgment of dismissal could be entered.

[1] The statutory provision in question has always been held mandatory. Whenever it has been necessary to decide how the provision affects jurisdiction it has been held that the court is deprived of all power to proceed further with the prosecution of the action. As said in *Gonsalves v. Bank of America Nat. Trust & Savings Ass'n*, 16 Cal.2d 169, 105 P.2d 118, 120: "The statute is 'jurisdictional' in the sense that the court has no power to excuse the delay, nor can it refuse to act merely because the party fails to make a motion for dismissal. *It has power to act only in a certain way, that is, by ordering a dismissal.*" (Emphasis added.) *Brock v. Fouchy*, 76 Cal. App.2d 363, 172 P.2d 945; *Kelly v. Ferbrache*, 119 Cal.App. 529, 6 P.2d 987; *Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal.App. 515, 170 P. 632; *Perrin v. Resleure*, 77 Cal.App.2d 408, 175 P.2d 281; *Frohmman v. Bonelli*, 91 Cal.App.2d 285, 204 P.2d 890; *Pease v. City of San Diego*, 93 Cal.App.2d 706, 209 P.2d 843; *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 P. 470; *Davis v. Hart*, 123 Cal. 384, 55 P. 1060; *Sharpstein v. Eells*, 132 Cal. 507, 64 P. 1080; *Grant v. McArthur*, 137 Cal. 270, 70 P. 88; *Swortfiguer v. White*, 141 Cal. 576, 75 P. 172; *Wilson v. Leo*, 19 Cal.App. 793, 127 P. 1043; *McColgan v. Piercy*, 17 Cal.App. 160, 118 P. 957; *People v. Kings County Dev. Co.*, 48 Cal.App. 72, 191 P. 1004; *Ransome-Crummey Co. v. Wood*, 40 Cal.App. 355, 180 P. 951; *Narum v. Cheatham*, 127 Cal. App. 505, 15 P.2d 1106; *Pearson v. Superior Court*, 122 Cal.App. 571, 10 P.2d 489; 167 A.L.R. 1058-1096-1103.

[2] Prohibition is granted to restrain further exercise of jurisdiction. *Sauer v. Superior Court*, 74 Cal.App. 580, 241 P.

570; *Thornley v. Superior Court*, 89 Cal. App.2d 662, 201 P.2d 567; *White v. Superior Court*, 126 Cal. 245, 247, 58 P. 450; *Modoc Land & Livestock Co. v. Superior Court*, 128 Cal. 255, 60 P. 848.

By Statutes 1933, p. 1869, a provision was added to section 581a that of its own motion, or on motion of an interested party, the court must dismiss an action in which summons has been served and no answer filed unless the plaintiff has caused judgment to be entered within three years after service of summons. It has been held that the provision is mandatory and that the action must be dismissed. *Perry v. Dabney*, 76 Cal.App.2d 395, 173 P.2d 62; *Schultz v. Schultz*, 70 Cal.App.2d 293, 161 P.2d 36; *Schultz v. Superior Court*, 69 Cal.App.2d 530, 159 P.2d 417; *Rio Del Mar Country Club v. Superior Court*, 84 Cal.App.2d 214, 190 P.2d 295 (prohibition granted); *Lynch v. Bencini*, 17 Cal.2d 521, 110 P.2d 662; *Jacks v. Lewis*, 61 Cal.App.2d 148, 142 P.2d 358. Nevertheless, it has also been held that if judgment has been entered after the three year period it will be reversed on direct attack but will not be treated as void for want of jurisdiction to enter it. *Taintor v. Superior Court*, 95 Cal.App.2d 346, 213 P.2d 42; *Merner Lumber Co. v. Silvey*, 29 Cal.App.2d 426, 84 P.2d 1062; *Phillips v. Trusheim*, 25 Cal.2d 913, 156 P.2d 25; *Pavlovich v. Watts*, 46 Cal.App.2d 103, 115 P.2d 511. The latter cases do not aid appellant, since no judgment was entered in the present action.

[3] Cases decided under section 583, Code of Civil Procedure, are not in point. The section, while requiring dismissal after five years, contains the proviso, "except where the parties have filed a stipulation in writing that the time may be extended * * *." It has been held that without a written stipulation within the five year period a defendant may by his conduct thereafter lose the right to have the action dismissed. *Rio Vista Min. Co. v. Superior Court*, 187 Cal. 1, 200 P. 616; *Smith v. Bear Valley Milling & Lumber Co.*, 26 Cal.2d 590, 160 P.2d 1; *Koehler v. Peck-*

ham, 11 Cal.App.2d 481, 54 P.2d 500; *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal.App.2d 636, 116 P.2d 458. There was no such proviso in section 581a on June 18, 1949, when the present action was dismissed. Upon the contrary, it was provided that "no further proceedings shall be had therein," and there was no exception that has application to the present situation. Upon the expiration of the three year period the court could do nothing but dismiss the action. Jurisdiction having been lost, it could not be restored. Although in 1949 the section was amended so as to permit the parties to extend the time by written stipulation this exception was not effective until after the order appealed from was made. Therefore no question is presented by reason of the amendment as to the ability of the parties to extend the time after the expiration of three years. They could not do so under the law as it existed prior to the amendment.

Cooper v. Gordon, 125 Cal. 296, 57 P. 1006, which is also relied upon by plaintiff, decided that defendant was estopped to move for a dismissal because of two written stipulations, signed by the parties or their assignees, that judgment could be entered against defendant at any time. These stipulations had been entered into prior to the expiration of the three year limitation provided for in the statute. The case was decided upon its particular facts; the court stated that without the stipulations it would have been necessary to dismiss the action. There was no such stipulation in the present action.

[4] The evidence, consisting of affidavits, was conflicting as to whether defendant had been absent from the State. The order implies a finding that he was not absent, and there was direct evidence to that effect.

The action was properly dismissed.

The judgment is affirmed.

PARKER, WOOD and VALLÉE, JJ.,
concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

101 Cal.App.2d 340

NELSON et al. v. ORO LOMA SANITARY DIST. OF ALAMEDA COUNTY et al.

No. 14365.

District Court of Appeal, First District,
Division 1, California.

Dec. 22, 1950.

W. W. Nelson and others brought action against the Oro Loma Sanitary District of Alameda County and others for declaratory relief to declare void a reassessment levy, and to enjoin issuance of bonds thereon. The Superior Court, in and for the County of Alameda, Donald K. Quayle, J., rendered a judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that neither Superior Court nor District Court of Appeals could go behind finding of board of directors of the district that it had jurisdiction to make reassessment, in absence of allegations of fraud or arbitrary action on part of board.

Judgment affirmed.

1. Administrative law and procedure ⇨683, 795

Declaratory judgment ⇨365, 393

Superior court in declaratory judgment action and District Court of Appeal on appeal could not go behind finding of board of directors of sanitary district of county that board had jurisdiction to make reassessment, in absence of allegations of fraud or arbitrary action on part of board. Streets and Highways Code, §§ 5000-6794.

2. Administrative law and procedure ⇨500
Health ⇨4

Only where lack of jurisdiction appears on face of proceedings of tribunal, such as a board of directors of a sanitary district, may collateral attack be made, as, for example, where record shows that statutory notice of required hearing has not been given.

3. Administrative law and procedure ⇨447, 439

Health ⇨4

Tribunals, such as a board of directors of a sanitary district, have jurisdiction of proceedings if statutory steps have been taken, and then have authority to pass on facts requisite to support final action taken.

4. Administrative law and procedure ⇨500, 658

Health ⇨4

If board of directors of sanitary district makes wrongful determination of facts requisite to support final action taken, remedy is by direct appeal from that determination, rather than by collateral attack.

5. Administrative law and procedure ⇨500
Health ⇨4

Finality of findings of board of directors of sanitary district may be questioned on collateral attack where it is directly charged that action of board was result of fraud.

6. Health ⇨4

Board of directors of sanitary district was not deprived of rights to make reassessments because of absence of any finding by a court that original assessment proceedings were invalid or unenforceable, or because of absence of a demand for reassessment by property owners or bondholders. Streets and Highways Code, §§ 5500-5502, 8702.

7. Health ⇨4

Reassessment by board of directors of sanitary district was not improper because some of the additional costs incurred were not included in original specifications. Streets and Highways Code, §§ 5000-6794, 5501.

8. Health ⇨4

Basis for reassessment by board of directors of sanitary district was existence of completed work. Streets and Highways Code, §§ 5000-6794.

9. Administrative law and procedure ⇨658
Health ⇨4

Exclusive remedy of landowners in sanitary district as to items considered by board of directors of sanitary district in making reassessment, was by appeal. Streets and Highways Code, §§ 5003, 5368, 8620.

John F. O'Sullivan, San Francisco, for appellant.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

BRAY, Justice.

In a representative action for declaratory relief to declare void a reassessment levied, and to enjoin the issuance of bonds thereon by defendant sanitary district, the court held the reassessment and bonds valid. Plaintiffs appeal from the judgment in favor of defendants.

Question Presented.

The primary question is whether the trial court and this court may go behind the board's finding of jurisdiction to make the reassessment.

Facts.

In 1945, the district, in order to acquire rights of way and construct certain storm drainage work and improvements, levied an assessment of \$118,501.86 against the property of plaintiffs and approximately five hundred other land owners within a special assessment district. Of this sum, \$12,720.64 was paid in cash and the balance, \$105,781.82 was raised by the issuance of bonds. The assessment was levied and the bonds issued under the provisions of the Municipal Improvement Act of 1913, Act 5215, Deering's General Laws. Contracts were let for the doing of the work. As frequently happens in public work, the cost of the project exceeded the estimates and the amount raised by the assessment. It is unnecessary to detail the reasons. The district paid out of its general fund the sum of \$71,084.55 over and above the amount of the assessment. To recover this amount for its general fund the district made the reassessment under attack here. This reassessment was made pursuant to section 18 of the 1913 act. No attack is made on the regularity of the reassessment proceedings so far as the mechanical steps and procedures required are concerned. It is claimed, however, that the reassessment is void as the board had no jurisdiction to levy a reassessment for the reason that the original assessment proceedings were valid. The trial court found the reassessment valid and that bonds might be issued thereon; that the amounts of the reassessment were not arbitrary, discriminatory or unfair; that plaintiffs are barred

from obtaining relief because of failure to appear and protest at the reassessment hearings; that this action is barred by sections 6 and 18 of the Municipal Improvement Act of 1913.

Applicable Sections of Improvement Acts.

Section 18 of the 1913 act provides that the original assessment shall be recorded in the office of the district engineer of the district "in the manner and with like force and effect as provided in the Improvement Act of 1911 and the Improvement Bond Act of 1915, and the assessment therefor shall have the priority, and *the proceedings shall be subject to all of the curative clauses and powers of reassessment, provided in those acts * * **" (Emphasis added.) Pursuant to this section the district followed the reassessment provisions of the 1911 and 1915 acts as they then existed. The Improvement Acts of 1911 and 1915 have been incorporated into the Streets and Highways Code.¹ Some of the pertinent portions follow: Section 5500 provides: "If any assessment heretofore or hereafter made, issued or filed in the office of the clerk is void or unenforceable for any cause or if bonds have been or are issued to represent or be secured by any assessments and such issuance was or is not effective through the curative provisions in relation thereto, or any curative act that may be passed by the Legislature in relation thereto to make them valid and enforceable, then, in any of such events a reassessment therefor may be issued." Section 5501 provides: "The true intent and meaning of this chapter is to make the cost and expense of any work made through an attempted compliance with this division payable by the real estate benefited by such work by making a reassessment therefor." Section 5502 will be discussed later. Then follow sections setting forth the reassessment proceedings. Section 5366 provides for an appeal by any interested person to the district board from a reassessment. (While it does not specifically refer to reassessments, it includes them.) Section 5367 authorizes the board upon such appeal to correct or amend the

4. The 1911 act is found in sections 5000 through 6794, Streets and Highways

Code; the 1915 act in sections 8500 through 8851.

assessment in any particular. Section 5368 provides: "All the decisions and determinations of the legislative body, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal to the legislative body, as to all errors, informalities, and irregularities which the legislative body might have avoided, or have remedied during the progress of the proceedings or which it can at that time remedy."

If bonds are to be issued upon an assessment and after notice is given and a hearing had of protests, section 8596 provides: "If at the hearing the legislative body determines that any assessment is void and unenforceable, it shall order a reassessment * * *."

Section 8702 is practically identical with section 5500 except that the last sentence of section 8702 does not appear in section 5500. That sentence reads: "The reassessment shall be made upon the demand of the owner or holder of bonds aggregating one-third of the principal amount outstanding and shall be made in the manner and form provided by the law pursuant to which the work was done."

Jurisdiction of Board.

[1] In resolution 354, entitled "Directing Making of Reassessment," the board found that the original assessment and bonds issued thereon were irregularly levied and unenforceable. Plaintiffs contend that the record of the original assessment proceedings shows on its face that the assessment and the bonds issued thereon were valid and enforceable, and hence the board did not have jurisdiction to make a reassessment. (The trial court found the particular steps taken by the board in the original assessment proceedings, but made no finding as to their validity.) Defendants contend that the board's finding of jurisdiction is final and conclusive in a collateral attack of this kind, particularly against one who failed to protest the reassessment proceedings. Thus, we are required to decide whether in the absence of allegations of fraud or arbitrary action, the courts in a collateral attack may go behind the jurisdic-

tional finding of the board. The authorities hold that the courts may not do so. The early case of *People v. Hagar*, 52 Cal. 171, was an action to collect an assessment levied by a swamp land district. In upholding the trial court in striking from the answers of the property owners who were contesting the assessments, certain denials of facts found by the board of supervisors in establishing the district, which facts the superior court found to be jurisdictional, the latter court stated that it was the duty of the board to pass upon these facts and having done so its judgment is conclusive, stating 52 Cal. at page 183: "These were jurisdictional facts which the Board necessarily determined in approving the petition, and its action is not open to attack in a collateral action. 'Whenever the jurisdiction of a Court not of record depends on a fact which the Court is required to ascertain and settle by its decision, such decision, if the Court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack.' (Freeman on Judgments, sec. 523; Bigelow on Estoppel, p. 142.)" This rule was followed in *Spaulding v. North San Francisco Homestead & Railroad Ass'n*, 87 Cal. 40, 24 P. 600, 25 P. 249, in an action brought by an assignee of a street contractor against a property owner to recover the amount of an assessment for the grading of a street under the act of April 1, 1872. That act provided that no grading could be ordered by the supervisors unless a majority of the frontage of lots fronting on the proposed work was represented in the petition. The petition upon which the board acted was uncertain on its face as to whether a majority of the frontage was so represented. At the trial, the defendant offered to prove that the fact was that a majority were not represented. The trial court refused to admit the proof. On appeal, it was held that the action was proper; that in spite of the uncertainty of the allegations of the petition it was sufficient to give the board of supervisors jurisdiction to act upon it, and the determination by the board of the jurisdictional facts is conclusive against collateral attack. The court then refers to a provision in the act providing a method for property

owners to object and that the action of the board thereon "shall be final and conclusive."

"This provision is intended to enable parties in interest to reach any irregularity or defect in the petition itself, or matter connected with the granting of it, and to be their only remedy. There is no evidence here that appellant ever availed itself of the opportunity thus given to be heard. It therefore waived all objections to the form of and the granting of the petition." 87 Cal. at page 46, 24 P. at page 601. This holding is important in our case because of similar provisions in the three acts involved.

In *People ex rel. Skelton v. Los Angeles*, 133 Cal. 338, 65 P. 749, an action in quo warranto was brought to declare void the proceedings of the city council in annexing certain territory to the city. It was contended that the petition for annexation was not signed by the requisite number of electors. The court held that the jurisdiction of the council to act depended upon the petition being signed by the requisite number of electors; that this was a question of fact to be determined by the council, and its determination was conclusive, saying 133 Cal. at page 342, 65 P. at page 750: "An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of *facts* upon the existence of which its jurisdiction or power depends. * * *"

A case directly in point is *Godber v. City of Pasadena*, 206 Cal. 90, 273 P. 30. There the city levied an assessment under the procedure provided by the 1903 Street Opening Act. It later passed a resolution declaring the assessment invalid and proceeded to make a reassessment. Plaintiff, a property owner affected, sought to enjoin the enforcement of the reassessment on the ground (the same as here) that the first assessment was a valid one. After pointing out a provision in the 1903 act (similar to provisions in the acts involved here) to the effect that the confirmation of the reassessment by the city council "shall be a final determination of all matters relating to the actual benefits derived or to be derived from the improvement by the respective lots * * *" the court said: "Appellant seems

to overlook the fact that the court may take only a restricted view of the action of the city directors. We are required to look, therefore, upon the last action of the board with the same complacency that we would have looked upon the first assessment had there been no attempt to rescind it. The rules of law which guide the court in a proceeding of this character are well settled and are relied upon by both parties. The controlling principle, in a word, is that every intendment must be indulged that can be in favor of the final action of the city directors and all doubts resolved in favor of the validity of the action so taken. The court will not hear the opinions of witnesses and other evidence in any subsequent issue involving the assessment in order to determine whether or not it can plainly see that the action taken by the municipality was or was not correct, but the court can only view such facts as appear on the record of the proceedings taken in the light of those further facts of which we may take judicial notice [Citations]." 206 Cal. at page 93, 273 P. at page 31.

Plaintiffs mainly rely on two cases, one of which is *In re Madera Irrigation District*, 92 Cal. 296, 28 P. 272, 14 L.R.A. 755. There, the board of directors of the Madera Irrigation District filed in the superior court a petition for confirmation of their proceedings for the issue and sale of certain bonds of the district. That court confirmed the legality of the proceedings and bonds. Certain property owners appealed, contending, among other things, (1) that the bond required to accompany the petition for the formation of the district was so defective as to deprive the board of supervisors of jurisdiction to proceed. As to this the court said 92 Cal. at page 329, 28 P. at page 280: "The bond which was presented, although informal, was not invalid, and was of binding obligation upon those who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given." Plaintiffs can derive no comfort from this holding. (2) That the superior court did not require the district

to prove that the petition for formation of the district was signed by the requisite number of property owners, but allowed in evidence the record of the board's proceedings which contained a finding to that effect and refused to permit the introduction in evidence of the petition itself. The Supreme Court held that this action of the trial court was error, stating 92 Cal. at page 332, 28 P. at page 281: "Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question was an issue before the court, to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction." However, the action in that case was a direct attack on the action of the board where here it is a collateral attack. The proceedings there were under the act of 1889 which expressly declared that the court alone (and not the board as in our case) should have power and jurisdiction to examine and determine the validity of all proceedings. The court further stated that this was not a collateral proceeding but a direct attack and compared it to a quo warranto proceeding in holding that the burden was on the district to prove the validity of its organization. The court expressly recognized the fact that the rule might be different in a collateral proceeding by saying 92 Cal. at page 332, 28 P. at page 281: "It may be held that, when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency of the petition would be presumptive of such sufficiency * * *."

[2-4] The other case mainly relied on by plaintiffs is *Raisch Implement Co. v. Bonslett*, 28 Cal.App. 649, 153 P. 747 (Supreme Court denied a hearing). In 1910 the board of trustees of the town of Antioch, under the provisions of section 20 of the Vrooman

Act, passed an ordinance accepting certain streets after their improvement under that act. Section 20 provided, in effect, that whenever any street had been constructed in a certain manner and had sewer, gas pipes and water pipes laid therein, such street could be accepted by the council by ordinance. The ordinance recited that gas pipes had been laid in the streets in question. It was an admitted fact in the case that the gas pipes had not been laid. In 1914 the board passed another ordinance stating that the recital in the 1910 ordinance was untrue and therefore the board was without jurisdiction to pass an ordinance accepting said streets, and repealed said ordinance. The board then initiated certain proceedings for the improvement of some of the streets mentioned in the 1910 ordinance. Under these proceedings a contract for doing the work was awarded to petitioner. Respondent superintendent of streets refused to sign the contract, basing his refusal upon the ground that having accepted the streets in the 1910 ordinance the board was without jurisdiction to order another improvement of the streets at the property owners' expense. Petitioner then sought a writ of mandate to compel him to sign. The court stated that the only question was the validity of the 1910 ordinance; that the jurisdiction of municipalities to improve streets at the property owners' expense was a limited one and under section 20 of the Vrooman Act required that gas pipes be actually laid in a street before the city could accept it.² In answer to the respondent's contention that the courts are bound by the recital in the ordinance the court relied upon the statement in *Re Madera Irrigation District*, supra, 92 Cal. 296, 28 P. 272, 14 L.R.A. 755: "No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction." But, as pointed out in *People ex rel. Skelton v. City of Los Angeles*, supra, 133 Cal. 338 at page 343, 65 P. 745, the situation in the *In re Madera* case was a peculiar one. There the act under which the proceedings to confirm the district's bonds was brought provided "that 'the court shall have power and jurisdiction to examine and determine

2. The act provided for an alternative not applicable to the facts of the case.
225 P.2d-37

the legality and validity of * * * each and all the proceedings for the organization of said district, * * * from and including the petition for the organization of the district." (Emphasis added.) The court there found that the petition was not signed by a majority as the law required. Thus it appears that the *In re Madera* proceeding was a *direct* attack on the proceedings and the language concerning jurisdiction was proper. "The proceeding was special, and was so declared by the act." *People ex rel. Skelton v. City of Los Angeles*, supra, 133 Cal. 338 at page 343, 65 P. 749. Hence the court in the *Raisch* case considered the attack on the ordinance as a *direct* and not a *collateral* attack. An examination of the cases in California concerning the finality of the findings of tribunals of the type here shows that it is only where the lack of jurisdiction appears on the face of the proceedings that a collateral attack may be made, as, for example, where the record shows that the statutory notice of a required hearing has not been given. The word jurisdiction is a much misused one. These tribunals have jurisdiction of the proceedings if the statutory steps have been taken, and then have the authority to pass upon the facts requisite to support the final action taken. If the board makes a wrong determination of those facts, the remedy is by a direct appeal from that determination. In many cases, as in the acts involved here, an appeal to the board is provided, and in all cases, of course, there may be a direct appeal to the courts. In our case, plaintiffs did not avail themselves of either remedy, nor did they appear at the board hearings. An examination of the various acts involved shows that it was the intention of the Legislature to make the board's action as to the determination of facts final. Thus under the 1911 act a hearing on the reassessment must be had, and notice thereof given. Section 5501 states: "The true intent and meaning of this chapter is to make the cost and expense of any work made through an attempted compliance with this division payable by the real estate benefited by such work by making a reassessment therefor." Section 5003 provides: "This division shall be liberally construed in order to effectuate

its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division." Section 8620 of the 1915 act which provides the procedure for issuance of the bonds provides: "All of the decisions and determinations of the legislative body upon the objections and matters submitted at the hearing, shall be final and conclusive upon all persons who were entitled to appear at the hearing." Section 8594 provides that any owner of property affected by the assessment may appear and "set forth his objections, or any reason which he may have why bonds should not be issued upon the security of the unpaid assessments. He may show any act or determination done or made in the proceeding whereby he is aggrieved and any act or thing done in the proceeding which may be irregular, defective, erroneous or faulty, and may set forth what assessments are unpaid and what assessments have been paid. *If he claims that the legislative body does not have jurisdiction to issue the bonds he shall set forth the ground upon which his contention is made.*" (Emphasis added.)

While, of course, jurisdiction in the strict sense cannot be obtained by a mere recital, it is apparent from the above sections that the Legislature intended the board's determination to be final. As said in *People ex rel. Skelton v. City of Los Angeles*, supra, 133 Cal. 338 at page 342, 65 P. 749, 750, in quoting from Wells on Jurisdiction, section 61: "Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive." See also *Godber v. City of Pasadena*, supra, 206 Cal. 90, 273 P. 30. The language in 19 Cal. Jur., p. 221, although referring to other street improvement acts, applies here: "Upon the hearing, the coun-

cil sits as a quasi court of appeal, and may confirm, modify or correct the assessment or it may order a new assessment. Action by the council is final and conclusive, unless it be shown that the council refused to decide, upon the merits, objections urged against an assessment, and, instead thereof, willfully based its order upon illegal considerations which were inconsistent with making an assessment in proportion to benefits to be derived from the improvement, and which in effect amounted to fraud upon the rights of the property owners."

[5] It must be pointed out that the finality of the board's findings may be questioned where it is directly charged that its action was the result of fraud. See *Cake v. City of Los Angeles*, 164 Cal. 705, 130 P. 723. Here there is no such charge in the complaint. Plaintiffs contend that some of the language of their complaint indicates such a charge. However, an examination of the complaint discloses a complete absence of the particularity of allegations of fraud which the law requires, and which are necessary in order that the trial court might find on the subject.

Prior Proceedings.

Plaintiffs contend that the trial court found that the prior proceedings were valid. The court found the steps taken by the board in the original assessment proceedings. However, it did not find that these steps constituted a valid assessment proceeding. Assuming, however, that the findings could be interpreted as plaintiffs interpret them, they do not change the situation for the reason, as pointed out before, that the court had no power to go behind the finding of the board that those proceedings were invalid.

Conditions for Reassessment.

[6] In interpreting the reassessment provisions, plaintiffs contend, in effect, that a board has no authority to make a reassessment unless (1) a court has found that the assessment proceedings are invalid or unenforceable, or (2) that a demand for reassessment has been made by property owners or bondholders. This contention is based upon the fact that in some of the pro-

visions for reassessment it is provided that reassessments *shall* be made in the above contingencies. However, the right to make the reassessment is not confined exclusively to those situations. Section 8702 provides that if any assessment is void or unenforceable for any cause, or if the issuance of bonds thereon is not effective through the curative provisions to make them valid and enforceable, then a reassessment *may* be made. It *shall* be made upon the demand of one-third of the bondholders. Section 5500 provides that if the assessment is void or unenforceable or if the issuance of bonds is ineffectual a reassessment *may* be issued. Section 5501 then sets forth that the true intent of the chapter is to make the cost of any work through an attempted compliance with the provisions of the division payable by the real estate benefited by the work by making a reassessment therefor. Section 5502 (one of the sections upon which plaintiffs rely for their contention) provides that a reassessment *shall* be made (1) on the request of certain bondholders; (2) when a court has declared the assessment or bonds, or the lien thereof, or the contract for doing the work, void or unenforceable. It is obvious from a reading of the above sections that in providing that a reassessment *shall* be made on the demand of bondholders or in the event of an adverse court decision, the Legislature did not intend to deprive the board of the right on its own motion under the authority granted by the sections stating that reassessment *may* be made, to make such reassessment. *Gray v. Lucas*, 115 Cal. 430, 47 P. 354, and *Westall v. Altschul*, 126 Cal. 164, 58 P. 458, cited by plaintiffs, are not in point. In both cases the court was considering street improvement acts which confined the right of reassessment to a situation where a court had first determined the original assessments to be illegal.

Cost of Work.

[7-9] The \$71,084.55 for which the reassessment was made exceeded to that extent the original estimate for doing the work. Likewise, some of the costs incurred were not included in the original specifications. Plaintiffs contend that nothing can be in-

cluded in the reassessment that was not in the original estimate for doing the work or in the specifications. Under present conditions, to hold that a reassessment cannot be made for the cost in excess of the original estimate would practically prohibit the doing of any public work. In the face of ever changing costs of labor and materials, it is almost impossible to estimate accurately the cost of a particular improvement. Moreover, unforeseen difficulties frequently arise in the doing of the work, and changes must be made in the specifications. Undoubtedly the Legislature had this in mind when it enacted section 5501 making the cost and expense of the work payable by the real estate benefited. The basis of the reassessment is the existence of a completed work. See *Cowart v. Union Paving Co.*, 216 Cal. 375, 382, 14 P.2d 764, 83 A.L.R. 1185. Moreover, as to the items considered in making the reassessment, plaintiffs' exclusive remedy is "by appeal to the legislative body in accordance with the provisions of this division." § 5003. See §§ 5368, 8620.

The judgment is affirmed.

PETERS, P. J. and FRED B. WOOD, J., concur.



101 Cal.App.2d 566

PIUS v. JONES et al.
Civ. 17815.

District Court of Appeal, Second District,
Division 1, California.
Jan. 2, 1951.

Action by Cornelia R. Pius against Buford Jones and others involving title to realty. The Supreme Court of Los Angeles County, Wm. P. Raughton, J., rendered judgment for plaintiff and from such judgment and an order denying motion for new trial, defendants appealed. The District Court of Appeal, Doran, J., held that grant deed by which

purchasers after their interest under contract to purchase realty had been forfeited purportedly conveyed such realty to others was void.

Judgment affirmed and appeal from order dismissed.

1. Deeds ⇐8

Grant deed by which purchasers after forfeiture of their interest under contract to purchase realty purported to convey such realty to others without consideration was void, since record title had remained in vendor at all times.

2. Vendor and purchaser ⇐187

Contention that provision in contract for sale of realty making time of the essence had been waived by vendor's failure to insist on its strict performance was of no avail to purchasers who had failed to pay at all.

Crispus A. Wright, Los Angeles, for appellants.

Arthur J. Speight, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment and the order denying defendants' motion for a new trial.

It is contended on appeal that "The court committed reversible error in failing to allow appellants to amend their answer to conform to the evidence and in refusing to grant to appellants a new trial."

The record reveals that "The respondent and her husband, John E. Pius, acquired the real property concerned in this litigation by grant deed dated 6th of March, 1945, from Alberta Seward. On April 3, 1945, respondent and her husband made a contract in writing under the terms of which Leslie Howard and his wife Eva Mae Howard, were to purchase the property. The agreement is Plaintiff's Exhibit 3. John E. Pius died on December 22, 1946, and thereafter and before the commencement of this action, the Superior Court of this County, upon petition of this respondent, made a decree establishing the death of Mr. Pius and terminating the joint

tenancy which had existed between them, and the record title was then in Cornelia R. Pius.

"The Howards made payments on the property to December 15, 1947, but failed to make the payment of \$75.00 due on January 14, 1948, and thereafter made no payments whatever.

"Under the terms of the agreement, the Howards were to pay taxes, and upon their failure to do so, the property was sold to the State for delinquent taxes, and Mrs. Pius paid the necessary money to redeem. Howards were also to pay the insurance, but Mrs. Pius also paid that.

"During 1948, a Mr. Robert Newman, real estate broker, purportedly acting for the Howards, wrote several letters to Mrs. Pius, in an attempt to persuade her to sell the property. She was then in the east. At first she paid no attention, but later, through her then attorney, H. Leonard Richardson, she agreed to take the balance due her from the Howards, although Newman had written her that Howard was unable to meet the payments. Mrs. Pius sent a grant deed to Richardson, which was dated April 21, 1948. This deed was placed in escrow. The deed was returned to Richardson on September 25, 1948, together with a letter from the escrow company. The escrow had been opened on March 22, 1948 but no money was ever put in by the Howards or in their behalf. The escrow failed because Newman or the Howards could not get a loan. As Newman put it, 'he had a transaction but had failed for finances.' Mrs. Pius was not the party who cancelled the escrow, nor did her attorney, Mr. Richardson cancel it.

"On September 30, 1948, respondent exercised the option provided in the contract, to be released from all obligations in law and equity to convey the property and to forfeit the interest of the Howards therein.

"On October 4, 1948, the Howards executed a grant deed to Buford Jones and Floreda Jones, for which he received nothing. * * * During all of 1948, Howards collected \$40.00 per month as rent upon the rear house on the property, and prior to that had collected \$25.00 per month."

[1] The deed executed by the Howards above referred manifestly was void for the record title remained in the plaintiff at all times.

[2] Appellants' argument that the clause in the contract making time the essence was waived because plaintiff did not insist on its strict performance lacks merit; the buyer simply failed to pay at all.

The appeal is destitute of merit. The evidence supports the findings and the record is without error.

The judgment is affirmed and the appeal from the order dismissed.

WHITE, P. J., and DRAPEAU, J., concur.



NEW YORK LIFE INS. CO. v.
HOLLENDER et al.

Civ. No. 17947.

District Court of Appeal, Second District,
Division 2, California.

Dec. 19, 1950.

Rehearing Denied Jan. 5, 1951.

Hearing Granted Feb. 15, 1951.*

Action by New York Life Insurance Company against Beatrice Hollender and Leo Hollender for reformation of an insurance contract, wherein second named defendant filed cross-complaint. The Superior Court, Los Angeles County, Joseph Marchetti, J., rendered judgment for defendant and cross-complainant and plaintiff appealed. The District Court of Appeal, McComb, J., held that the incontestable clause of the policy did not bar plaintiff's action to adjust the amount payable under the contract in accordance with the provisions of the age adjustment clause.

Judgment reversed.

1. Insurance ☞400.8

When an insurance policy by its terms, is made incontestable after a designated period, intent of parties is to fix a limited time within which company must discover

* Subsequent opinion 237 P.2d 510.

and assert any reasons or grounds it might have to justify a rescission of contract on account of any misrepresentations in application.

2. Insurance ⇨400.1

When an insurance policy, by its terms is made incontestable after a designated period, insurer must make its contest within specified period either by institution of a suit to cancel policy, or by setting up misrepresentation or fraud in procurement of policy in an action brought by insured or beneficiary.

3. Insurance ⇨247

Under life policy obligating insurer to pay amount of insurance which premium paid would have purchased at insured's correct age, insured's understatement of his age would not be grounds for its rescission by insurer.

4. Insurance ⇨515.1

A policy provision which measures amount of recovery at time of application does not avoid obligation of policy, but gives insured what his money bought at his correct age.

5. Insurance ⇨400.5, 400.8

Denial of liability under policy by reason of fraud or misrepresentation in the obtaining thereof, is the "contest" which is precluded by incontestable clause and not raising by company of question of coverage afforded by contract under application of age adjustment clause.

See publication Words and Phrases, for other judicial constructions and definitions of "Contest".

6. Insurance ⇨400.5

An incontestable clause in life insurance policy does not invalidate enforcement of an age adjustment clause or provision.

7. Insurance ⇨400.6

A provision that policy shall be incontestable after it has been in force for period of two years is not a mandate as to coverage, but only means that within limit of coverage policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

8. Insurance ⇨400.5

Under life policy containing incontestable clause except for non-payment of premium and except as to provisions and conditions relating to disability and double indemnity benefits, insurer was not barred from adjusting face value of policy and semi-annual premium due thereunder in accordance with provision that if age of insured had been misstated, amount payable under policy should be such as premium paid would have purchased at correct age.

Meserve, Mumper & Hughes, Los Angeles, for appellant.

Newlin, Holley, Sandmeyer & Tackabury, Los Angeles, Keesling & Keesling, San Francisco, Henry H. Childress (George W. Tackabury and Hudson B. Cox, all of Los Angeles, of counsel), amicus curiae for appellant.

Leo M. Zinner and Walley & Davis, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment entered in favor of defendant and cross-complainant, hereafter referred to as defendant, and against plaintiff and cross-defendant, hereafter referred to as plaintiff, in an action for the reformation of an insurance contract after trial before the court without a jury, plaintiff appeals.

Plaintiff issued a life insurance policy on the life of defendant which contained among others these provisions:

(a) That plaintiff company shall, upon receipt of due proof of the death of defendant, pay to the beneficiary therein named the sum of \$5,000.00;

(b) That upon receipt by plaintiff company of due proof that defendant had become totally and permanently disabled, which disability began before the anniversary of the policy on which defendant's age at nearest birthday was sixty, and prior to default in payment of premium and prior to the maturity of said policy, plaintiff company would pay defendant monthly income benefits in the sum of \$10.00 per \$1,000.00 of the face of the policy (In this case, the

sum of \$50.00 per month) for the fourth and succeeding completed month of such total disability and during its continuance, upon the happening of which event, plaintiff company would also waive the payment of each premium falling due after the commencement of such total disability.

(c) "Age. If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

(d) "The Contract. The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. * * *

(e) "Incontestability. This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to the provisions and conditions relating to Disability and Double Indemnity Benefits."

The policy further provided that before the insured should be entitled to any disability benefits as provided therein such total and permanent disability must have begun before the anniversary of the policy on which the insured's age at nearest birthday was 60 and prior to the maturity of the contract.

Defendant set forth in his application for the policy that he was born on April 27, 1886. In this action plaintiff alleged that defendant was in fact born on April 27, 1884, and asked that the policy be reformed by changing the face value of the policy from \$5,000 to \$4,632, and reducing the semiannual premium due under the policy to \$105.45.

Question: Does the incontestable clause of the policy bar the right of plaintiff to adjust the amount payable under the contract in accordance with the provisions of the age adjustment clause thereof?

This question must be answered in the negative. In the present case plaintiff, the insurer, is seeking to enforce the terms of the contract as entered into by the parties which provides that if the age of the insured has been misstated the amount payable under the policy shall be such as the

premium paid would have purchased at the correct age.

[1,2] When an insurance policy by its terms is made incontestable after a designated period, the intent of the parties is to fix a limited time within which the company must discover and assert any reasons or grounds it might have to urge as justifying a rescission of the contract on account of any misrepresentations in the application. The insurer must make its contest within the specified period either by the institution of a suit to cancel the policy or by setting up misrepresentation or fraud in the procurement of the policy in an action brought by the insured or the beneficiary.

[3-5] The insured's understatement of his age was not, under the terms of the contract, grounds for its rescission by the company for the reason that the contract expressly obligated the company to pay the amount of insurance which the premium paid would have purchased at the insured's correct age. A policy provision which measures the amount of recovery at the time of application does not avoid the obligation of the policy. It gives the insured what his money bought at his correct age. The denial of liability under a policy by reason of fraud or misrepresentation in the obtaining thereof is the "contest" which is precluded by the incontestable clause and not the raising by the company of the question of coverage afforded by the contract under application of the age adjustment clause.

[6] This is the first time so far as our research discloses that this precise problem has been presented to the appellate courts of California. It has arisen however in a number of other states and it has been held almost unanimously by the appellate courts of our sister states that an incontestable clause in a life insurance policy does not invalidate the enforcement of an age adjustment clause or provision.

[7] In Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642, Chief Judge Cardozo in referring to an analogous situation thus states the rule:

"The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. Like questions have arisen in other jurisdictions and in other courts of this state. There has been general concurrence with reference to the answer."

In *Murphy v. Travelers' Ins. Co.*, 134 Misc. 238, 234 N.Y.S. 278, 279 et seq., in passing upon a situation identical with that before this court, it was said:

"The question of law which is presented by the facts is simply this: Is the defendant, in resisting payment of the full amount of insurance, contesting the policy in violation of the terms of the incontestability clause? The plaintiff asserts that, if her husband had died within one year from the date of the policy, the liability of the defendant would be limited on the contract to the amount which has been paid to her. But, since death did not occur until after the prescribed period, the incontestability clause has nullified the provision with respect to misstatement of age, and the liability of the defendant for the face amount of the contract is absolute. The defendant contends that it does not now nor has it ever questioned the validity of the contract of insurance, but in defending this action it is simply insisting that the contract be performed as the parties intended at the time of its creation.

"It is argued by counsel that the incontestability clause and the condition as to misstatement of age are in no wise related to each other and in no respect dependent. The question of the survival of one over the other is not involved. It seems to me that little comfort is to be found by either party in the authorities which have been cited. I will not say that the problem is one of first instance, but I do not feel myself concluded by any decisions to which I have been referred, or which I have dis-

covered. When the insured, Edward A. Murphy, applied for life insurance, no matter what age he may have stated in his application, he knew that he was entitled to no more than the amount which he could purchase for the stipulated premium at his true age. This was clearly what the defendant intended when it issued its policy. Can it be logically said that the defendant intended that this intent expressed in the contract should prevail for only one year? I do not think so. A contrary conclusion would of necessity involve an intentional injustice on the part of the defendant to every policyholder paying premiums predicated upon true age. This, it seems to me, was never contemplated.

"The claim that defendant is contesting a contract contrary to its provisions is not well founded. The case might better be stated in this fashion: The plaintiff is attempting to enforce a contract which was never made, is seeking to obtain something which was never paid for, is striving to employ that which was designed for her protection as an instrument of injustice to the defendant and all its policyholders." (See also *Unterberg v. New York Life Ins. Co.*, Sup., 172 N.Y.S. 241, 242; *Grenis v. Prudential Ins. Co. of America*, 154 Misc. 867, 278 N.Y.S. 137, 138; *Stean v. Occidental Life Ins. Co.*, 24 N.M. 346, 171 P. 786, 787; *Messina v. New York Life Ins. Co.*, 173 Miss. 378, 161 So. 462, 463; *Sipp v. Philadelphia Life Ins. Co.*, 293 Pa. 292, 142 A. 221, 222 et seq.; *Langan v. United States Life Ins. Co.*, 344 Mo. 989, 130 S.W.2d 479, 481, 123 A.L.R. 1409; *Equitable Life Assur. Soc. of the United States v. First Nat. Bank of Birmingham*, 5 Cir., 113 F.2d 272, 274, 135 A.L.R. 439; *Metropolitan Life Ins. Co. v. Shalloway*, 5 Cir., 151 F.2d 548, 550, et seq. Cf. 123 American Law Reports (1939) page 1416.)

[8] We are of the opinion that the decisions in the foregoing cases correctly declare the law applicable to defendant's contention, and that the holding that the incontestable clause in a policy of insurance is not inconsistent with and does not vitiate an age adjustment clause contained in the

same policy is correct. Therefore the trial court, in holding to the contrary, was in error.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.



101 Cal.App.2d 512

E. A. STROUT WESTERN REALTY AGENCY, Inc. v. GREGOIRE et ux.

Civ. 7819.

District Court of Appeal, Third District, California.

Dec. 28, 1950.

Hearing Denied Feb. 19, 1951.

E. A. Strout Western Realty Agency, Inc., a corporation, sued Robert Gregoire and another upon a brokerage contract in respect of the sale of real property owned by the defendants. The Superior Court, Colusa County, Ben. R. Ragain, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeals, Van Dyke, J., held that the contract created an exclusive agency but did not grant an exclusive right to sell, and that the evidence sustained the trial court's finding that the sale had been made by defendants without having been presented with any offer from plaintiff's customer to buy the property for any sum, and without their having in effect known of a claim by plaintiff that his customer qualified as a purchaser.

Affirmed.

1. Brokers ⇨11, 46

Where broker is constituted agent for sale of property, principal can still sell through his own effort to his own customer without breach of agreement or liability for agreed commission, since right on part of owner is implied condition of agency, subject to which agent accepts, and his commission is payable only in case of his success in finding purchaser.

2. Brokers ⇨11

Where brokerage contract grants exclusive right to sell subject property, sale

within prescribed life of grant by owner is such breach of contract as to permit broker, without himself having been procuring cause of sale or having produced purchaser, to hold principal responsible as for breach of agreement, damages being presumptively measured by commission to be paid in event of sale by broker.

3. Brokers ⇨7

Where brokerage contract was prepared by broker, its terms would be taken most strongly against broker in determining whether, giving language used its fair meaning, agreement created exclusive agency or exclusive right to sell.

4. Brokers ⇨7

Right of owner to sell through his own efforts will not be considered to have been contracted from him and vested in broker unless such construction is made necessary either by express language to that effect or by necessary implication from terms used, since owner of property, among rights arising from ownership, has right to dispose of same, the *jus disponendi*.

5. Brokers ⇨7

Where it was expressly agreed in brokerage contract that there was given to broker, not, in terms, exclusive right to sell property but expressly "the sole and exclusive right to procure a purchaser" therefor contract created an exclusive agency, but did not grant exclusive right to sell.

6. Brokers ⇨11

In action by broker against vendors for breach of contract creating exclusive agency for sale of property, evidence sustained trial court's finding that property had been sold by vendors without having been presented with any offer, oral or written, of broker's customer to buy for any sum and without their having, in effect, known of claim by broker that its customer qualified as a purchaser ready, willing and able to buy either at listed price or at any price.

Neil J. Cooney, Colusa, for appellant.

Virgil O'Sullivan, Colusa, for respondents.

VAN DYKE, Justice.

Appellant herein, a corporation, as plaintiff, brought action against respondents, Robert Gregoire and Veronica Gregoire, his wife, basing its action upon a contract in writing executed by respondents, giving it brokerage rights in respect of the sale of real property owned by the respondents. The parts of the contract pertinent to the issues presented here are as follows: The respondents employed appellant "to procure a purchaser ready, willing and able to buy" the property and authorized appellant to make in respondents' name a binding contract for the sale thereof. If a customer was so procured respondents agreed to pay appellant a commission of \$150 plus 5% of the selling price. The price was stated to be \$60,000. The contract declared that the listing of the property and the continued endeavor of the appellant to sell the same should constitute sufficient consideration for the agreement. By an amendment to the contract, appended thereto, but executed on the same day, it was agreed that the contract should be amended "in that it give to the E. A. Strout Western Realty Agency, Inc., the sole and exclusive right to procure a purchaser" for the property for a period of twelve months. It was alleged in the complaint that upon the execution of the contract appellant commenced extensive advertising in an effort to sell the property and thereon expended large sums of money advertising the property in metropolitan newspapers. It was further alleged that appellant through its efforts secured several prospective purchasers for the property and that on December 6, 1948, approximately three and a half months from the time the agreement was signed, appellant exhibited the property to a customer procured by it, and brought the customer to respondents; that the customer then orally offered to buy the property for \$45,000, whereupon respondents asked for time to consider the offer; that on the day following respondents orally notified appellant of their acceptance of that offer; that thereupon appellant communicated the acceptance to the customer by telephone and on December 9th received a telegram from him, con-

firmed by letter of the same date, instructing appellant to proceed with the sale; that the customer in the letter enclosed a deposit check for \$500; that on December 10th respondents orally notified appellant they would not consummate the sale and further notified it that they had sold the property to one Babu Singh; that respondents refused to pay any commission whatever and that appellant thereby sustained damages in the sum of \$2,400.

Respondents answered and upon the issues thereby raised the cause went to trial before the court without a jury. The court made findings of fact as follows: It found the corporate capacity of appellant and that it was duly licensed as a real estate broker in this state; it found the contract to have been executed as alleged; concerning the allegations as to the customer found by appellant the court found that appellant did not bring the customer and respondents together at any time and that the customer did not offer to buy the property for \$45,000 or for any sum; that respondents did not ask for time to consider any offer and did not notify appellant of any acceptance. It further found appellant did not communicate any acceptance to the customer nor did the customer instruct appellant to proceed with the sale nor did he enclose a deposit on the purchase price of the land. Further findings were to the effect that respondents did not orally or in writing or in any manner notify appellant they would consummate a sale with its customer; that respondents sold the property to Babu Singh and refused to pay a commission, but that appellant did not sustain any damage thereby. Judgment was decreed in favor of respondents and from that judgment appellant takes this appeal.

[1-5] Appellant first contends that by virtue of the contract made, respondents, by selling the property during the term of the agency, became liable to pay damages, measured prima facie by the amount of the commission that was provided for by the contract, and this without regard to whether or not appellant in the meantime had produced a purchaser ready, willing and able to buy upon the terms offered by

respondents. Appellant says that the contract entered into was a contract giving to it the exclusive right for the agreed period to sell the property as distinguished from the creation of an exclusive agency. The claimed distinction between a brokerage contract creating an exclusive agency for a definite period and one which, for such definite period, grants to the broker an exclusive right to sell such property has been the subject of conflicting decisions throughout the country. Some courts recognize no such distinction and declare that in either case the owner by implication reserves the right to make a sale during the agreed term of the agency without becoming obligated for a commission under the contract or being guilty of a breach thereof. The reasoning of these courts is well illustrated by the case of *Sunnyside Land & Investment Co. v. Bernier*, 119 Wash. 386, 205 P. 1041, 1043, 20 A.L.R. 1261, where the court held that a contract which gave the broker "the exclusive right" for a stated time to sell certain property owned by defendants did not entitle the broker to a commission where the owners themselves sold the property within the life of the contract to a purchaser of their own procuring. The court refused to adopt the broker's view that the phrase "exclusive agency" has not the same meaning as the phrase "exclusive right to sell". The court said: "But we cannot think there is any essential difference in the contract, no matter which of the phraseologies is used. Primarily the contract is in each instance one agreeing to pay a commission in case the broker procures a purchaser for the listed property, able, ready, and willing to take it on the terms the owner offers it for sale, and if the grant of an exclusive agency for that purpose means, as the rule adopted by us presupposes, that the owner will not list the property with another agent during the life of the agency, the grant of an exclusive right can mean no more."

But our appellate courts have long recognized the distinction and declare that under an exclusive agency the principal might still sell through his own efforts to his own customer without breach of the agreement

or liability for the agreed commission. In *Golden Gate Packing Company v. Farmers' Union*, 55 Cal. 606, the court said: "We are unable to discover anything in the agreement which forbade the selling of its goods by the plaintiff to whomever would purchase them in any part of the world. It could not, under that agreement, establish any other agency than that of defendant for the sale of its goods east of the State of California. And there is no evidence tending in any degree to prove that it did. It is not stipulated that the defendant should have the *exclusive sale* of the plaintiff's goods within the territory mentioned, and there is nothing in the agreement from which we can infer that such was the intention of the parties." (Italics added.)

Snook v. Page, 29 Cal.App. 246, 247, 155 P. 107, was a case recognizing the distinction. The court said:

"The first question of importance, then, is whether the plaintiffs were constituted the *exclusive agents*, or were they given the *exclusive right* to sell said property?"

"If the former only, the rule is well settled that: 'The owner has the right to sell the same by his own unaided efforts without becoming liable to the broker for commission, that the only effect of such contract is to prevent the owner from placing the property in the hands of another agent, and that the owner does not thereby relinquish his right to sell the property himself independently of the broker.' *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606; *Waterman v. Boltinghouse*, 82 Cal. 659, 23 P. 195; *Dreyfus v. Richardson*, 20 Cal.App. 800, 130 P. 161.

"The right on the part of the owner is an implied condition of the agency, subject to which the agent accepts it, and, as his commission is payable only in case of his success in finding a purchaser, the agent takes his chances of the owner himself making a sale. *Dole v. Sherwood*, 41 Minn. 535, 43 N.W. 569, 5 L.R.A. 720, 16 Am.St.Rep. 731.

The court, 29 Cal.App. at page 248, 155 P. at page 107, then construed the brokerage contract before it:

"The contract herein certainly does not expressly confer upon plaintiffs the exclusive right to sell the property, nor does it in apt terms, if at all, provide for a commission in case the owner himself should dispose of it.

"In considering the matter we are to keep in mind that the burden is upon plaintiffs to establish their claim, and that, since the contract was prepared by them, any uncertainty or ambiguity in the terms of the instrument must be resolved in favor of the owner.

"With this in view, then, taking the contract 'by the four corners,' we reach the conclusion that plaintiffs were made the exclusive agents, but they were not clothed with the exclusive right to sell the property. * * * If it had been the intention to deprive the owner of the right to sell, or in case of such sale to create a liability for commissions, it could, and, no doubt, would, have been easily and clearly expressed."

In *Walter v. Libby*, 72 Cal.App.2d 138, 141-142, 164 P.2d 21, 23, this court also recognized the distinction under discussion and applied it. The court said: "Where, as here, the agent or broker is given an exclusive right to sell, as distinguished merely from a sole or exclusive agency (such as that which engaged the attention of the court in *Dreyfus v. Richardson*, 20 Cal.App. 800, 130 P. 161, strongly relied upon by appellant), he is entitled to be compensated when a sale is made by the principal, and it is immaterial that he was not the procuring cause thereof. *Fleming v. Dolfin*, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585; *Gregory v. Bonney*, 135 Cal. 589, 67 P. 1038; *Kimmell v. Skelly*, 130 Cal. 555, 62 P. 1067; *Justy v. Erro*, 16 Cal. App. 519, 117 P. 575; 9 C.J., p. 622, § 101, 12 C.J.S., *Brokers*, § 94, pp. 219-221."

In *Fleming v. Dolfin*, 214 Cal. 269, 271, 4 P.2d 776, 777, 78 A.L.R. 585, where the broker had been given an exclusive right to contract for the sale of the subject property and the sale had been made by the owner without the intervention of another broker the court said: "It is further contended that, irrespective of any fault of

defendant, plaintiffs cannot recover in the absence of a showing that they had a purchaser ready, able, and willing to buy. This assumes, of course, that the action was brought to recover an earned commission. Such was not the nature of this action, which seeks damages for breach of an exclusive agency contract. Plaintiffs were entitled to the exclusive right to contract for the sale of the property during the period specified, and the sale by Pair before the conclusion of that period destroyed that right and made performance by them impossible. Upon this breach by defendant, plaintiffs were entitled to sue for the benefits they might have received under it; namely, the agreed commission."

Enough has been said to show that our courts have long recognized the distinction referred to and have held that where the brokerage contract does grant an exclusive right to sell the subject property then the sale within the prescribed life of the grant by the owner is such a breach of the contract as to permit the broker, without himself having been the procuring cause of the sale or having produced a purchaser, to hold the principal responsible as for a breach of the agreement, the damages being presumptively measured by the commission stipulated to be paid in the event of sale by the broker.

Since the written agreement here does not in express terms create either an exclusive agency or an exclusive right to sell, it becomes necessary to construe the same, giving to the language used its fair meaning; and since the instrument and the written amendment thereto were concededly drafted by the appellant we must in construing it apply to it the rule stated in *Snook v. Page*, supra, that its terms are to be taken most strongly against appellant. The first part of the instrument declares that appellant is employed to procure a purchaser ready, willing and able to buy the property at the stated price and terms. This is a statement in apt terms of the creation of the usual non-exclusive contract between an owner and a broker. To the same purport is the covenant that if a customer is so procured a commission

will be paid. But by the amendment the parties were evidently endeavoring to state more exactly the scope of the agency, and they expressly agree that there was given to the appellant, not, in terms, the exclusive right to sell the property but expressly "the sole and exclusive right to procure a purchaser" therefor. Now, it has often been declared, wherever there has come before the courts a claim that a brokerage contract creates an exclusive right to sell, as distinguished from an exclusive agency, that the right of the owner to sell through his own efforts will not be considered to have been contracted from him and vested in the broker unless such a construction is made necessary either by express language to that effect or by necessary implication from the terms used. This has been stated to follow from the fact that the owner of property, among the rights arising from ownership, has the right to dispose of the same, the *jus disponendi*. *Roberts v. Harrington*, 168 Wis. 217, 169 N.W. 603, 10 A.L.R. 810, 812.

We think that the application of the rules of construction pertinent here impels a holding that the terms of this contract giving appellant the sole and exclusive right to procure a purchaser created an exclusive agency and did not grant an exclusive right to sell. A case of a contract worded almost exactly as this contract is worded is reported in *Ingold v. Symonds*, 125 Iowa 82, 99 N.W. 713. In that case the agent was by the contract "exclusively authorized to procure a purchaser". The court said, 99 N.W. at page 714: "It will be observed that plaintiff was not given the exclusive sale of the property, but did have exclusive authority to find a purchaser. Does such a contract prevent a sale by the owner himself, or, in other words, will a sale by the owner constitute a breach of the contract of agency? The right of an owner to sell his own property is an implied condition of every contract of agency, and, unless expressly negatived, will prevail. The commission is payable only in case of the agent's finding a purchaser, and the agent takes his chances on the owner himself making a sale. The only effect of

such a contract as the one now before us is to forbid the owner from placing the property in the hands of any other agent. Under such a contract as this the owner has the right to sell the property himself without in any way violating his obligation to his agent. This view is sustained by the unbroken voice of authority. *Dole v. Sherwood*, 41 Minn. 535, 43 N.W. 569, 5 L.R.A. 720, 16 Am.St.Rep. 731; *Golden Gate Packing Co. v. Farmers' Union Co.*, 55 Cal. 606."

We conclude that under this contract the respondents were free to sell the property, provided, as was the case here, they sold to a person not procured as a purchaser by appellant.

[6] Appellant further contends that even construing the contract as an exclusive agency only, still it was entitled to recover on the ground that it had, before the sale by the owners, produced a purchaser who was ready, willing and able to buy on terms acceptable to them, and that the act of the owners in selling to Babu Singh prevented the appellant from making a sale. However, the findings of the trial court as hereinbefore set out constitute a complete answer to this contention. These findings are based on substantial evidence, although it is true that the evidence upon the subject matter was conflicting. The listed price for the property was \$60,000. Appellant's customer was considering, according to appellant's evidence, offering \$45,000 therefor. The property was actually sold to Babu Singh for \$43,000 cash. The court found that this sale was made by respondents without having been presented with any offer, oral or written, from appellant's customer to buy the property for any sum and without their having in effect known of this claim by appellant that its customer qualified as a purchaser ready, willing and able to buy either at the listed price or at any price. Under those circumstances the sale by respondents effectually and of right terminated the agency and appellant failed to make the necessary proof that prior to that revocation it had procured a purchaser ready, willing and

able to buy upon either the listed terms or any terms satisfactory to the respondents, and had made this known to the respondents.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 208

ELBERT, LTD. v. HALL et al.

Civ. 17583.

District Court of Appeal, Second District,
Division 3, California.

Dec. 19, 1950.

Hearing Denied Feb. 15, 1951.

Elbert, Ltd., a corporation brought action against Albert Edward Hall, Stella L. Ehrhardt, and others to quiet title to realty claimed by plaintiff under a tax deed from the state. The Superior Court of Los Angeles County, Ray P. Brockmann, J., rendered judgment and orders for plaintiff, and Stella L. Ehrhardt appealed, and applied for right to produce additional evidence on appeal. The District Court of Appeal, Wood, J., held that evidence was sufficient to support judgment for plaintiff.

Judgment and order refusing to vacate judgment affirmed, appeal from order denying motion for new trial dismissed, and application to produce additional evidence denied.

1. Taxation ☞809(4)

In action by holder of tax deed to quiet title to realty, court did not abuse its discretion in denying motion of defendant to amend answer to include answer in prior action against defendant to foreclose street bond liens on realty.

2. Evidence ☞208(2)

In action by holder of tax deed to quiet title to realty, parts of defendant's answer in a prior action against her to foreclose street bond liens on realty, were not competent evidence.

3. Trial ☞2

Court in action by holder of tax deed to quiet title to realty properly denied motion of defendant to consolidate for trial action with her pending quiet title action, against the state involving same realty.

4. Evidence ☞165(1)

In action by holder of tax deed to quiet title to realty, letter which had been written by defendant, and which referred to alleged agreement that defendant would be permitted to redeem, was not proof of such an agreement.

5. Taxation ☞810(3)

In suit to quiet title to realty, certified photostatic copy of deed executed by tax collector as grantor, wherein it was stated that realty was conveyed to state for nonpayment of taxes for certain year, and deed executed by state as grantor, wherein it was stated that realty was sold and conveyed to state for nonpayment of taxes, and that state through tax collector sold realty at public auction to plaintiff, and that realty was granted to plaintiff, established a prima facie case for plaintiff. Revenue and Taxation Code, § 3711.

6. Taxation ☞793

A deed to the state is an essential element in proof of title to realty purchased from the state at tax sale in suit to quiet title. Revenue and Taxation Code, § 3711.

7. Taxation ☞810(3)

In action to quiet title to realty by plaintiff relying on tax deed from the state, evidence was sufficient to support judgment for plaintiff. Revenue and Taxation Code, § 3711.

8. New trial ☞86, 88

Denial of motion for new trial supported by affidavit alleging that attorney for movants had been unable to appear, that certain witness was unable to appear because of sickness, and that chief clerk of tax sales department, after subpoena duces tecum had been delivered to him, refused to appear in court without payment to him of witness fee, and that movant did not know that chief clerk could legally demand such a fee so was not prepared to comply with his demand, was not error.

9. Judgment ☞343

Denial of motion of defendant to vacate judgment and enter a different judgment, on ground that when trial court continued case, court had stated that if defendant could find any evidence to substantiate certain statement case would be dismissed, and that she had found such evidence but that court rendered judgment against her, was not error.

10. Appeal and error ☞891

Where there was no sufficient showing by defendant why tax list was not produced for consideration of trial court in action to quiet title by holder of tax deed, and it did not appear that defendant exercised diligence in effort to produce list in trial court, and defendants had not made sufficient offer to redeem property, application to District Court of Appeal for permission to produce on appeal additional evidence consisting of list, would be denied.

11. Appeal and error ☞891

Where purpose to be served by copy of summons and complaint in a prior action was not clear, application to District Court of Appeal for permission to produce on appeal the summons and complaint would be denied.

Stella L. Ehrhardt, in pro. per.

Robt. E. Rosskopf, John F. Bender and Gizella M. Loshoney, all of Los Angeles, for respondents.

WOOD, Justice.

In this action to quiet title to real property, defendant Mrs. Ehrhardt appeals from the judgment in favor of plaintiff.

In the complaint it was alleged that plaintiff is the owner and entitled to possession of Lot 18, Tract 1971, in Los Angeles County, California; that defendant Stella Ehrhardt claims some right, title or interest in said property; that said defendant has no right, title or interest therein. In her answer, the defendant denied the allegations of the complaint hereinabove set forth; and she alleged as a separate defense that she is the sole owner of said property and is entitled to the possession thereof. The

answer was filed October 23, 1946. This appeal is presented upon a settled statement.

When the case was called for trial on July 1, 1949, defendant, appearing in propria persona, made a motion for a continuance upon the ground that she was not prepared for trial. The motion was denied and the trial commenced on that date. The plaintiff offered in evidence a certified photostatic copy of a deed executed by the tax collector as grantor, dated September 18, 1933, wherein it was stated that said property was conveyed to the state for the non-payment of taxes for the year 1927. The plaintiff also offered in evidence a deed executed by the state as grantor, dated March 21, 1946, wherein it was stated that said property was sold and conveyed to the state for non-payment of taxes, and that the state, acting through the tax collector, sold said property at public auction to plaintiff for \$355, and that said property was granted to the plaintiff. Defendant objected to said offer upon the ground "that proper foundation had not been laid showing jurisdictional prerequisites leading up to the sales, both to and from the State, had been complied with; stating that this defendant as last assessee had not been given notice of either sale and that she had no knowledge of said sales." The objection was overruled, the two deeds were received in evidence, and the plaintiff rested.

[1, 2] Defendant did not testify, but she offered in evidence her answer in an action in the superior court (No. 276252), filed in 1929, entitled Los Angeles Bond and Securities Company v. Stella Ehrhardt (which was an action to foreclose two street bond liens upon said property). According to the settled statement that answer was offered to prove that the property "was illegally taxed in 1927; to prove that Barnes City lacked taxing authority in 1927." The settled statement does not show the ruling of the court regarding that offer, but it will be assumed that the offer was rejected. In any event the assertions of defendant in said answer, being merely allegations which defendant presumably intended to prove, did not constitute proof and said answer was not competent evidence. Defendant then made a motion to amend her answer in the

present case to include the said other answer which was in the 1929 case. The motion was denied. Whether or not the proposed amendment should have been allowed was a matter within the discretion of the trial court. The court did not err in denying the motion. Defendant asserts that her "rejected Exhibit 4" was unimpeachable evidence proving that Barnes City lacked taxing authority and "the taxes" were excessive. (The document so referred to as "Exhibit 4" was a purported copy of parts of said answer in the 1929 case, which copy was offered at the hearing of defendant's motion for a new trial on August 30, 1949, when it was marked as Exhibit 4 for identification.) It was not competent evidence.

[3] Defendant then made a motion that the present case be consolidated for trial with a pending quiet title action involving the same property, which case is entitled *Stella Ehrhardt v. State of California*, No. 476761 (filed in 1942). The motion was denied. As above indicated that prior case was filed about seven years before the trial of the present case was commenced. She asserts that the prior case so referred to is evidenced by her "Exhibit 5." (That exhibit is a purported copy of the complaint in said prior action and it was offered at the hearing of her motion for a new trial on August 30, 1949, when it was marked Exhibit 5 for identification.) It does not appear that the court erred in denying the motion to consolidate the cases.

[4] According to the settled statement defendant then "insisted that long prior to the sale from the State to the plaintiff herein a definite agreement had been made for the redemption of said property in the County Counsel's office and had been reaffirmed in the Delinquent Tax and the Sales Tax Departments." It appears from this portion of the settled statement that defendant merely "insisted" or argued that an agreement for redemption had been made. In this connection defendant refers to her Exhibit 6 for identification, which is a letter written by her on June 15, 1949, to the county counsel, wherein she stated that she had attempted unsuccessfully on various occasions to redeem the property;

that a deputy county counsel and the chief clerk of the tax sales department had assured her that the filing of the case of *Ehrhardt v. State of California* (wherein she sought a determination of the amount necessary to redeem the property) removed said property from any possible sale for delinquent taxes. (That letter was offered at the hearing of her motion for a new trial on August 30, 1949, when it was marked Exhibit 6 for identification.) Of course, an argument before the court, or a statement in a letter from defendant, regarding such an agreement is not proof that there was an agreement for redemption.

After said above-mentioned proceeding, the trial was continued to July 12, 1949, at the request of defendant to enable her to secure and present evidence. On said July 12th the trial was continued to July 19, 1949, at the request of defendant to enable her to employ counsel and present evidence. On said July 19th she had not employed counsel and did not present evidence. Her request for a further continuance was denied, and judgment was rendered for plaintiff.

[5-7] The deeds introduced in evidence by the plaintiff established a prima facie case for plaintiff. Section 3711 of the Revenue and Taxation Code provides: "Except as against actual fraud, the deed [referring to a deed from the state] duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." In the present case, as above shown, there was such a deed from the state to plaintiff. Therefore, the regularity of the proceedings from the assessment herein to the execution of the deed by the state was proved prima facie. Said section 3711, however, "refers only to the regularity of the taxing procedure and does not purport to declare that the deed received by a purchaser from the State is evidence that the property had previously been deeded to the State." *Roma v. Elbert, Ltd.*, 73 Cal.App.2d 338, 340, 166 P.2d 294, 295. A deed to the state is an essential element in proof of title to property purchased from the state at a tax sale. *Jones v. Luckel*, 174 Cal. 532, 536, 163

P. 906. In the present case, as above shown, there was in fact a deed to the state. Also, as above shown, defendant did not testify and she offered no competent evidence at the trial. The evidence was sufficient to support the judgment for plaintiff.

[8] Defendant made a motion for a new trial. In her affidavit, filed in support of her motion, she stated that an attorney upon whom she had relied for her defense had become inactive as an attorney by reason of ill health; she believed another attorney would appear for her, but she was advised on the day before the trial that he could not appear; after the continuance to July 12th was ordered she made three unsuccessful trips to Culver City to locate proper evidence and parties; after the continuance to July 19th was ordered she went to Laguna Beach to find a missing "deputy," but she found a sick man and she could not compel him to appear at the trial; on July 19th she was physically unable to proceed with the trial on that day; she was further prevented from having a fair trial because the chief clerk of the tax sales department, after a subpoena duces tecum had been delivered to him, refused to appear in court on the ground that his demand for a witness fee of \$2.00 had not been complied with; and since she did not know that public officers could legally demand such a fee she was not prepared to comply with his demand. In an affidavit of another person, filed in support of the motion, the affiant stated that she served the subpoena duces tecum on the chief clerk of the tax sales division of the county tax collector's office on July 1, 1949; defendant was present and attempted to explain more fully the documents which were called for in the subpoena; defendant asked the said clerk if he remembered that she showed him a complaint and summons in a tax redemption action, and that he had made a note regarding the action and stated that the property would not be listed for tax sale; the clerk replied, "Yes, it was about like that"; the clerk said he would not appear until his witness fee of \$2.00 had been paid. At the hearing of the motion on August 30, 1949, defendant offered ten documents for the

consideration of the court which documents were marked Exhibits 1 to 10, inclusive, for identification only. Those documents consisted of: 2 newspaper clippings; grant deed, dated September 17, 1925, to defendant as grantee; map of part of said tract; purported excerpts from answer in 1929 case; copy of complaint in Ehrhardt v. State; letter from defendant to county counsel; estimates of amounts required to redeem; copy of request to include lot 18 in auction; a newspaper; list of various parcels of property. The court did not err in denying a motion for a new trial.

[9] On September 28, 1949, defendant made a motion to vacate the judgment and enter a different judgment. The motion was denied on said date. She asserts that the motion was made to remind the court that the case should have been dismissed for the reason, among others, when the judge continued the case he said that if defendant could find any evidence to substantiate her statement the case would be dismissed; and that she had found such evidence but the court rendered judgment against her. The court did not err in denying the motion.

[10, 11] Defendant made an application to this court for permission to produce additional evidence on appeal. The application and the appeal were submitted at the same time. Defendant presented to this court, as part of the proposed evidence, the following: (1) photostatic copies of two parts of a newspaper, The Los Angeles Daily Journal, dated August 15, 1933, pertaining to a delinquent tax list; (2) photostatic copy of affidavit of the tax collector stating the dates of the publication of the delinquent tax list in 1933; (3) certified photostatic copy of a part of a delinquent tax list for 1927 filed in the office of the county recorder on September 27, 1928; and (4) copy of summons and complaint in the 1929 action to foreclose the street bond liens. The purpose to be served by the two copies of parts of the newspaper is not clear. As to said certified photostatic copy, it appears that the name "Ehrhardt Stella L." (not Ehrhardt) appears in that part of the delinquent tax list for 1927. Appellant

asserts that it was not until after her reply brief on appeal was partially prepared that she learned of the existence of the proposed additional evidence. The recorded delinquent tax list was available, of course, at the time of trial. There is no sufficient showing why said list was not produced for the consideration of the trial court. After plaintiff had rested its case on July 1st the appellant was granted two continuances to enable her to secure and present evidence. It does not appear that appellant exercised diligence in an effort to produce said list in the trial court. Also appellant has not made a sufficient offer to redeem the property. The purpose to be served by the copy of the said summons and complaint is not clear. The application to produce additional evidence should be denied.

The judgment, and the order refusing to vacate the judgment, are affirmed. The appeal from the order denying defendant's motion for a new trial is dismissed. The application to produce additional evidence on appeal is denied.

SHINN, P. J., and VALLÉE, J., concur.



101 Cal.App.2d 418

CROFTS & ANDERSON v.

JOHNSON et al.

Civ. 14407.

District Court of Appeal, First District,
Division 1, California.

Dec. 27, 1950.

Crofts & Anderson, a corporation, sued O. E. Johnson, and others, setting forth a cause of action on a book account for goods, wares and merchandise, and another cause of action on an account stated. The Superior Court in and for the County of Alameda, Donald K. Quayle, J., entered an order granting a change of place of trial from Alameda County to Humboldt County, and plaintiff appealed. The District Court of Appeal, Bray, J., held that the evidence sup-

ported the trial court's implied finding that the account was not stated in Alameda County.

Affirmed.

1. Venue ⇐21

General rule is that defendant is entitled to have action tried in county of his residence, and right of plaintiff to have action tried elsewhere is exceptional right, and must find its justification in terms of some statute, and it is duty of plaintiff to bring himself within some exception if he can. Code Civ.Proc. § 395.

2. Venue ⇐16½

If defendant is entitled to change of venue upon one contractual cause of action in complaint, he may not be deprived of that right because plaintiff included other causes of action upon which defendant would not be entitled to change.

3. Venue ⇐16½

Where complaint stated two causes of action, one upon book account and the other upon account stated, and it appeared that under account stated cause defendant would be entitled to change of venue, even assuming that under book account cause of action defendant was not entitled to change of venue, inclusion of that cause would not deprive defendant of his right to change of venue. Code Civ.Proc. § 395.

4. Venue ⇐66

When complaint is used as affidavit, allegation that contract upon which action is based was made in county where action was brought is conclusion and is no stronger than facts averred to support it. Code Civ. Proc. § 395.

5. Appeal and error ⇐1011(1)

Where there was conflict of evidence, appellate court would not be permitted to disturb action of trial court, since all conflicts must be resolved in favor of prevailing party and all reasonable inferences to be drawn must be drawn in support of trial court's order. Code Civ.Proc. § 395.

6. Account stated ⇐5

To constitute account stated there must be something more than showing that statement setting forth account has been sent to debtor, and in addition to that show-

ing there must be admission of correctness of account by debtor, either directly or by acquiescence. Code Civ.Proc. § 395.

7. Venue ⇨70

In action upon account stated, evidence sustained trial court's implied finding that account was not stated in county where suit was brought and its order granting change of venue. Code Civ.Proc. § 395.

8. Account stated ⇨7

An account stated alters nature of original indebtedness and is itself in nature of new promise or undertaking, and action on account stated is not founded upon original items, but upon balance ascertained by mutual consent of parties, since account stated constitutes new contract which supersedes original contract. Code Civ.Proc. § 395.

9. Venue ⇨72

In passing on motion for change of place of trial of action on account stated, court could not consider original contract out of which account was stated, since account stated constituted new contract which superseded the original contract. Code Civ. Proc. § 395.

10. Account stated ⇨3

To constitute account stated there must have been pre-existing indebtedness, since such indebtedness constitutes consideration upon which new contract is based and account stated cannot create liability where none existed before. Code Civ.Proc. § 395.

Edward N. Jackson, San Francisco, Paul M. Hupf, San Francisco, of counsel, for appellant.

Gordon Johnson, Max Thelen, Jr. and Thelen, Marrin, Johnson & Bridges, all of San Francisco, for respondents.

BRAY, Justice.

Plaintiff appeals from an order granting a change of place of trial from Alameda County to Humboldt County.

Questions Presented.

(1) Is there evidence to support the court's implied finding that the account was

not stated in Alameda County; and (2) in passing on a motion for change of place of trial in an action on an account stated, may the court consider the original contract out of which the account was stated?

Facts.

There are two causes of action in the complaint filed in Alameda County: (1) a book account for goods, wares and merchandise; and (2) an account stated. Defendant Johnson, at the time of demurring, filed a notice of motion for change of place of trial on the ground of residence in Humboldt County, accompanied by his affidavit which, after averring the usual matters in an affidavit of merits, averred that he was a resident of Humboldt County and that he did not become indebted to plaintiff or contract to purchase the goods, wares and merchandise referred to in the complaint in Alameda County, nor was any indebtedness incurred or account stated there. Plaintiff filed the affidavit of one Gronwall, the vice-president of Edward F. Hale Co., plaintiff's assignor, stating that its head office was at Hayward; that one of its salesmen solicited orders from defendants subject to acceptance at the home office; that the orders were accepted there by affiant, and that the obligation to pay was actually entered into at Hayward; that statements were mailed to defendants from and payable only at Hayward.

Sufficiency of the Evidence.

[1] Section 395 of the Code of Civil Procedure provides in effect that actions arising on contract may be tried in the county in which the defendant resides, or in which the contract is made or is to be performed. "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—* * *." Goossen v. Clifton, 75 Cal.App.2d 44, 47, 170 P.2d 104, 107.

[2-5] The complaint and these two affidavits were the only evidence before the

court. The complaint alleged that defendant became indebted on the book account at Hayward. However, the rule is that if a defendant is entitled to change of venue upon one contractual cause of action in a complaint, he may not be deprived of that right because plaintiff included other causes of action upon which defendant would not be entitled to a change. *Goossen v. Clifton*, supra, 75 Cal.App.2d 44, 170 P.2d 104. Plaintiff does not challenge this rule. Assuming that under the book account cause of action, defendant is not entitled to a change of venue, it appears that under the account stated count, he is entitled to such change. The complaint alleged that the account was stated at Hayward. When the complaint is used as an affidavit such statement is a conclusion and is no stronger than the facts averred to support it. See *Baird v. Smith*, 21 Cal.App.2d 221, 68 P.2d 979; *Moon v. Moon*, 62 Cal.App.2d 185, 144 P.2d 596. See also *California Bean Growers Ass'n v. C. H. & O. B. Fuller Co., Inc.*, 78 Cal.App. 522, 248 P. 967, 968, where the court held that the statement "That said contract was made * * * in the county of Santa Barbara * * *" was but the conclusion of the affiant. There are no facts averred in the complaint on the subject. In the affidavit the only fact alleged as to the account stated is that statements were mailed to defendant from and payable only at Hayward. Defendant flatly denies this. Thus, at best, there was a conflict of evidence between the facts averred by the plaintiff in its complaint and affidavit, and those averred by the defendant in his affidavit. Therefore, we are not permitted to disturb the action of the trial court. *Carnation Co. v. El Rey Cheese Co.*, 88 Cal.App.2d 857, 200 P.2d 19; *Rench v. Harris*, 76 Cal. App.2d 113, 172 P.2d 576. Of course, "all conflicts must be resolved in favor of the prevailing party * * * and all reasonable inferences which are to be drawn must be in support of the trial court's order." *Parker Co., Inc., v. Exeter Refining Co.*, 26 Cal.App.2d 610, 79 P.2d 1114.

[6, 7] Moreover, to constitute an account stated there must be something more than a showing that a statement setting forth the account is sent the debtor. There must

be an admission of the correctness of that account by the debtor either directly or by acquiescence. So far as the evidence to date is concerned, there is no showing that defendant admitted the account in either way. So, there is no evidence before the court as to where, if at all, the account actually was stated. Therefore, the court could not determine that as to the account stated Alameda County was the county in which the contract was made or was to be performed. Code Civ.Proc. § 395.

Can the Original Contract be Considered?

[8-10] Plaintiff contends that the contract to be considered here is the original one, that is, the order for goods, wares and merchandise, given the salesman to be accepted and actually accepted at Hayward. Defendant has not denied these facts. This contention, however, overlooks the fact that "An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. * * * An action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." *Hallford v. Baird*, 27 Cal.App.2d 384, 389, 80 P.2d 1040, 1042.

Thus, as there is a new contract pleaded in the complaint, the court may not, for venue purposes, look to the old contract.

While it is true that to constitute an account stated there must have been a pre-existing indebtedness " * * * since such indebtedness constitutes the consideration upon which the new contract is based", *Block v. D. W. Nicholson Corp.*, 77 Cal. App.2d 739, 746, 176 P.2d 739, 744, the account stated is a new contract. "An account stated constitutes a new contract, which supersedes the original contract." *Jones v. Wilton*, 10 Cal.2d 493, 498, 75 P.2d 593, 595. In *Swim v. Juhl*, 72 Cal.App. 363, 237 P. 552, cited by plaintiff, it was held that an account stated could not be based upon a prior indebtedness which was void because of the statute of frauds. This was merely applying the well settled rule that an account stated cannot create a liability where none existed before. *Slaugh-*

ter v. Meroff, 93 Cal.App.2d 146, 208 P.2d 712, cited by plaintiff, is so fragmentary as to facts as to be of no value here. The question we are considering was not discussed, nor can it be determined whether or not the account was stated in the county of the defendant's residence. The fact that the court must, in an action on an account stated, inquire into the antecedent facts to determine whether there was a pre-existing liability in no way changes the fact that, if an account is stated on that pre-existing liability, the stating of such account is not the old contract but a new one.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



101 Cal.App.2d 390

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. ENGLEMAN.

Civ. 17820.

District Court of Appeal, Second District,
Division 2, California.

Dec. 22, 1950.

Action by the Bank of America National Trust and Savings Association, a national banking association, against M. W. Engleman, assignee for benefit of creditors of Belfast Bottling Company of Los Angeles, a corporation, for a declaration of plaintiff's right under assignment for benefit of creditors and to compel the defendant to pay dividends on two notes of the debtor. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the notes were valid obligations of the debtor and the bank as holder of one note and by virtue of subordination agreement was entitled to receive dividends on both obligations.

Judgment reversed with instructions.

1. Bills and notes ◊132

Where debtor's note provided that first installment would become due on or before

first day following date certain individual satisfied his obligation to a director of debtor corporation for notes and securities of debtor which individual had purchased if at such time named individual had received as payment on debtor's notes owned by him or as payment in dividends on stock owned by him, sum of \$15,000 and if such individual had not received such sum due date of debtor's note should be extended until payment of that sum had been made, debtor's obligation on its note was not conditional.

2. Contracts ◊212(1)

Where an event has been named as time for payment of money and such event can never occur, a reasonable time is by implication fixed as maturity date of promise to make payment.

3. Contracts ◊212(1), 221(3)

Whether parties to a transaction intend to make payment of money contingent must be gathered from situation of parties, their relationship, subject matter and purpose to be accomplished as disclosed by evidence and if they intend that debt shall be absolute and fix on future event as a convenient time for payment only, then debt will not be contingent, and if a future event does not happen as contemplated, law will require payment to be made within a reasonable time.

4. Corporations ◊550(5)

Where director of debtor corporation loaned money to debtor and director sold debtor's note for amount of loan to third party and thereafter debtor issued new note to third party in exchange for earlier note, new note was a valid obligation of debtor and did not constitute an attempt by directors of debtor to gain a preference over other creditors or to divert corporate assets to themselves. Corporations Code, § 824.

5. Corporations ◊550(5)

Where director of debtor corporation sold note received by him from debtor for amount of loan to third party and debtor issued new note to third party in exchange for earlier note, and new note was to be paid from dividends and third party exe-

cuted agreement subordinating his note to plaintiff bank's note, and neither directors or officers of debtor were parties to bank's action to compel assignee for benefit of creditors of debtor to pay dividends on subordinated note, there was no unlawful diversion of assets of debtor corporation. Corporations Code, § 824; Civ.Code, § 1643.

6. Corporations ☞550(9)

Liens ☞7

Bank, as holder of insolvent debtor corporation's note and by virtue of subordination agreement executed by holder of another note of debtor corporation, was entitled to receive dividends on both obligations, and an equitable lien on dividends payable on subordinated debts was given to bank by virtue of such agreement.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, Robert H. Fabian, Los Angeles (R. M. J. Armstrong, San Francisco, Robert L. Tollefsen, Los Angeles, of counsel), for appellant.

Craig, Weller & Laugharn, Frank C. Weeler, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant sued for a declaration of its rights under an assignment for the benefit of creditors and to compel respondent to pay dividends on two promissory notes of the debtor. From a judgment denying that respondent was obliged to pay such dividends comes this appeal.

Two Notes of Debtor

On September 24, 1947, Mr. A. Austin purchased certain corporate shares and promissory notes from one Burcham. The latter was at the time an officer of the Belfast Bottling Company¹ herein referred to as "debtor," the issuer of the shares and maker of the notes. By a written agreement the purchase price was fixed at \$25,940.69, of which \$4,640.69 was payable immediately, the balance on October 1, 1951; Austin was to be personally liable for \$10,000.00 but not for the remainder in the event debtor should legally exercise its right to dissolve or liqui-

date its assets prior to the due date of the balance. The notes so acquired from Burcham were valid and, pursuant to the agreement, were surrendered by Austin in exchange for new notes of the company in the same amounts. One of such new notes delivered to Austin was a demand note for the principal sum of \$45,657.24 and is herein referred to as the "Austin note." At the time of its execution the corporation was contemplating a refinancing of its business through a loan of \$50,000 from appellant. By reason of such plan, the note to Austin provided that it was to be subordinate to the note the corporation was about to execute to the bank. The Austin note was by him pledged to Burcham to secure payment of the balance of \$21,300 on the purchase price of the stock and notes.

The Clark Note

In October, 1947, debtor executed its promissory note to one Clark in the amount of \$27,500. This instrument provided for installment payments and contained the following pertinent provisions: "the first installment becoming due on or before the first day following the date A. Austin has satisfied his obligation to Gouley Burcham under that certain agreement dated September 24, 1947, if at said time the said Austin has received, as payment upon notes owned by him or as payment in dividends on stock owned by him, the sum of \$15,000. If the said Austin has not so received said sum the due date of this note shall be extended until the said Austin has received the payment of said sum."

On October 14, 1947, appellant loaned \$50,000 to debtor and at the same time both Austin and Clark executed an agreement subordinating their notes to the corporate indebtedness to appellant; Clark endorsed his note to the bank as collateral security for the corporation's debt. The subordination agreement of Austin and Clark provided that in the event of debtor's assignment for the benefit of creditors, the assignee should pay the bank its claim in full before making any payments to Clark or Austin and insofar as necessary for that purpose Clark and Austin assigned to appel-

1. Formerly Catalina Dry Beverage Company.

laint all rights to payments, dividends and distributions. Such assignment was accepted by the bank.

Is the Clark Note Entitled to
Share in Distributions?

[1-3] Respondent contends that the Clark note is not enforceable for the reason that the obligation thereby created is conditioned upon the debtor's ability to meet the installments maturing under the Austin note. In other words, he argues, payment of the Clark note is conditioned upon the occurrence of an uncertain event, to wit, the debtor's financial ability to pay the Austin note,—an event which has not occurred and cannot occur because the debtor was, and continues to be, insolvent. In support of such contention respondent relies upon *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 P. 587, 44 L.R.A.,N.S., 710; *Lynch v. Keystone Consolidated Mining Company*, 163 Cal. 690, 126 P. 968; *Rodgers v. Byers*, 127 Cal. 528, 60 P. 42; *Maurer v. Bernardo*, 118 Cal.App. 290, 5 P.2d 36. These decisions do not support his thesis. All of them are decided upon agreements conditioned upon the maker's ability to pay. In the *Van Buskirk* case the promise was to pay plaintiff "whenever * * * able to do so." In *Rodgers v. Byers* the promisor was bound to pay "as soon as I can get the money." [127 Cal. 528, 60 P. 43.] Such promises are conditional and of course created no absolute agreement to pay. In the case at bar the obligation of the debtor was not conditional. Only the time of payment was uncertain, being fixed with reference to a specified event. The very terms of the Clark note provide that "the due date of this note shall be extended" if Austin has not received dividends on his stock in the sum of \$15,000. Moreover, the corporation issued the Clark note in exchange for its valid, unconditional obligations to pay. In the light of that fact and of the extendability of its due date would it be a reasonable interpretation of the instrument to hold that it was conditional? The question is answered in the asking. It is the law that where an event has been named as a time for the payment of money and such event can never occur,

a reasonable time is by implication fixed as the maturity date of the promise to make payment. *Bartholomae Oil Corporation v. Oregon Oil Company*, 106 Cal.App. 57, 64, 288 P. 814; *Potts Drug Company v. Benedict*, 156 Cal. 322, 332, 104 P. 432, 25 L.R.A.,N.S., 609; *Ahlgren v. Walsh*, 173 Cal. 27, 34, 158 P. 748; *Williston on Contracts*, sec. 799; *Rest. Contracts*, sec. 301. Whether the parties to a transaction intended to make the payment of money contingent must be gathered from the situation of the parties, their relationship, the subject matter, and the purpose to be accomplished as disclosed by the evidence. Also, says Professor Williston, "if they intend that the debt shall be absolute and fix upon the future event as a convenient time for payment only * * * then the debt will not be contingent; and if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time." 3 Williston, sec. 799. The Clark note contains not the slightest suggestion that the debtor's obligation was to be contingent on its ability to pay; nor is there any direct evidence or inference to support such claim. The mere statement of one witness for respondent that in September, 1947, the corporation was not able to pay its debts as they matured does not warrant a finding that the parties to the note intended the obligation to be contingent.

Austin Note Valid

[4] There is no basis for a finding that the Austin note is not a valid, subsisting obligation of the debtor. It was issued to Austin in exchange for an earlier note that had been delivered to Burcham who had loaned moneys to the corporation in the amount evidenced by the note. However, argues respondent, the note evidences an attempt by the directors of the corporation to gain a preference over the other creditors and to divert corporate assets to themselves and for that reason is not enforceable. Respondent makes bold to advance the theory that payment of the note would be an unlawful diversion of corporate assets in that it would be violative of Corporation Code, section 824, since the funds

would come out of capital assets, inasmuch as the debtor, at the time of executing the note, was insolvent and there was no surplus.

[5] Contrary to such theory a reasonable interpretation of the note and the evident intention of the parties indicates that the parties contemplated that the corporation would become solvent and that the note would be paid from net earnings of corporate operations. The very purpose of bringing Austin into the company could have been only to provide new capital whereby to strengthen its financial structure, to increase its profits and to establish it on a firm basis. There is neither finding nor evidence of a contrary intent. The contract will therefore be given an interpretation that is reasonable and lawful. Civ.Code, sec. 1643.

Moreover, there is no evidence that the directors and officers seek any preference over other creditors. They are not parties to this action. Burcham has evidently severed his relation with the debtor, while Austin transferred his note to appellant to hasten the procurement of the loan to debtor. Now, all that is sought by the instant action is to compel respondent to pay dividends on the two notes on a pro rata basis, along with all creditors. Thus the numerous authorities cited by respondent on the aims of the directors are of no avail. All of them, *Nixon v. Goodwin*, 3 Cal.App. 358, 85 P. 169; *Title Insurance & Trust Co. v. Calif. Development Company*, 171 Cal. 173, 152 P. 542; *Stuart v. Larson*, 8 Cir., 298 F. 223; *In re Van Sweringen Company*, 6 Cir., 119 F.2d 231, involve attempts by men of bad faith who by virtue of their official advantages undertook to obtain preferences over other creditors of their respective corporations.

[6] As holder of the Clark note and by virtue of the subordination agreements appellant is entitled to receive the dividends on both obligations. An equitable lien upon the dividends payable on the subordinated debts was given to appellant by virtue of such agreements. *Searle v. Mechanics' Loan & Trust Company*, 9 Cir., 249 F. 942, 945; *In re Schinzel & Son*, D.C., 16 F.2d

289. By its failure to give full value to the subordination agreements the judgment creates a preference in favor of the other creditors to the detriment of the bank which undertook to save the debtor in its hour of gloom. It risked its funds in reliance upon the written agreements of the parties. Now, when it might be saved from loss by a fair construction of the writings it is the duty of the assignee "for the benefit of creditors" to pay dividends pro rata on all valid obligations of the debtor according to the terms of the assignment. 4 Am.Jur. p. 417. The Clark and Austin notes are such valid obligations.

The judgment is reversed with instructions to enter judgment awarding appellant the right to dividends pro rata on the two notes involved herein.

McCOMB and WILSON, JJ., concur.



101 Cal.App.2d 305

PEOPLE v. HAYS.

Cr. 694.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1950.

Robena Hays was convicted in the Superior Court of Riverside County, Russell S. Waite, J., of arson and she appealed. The District Court of Appeal, Griffin, J., held that evidence sustained conviction and that no prejudicial error occurred.

Order denying new trial affirmed.

1. Arson $\Rightarrow$ 37(1)

The incendiary origin of a fire is generally established by circumstantial evidence such as finding of separate and distinct fires on premises.

2. Arson $\Rightarrow$ 37(1)

Evidence of four separate and unrelated fires occurring in house, that holes were found in plaster behind two of fires,

that boxes of combustibles were in front of such holes, that papers had been stuffed between laths in one of holes and that debris smelling of petroleum products was near another hole in plaster amply justified inference that fire was of incendiary origin and was neither accidental or from natural causes and sufficiently established corpus delicti of crime.

3. Arson $\Rightarrow$ 37(1)

The connection of the defendant with crime of arson is no part of corpus delicti.

4. Criminal law $\Rightarrow$ 566

The identity of defendant as person who committed crime of arson may be proved by circumstantial evidence tending to connect her with crime and such circumstantial evidence may consist of proof of motive and conduct of defendant which tends to connect her with crime and statements which show a consciousness of guilt.

5. Arson $\Rightarrow$ 37(1)

Evidence sustained conviction for crime of arson.

6. Criminal law $\Rightarrow$ 781(2)

In arson prosecution, where on day following fire defendant was accused of setting fire by district attorney and defendant responded to direct accusation by saying "what would I set fire for, if you think I did set the fire to get insurance, I can write a check now for \$10,000", giving of instruction that if jury found that there was an occasion when defendant, under conditions which fairly afforded her an opportunity to reply, failed to make a denial and made evasive statements, in face of accusation, circumstances of her conduct could be considered against her as indicating an admission that accusation thus made was true, and leaving to jury question of applicability of such instruction, was not error.

7. Criminal law $\Rightarrow$ 814(16)

In arson prosecution, where it was not claimed that defendant ever confessed to crime charged, refusal to include word "confession" in instruction correctly stating law in reference to an admission was proper.

8. Arson $\Rightarrow$ 41

In arson prosecution, instructing jury that it was not necessary that building involved be completely destroyed was not error.

9. Criminal law $\Rightarrow$ 784(1), 808½

In arson prosecution, giving of instruction defining malice in language of statute and giving of instruction pertaining to proving of arson by circumstantial evidence was not error. Pen.Code, § 7, subd. 4.

10. Criminal law $\Rightarrow$ 829(9, 12)

In arson prosecution, refusal to give defendant's requested instructions in reference to burden and quantum of proof required in reference to proving that defendant wilfully and maliciously set fire to building, which was sufficiently covered by instructions given, was proper.

11. Criminal law $\Rightarrow$ 1023(10)

Where after defendant was arraigned for judgment court suspended further proceedings and granted her probation, since no judgment was pronounced or entered, attempted appeal therefrom would be dismissed.

Daly B. Robnett, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of the crime of arson. In April, 1949, defendant secured fire insurance in the sum of \$4500 on a home located in Corona, comprising rooms numbered on a diagram in evidence as 1 to 10 inclusive. Title to the property was formerly in the name of defendant's son, who, with defendant, was one of the co-beneficiaries of the policy. The house was leased to a Mr. Keys, who resided in it from April, 1949, to November, 1949. During that period defendant listed the property for sale at \$6500, which price was later quoted at \$5500. When Keys moved out he left no boxes, newspapers or rubbish in any of the rooms, and it remained in that condition up until the time

of his last inspection, which was about January 3, 1950.

On January 5, 1950, defendant came to Corona from her home in Santa Clara, where she lived with her husband. She stayed in the Corona house on the nights of January 5th and 6th. On January 7, defendant's insurance agent received a telephone call from defendant informing him she discovered she had only \$4500 insurance on the property and that she wanted \$1500 additional. The agent notified the head office to increase the insurance accordingly, effective January 7, 1950. Defendant spent the night of January 9th with a friend in Corona.

A neighbor, living next door to defendant's property, testified he saw defendant carry an amber colored gallon bottle into the house on January 6th and saw her again at the house on the morning of January 10th; that he saw lights in the back part of the house about 6 p. m. that night; that he retired about 9 p. m. and at 2:30 a. m. of January 11th he was awakened by flames coming from the gabled ends of defendant's house. The fire department was called. The firemen forced open the back door and saw no flames in rooms 8, 9, 3 or 4. One fireman went into room 1 and saw flames on the north wall and in a closet numbered 10. Another fireman forced open the front door and saw flames in room number 1 and saw evidence of separate fires in rooms 5, 6, and 10. There was found in room 1 an open faced gas heater, on which the valve was open and gas was coming into the house. After the fire was subdued the fire chief discovered that one of the back doors had been left open, to ventilate the house, but the screen door was still hooked.

About January 11, a deputy State fire marshal and others investigated the fire and discovered that the heaviest fire occurred in room 10, the closet, which was separated from room 1 by a door. The fire in that area had burned down through the floor and up through the ceiling, resulting in considerable fire damage to the house and roof. Directly across from room 10, in room 1, an area about 36 inches wide had

been burned on the wall. Apparently, the fire at that point started from the floor and burned up, since the baseboard was entirely gone and the fire plate at the top of the area was not burned away. There was a rug on the floor of room 1 and it was unharmed except for a few small holes where cinders had burned.

On the wall of room 5 was a charred area and in front of that area there was a box containing burned newspapers and a small hole had been burned through the floor under the box. Behind the box a part of the plaster had been removed. The area of that fire extended up the wall about 18 inches. The laths that showed were only charred and no hole was burned through the ceiling above this fire. The door between rooms 1 and 5 had been charred on the side of room 1 but not so on the side of room 5. The officer testified that this fact indicated the door had been closed during the fire.

On the wall of room 6, a closet opposite the fire area in room 5, there was another fire area. A cardboard carton was there found partially demolished by the fire, which also contained burned papers. There was a hole in the wall directly above that carton, as in the other room, and in between some of the exposed laths some newspapers had been stuffed which were slightly scorched by the fire. The scorched area above the carton resembled that described in room 5. In another portion of room 6 was a pile of debris consisting of paper, a mop, cloth, and a milk container, all of which carried a strong odor of petroleum products. Directly in back of the debris the plaster had been broken off of the wall. The debris had not burned.

In the opinion of duly qualified experts, who testified at the trial, there was no communication or connection between the fire causing the charred condition in room 5 and the burned areas in rooms 10 and 1, nor between the burned area in room 6 and the burned area in rooms 10 and 1, nor between the fires causing the burns in rooms 5 and 6.

A couch and mattress were found on top of a trailer located in the garage. In

a conversation with defendant on that day defendant said that these articles had been in the house but she was taking them to Santa Clara with her. She was asked as to the title to the property and she said her son had advanced money to her when she first bought the house so she had the insurance written in the two names; that she stayed at the house on the night of January 7 and found it in such a dirty condition she wanted to clean it; that the party her husband had leased his chiropractic business to did not intend to exercise his option to buy it in March of 1950; that she called her husband and he told her to get the house in shape and they would move back to Corona and occupy it; that when the investigator told her he understood they had just bought a place "in San Jose", defendant said: "We have just a deposit on it"; that she told him the insurance on the Corona home had been \$4500, and that in April, when it was to be renewed, she then asked the agent to increase it to \$6000 and that she did not know it had not been so increased until January 7, 1950, and that she then called the agent about it. She told the investigator that on January 10, she purchased two gallons of cleaning solvent to clean the rugs and other parts of the house, and that on that day the gas man came and connected the gas heater and lit it; that she stayed around most of the afternoon cleaning the walls with the solvent and had not used the mop but had used a sponge; that that evening about 7:30 she left the house locked and the heater on and went to Los Angeles; that she returned on January 11, and found the house had burned. She explained that area number 10 was a closet in which she kept her cleaning rags and sponge and that she had closed the door thereto before leaving.

On January 12th she was questioned by the district attorney. She stated she did not feel like answering questions; that "she was no fool and knew that she did not have to answer unless she wanted to". He told her that from the information he had received he understood the fire was of criminal origin and that since she was the last person known to have been there he

would like to ask her some questions. She told substantially the same story as related to the investigator except she said she obtained only one gallon of cleaning fluid on January 7th and 2 gallons on January 10th; that in January, 1946, she had paid back the money her son had loaned to her and he had given her a deed to the property but that she had not recorded it; that she and her husband had purchased a house in "Santa Clara" for \$18,000, paying \$8,000 down and assuming a mortgage as to the balance; that the property was out of escrow and they were in full possession of it. When asked about the carton of burned debris in the house she said the former tenants had left it in room 5.

The expert then testified that it would be possible for a fire to smolder in a closet the size of room 10 for several hours before developing into a large fire, if the door were closed.

At the trial defendant testified that the plaster in back of the fire area in room 6 had been broken accidentally when the house was being remodeled; that the hole which was in room 6 behind the unburned debris was there when she moved into the house; that she came to Corona on January 5; that on January 8, she learned that cleaning solvent would clean the walls and that on January 9, she obtained two gallons of that solvent (she claimed that the service station man told her that it "would not burn"); that she got a sponge and cleaned the walls in rooms 2 and 5, and that she dropped some solvent on the floor; that she obtained some papers and spread them along the edge of the wall; that when she was through for the day she carried the two jugs into the closet (room 10) and while putting them down the full one smashed against the other one and broke; that she mopped up the solvent with the mop, shut the door and went to dinner; that the next morning she picked up the broken glass, mopped up the closet, and aired the house; that she got a box from the garage and placed the papers, which were covered with solvent, in the box; that as she was carrying the box into room 5 she ran against the door and a piece of the baseboard fell down; that

to keep mice from coming in she propped the baseboard up with the box and dumped the papers and other things she had been using for cleaning purposes into it; that she went to a friend's house and remained there until 6:20 that evening; that she then returned to her house for some bedroom slippers; that she left the gas stove burning low in room 1 and went to Los Angeles and returned about 12:30 on January 11.

The service station man, from whom she bought the solvent, testified that he had not told her it "would not burn". An electrician testified that in his opinion the electric wire found hanging in room 6 had not arced and had not caused the fire at that point.

Defendant first argues that under the evidence no corpus delicti was shown nor established; that the prime element thereof is proving, beyond a reasonable doubt, the "criminal origin of the fire, and that it was not an accident or from natural causes", citing *People v. Bispham*, 26 Cal. App.2d 216, 79 P.2d 166; 6 C.J.S., Arson, § 29, page 749; and *People v. Walden*, 75 Cal.App. 565, 243 P. 25; and that extrajudicial statements of a defendant cannot be used to establish any necessary elements of the corpus delicti of a crime, citing *People v. Vertrees*, 169 Cal. 404, 408, 146 P. 890; and *People v. Quarez*, 196 Cal. 404, 238 P. 363.

[1,2] It has been repeatedly held that incendiary origin of a fire is generally established by circumstantial evidence such as the finding of separate and distinct fires on the premises. See, *People v. Sherman*, 97 Cal.App.2d 245, 217 P.2d 715, and cases cited. Here, there is evidence of four separate and unrelated fires occurring in the house in question; that holes were found in the plaster behind two of the fires; that boxes of combustibles were in front of such holes; that papers had been stuffed between the laths in one of the holes; and that debris smelling of petroleum products was near another hole in the plaster. The facts produced amply justify an inference that the fire was of

incendiary origin, and was neither accidental nor from natural causes, and that the jury could reasonably infer that the fire was wilfully and maliciously set for the purpose of burning the house. The corpus delicti of the crime was sufficiently established.

[3,4] Defendant appears to contend that the evidence of the corpus delicti was insufficient because it was not shown that defendant was present when the fire was set, nor were the means by which the fire occurred shown. The connection of the defendant with the crime is no part of the corpus delicti. *People v. Ward*, 134 Cal. 301, 307, 66 P. 372; *People v. Flores*, 34 Cal.App. 393, 394, 167 P. 413. The identity of the defendant as the person who committed the crime may be proved by circumstantial evidence tending to connect her with the crime. 8 Cal.Jur. p. 36, sec. 154. Such circumstantial evidence may consist of proof of motive and conduct of the defendant which tends to connect her with the crime, and statements which show a consciousness of guilt. *People v. Bauman*, 39 Cal.App.2d 587, 592, 103 P.2d 1020; *People v. Tom Woo*, 181 Cal. 315, 328, 184 P. 389.

[5] Subsequent to the fire, the defendant made numerous inconsistent statements. The jury was justified in believing the testimony of Mr. Keys that the defendant had offered the house for sale for \$5500, and that it had not been sold. This fact, coupled with the fact that she had secured an increase in the insurance to \$6000 on January 7th, three days before the fire, justifies the inference that she had a motive in burning the building and collecting the insurance. While there was no direct evidence introduced showing the method whereby the fires were started, whether by matches, candles, or similar devices, this fact is not fatal to the establishment of the corpus delicti. Sufficient evidence was introduced to support a finding that the fires were lit and that the defendant lit them. Her exact method of so doing was not a necessary element of the people's case. These facts established also rebut the pre-

sumption that the fire was caused accidentally or from natural causes.

The next complaint is that the court gave an instruction (CALJIC Instruction No. 30) as modified, that if the jury found that there was an occasion when defendant, under conditions which fairly afforded her an opportunity to reply, failed to make a denial and made evasive statements, in the face of an accusation, the circumstance of her conduct may be considered against her as indicating an admission that the accusation thus made was true, citing *People v. Wochnick*, 98 Cal.App.2d 124, 219 P.2d 70, 73.

[6] If there is any evidence to support these facts there is no error in the giving of such an instruction. *People v. Kynette*, 15 Cal.2d 731, 104 P.2d 794; *People v. Sanchez*, 35 Cal.App.2d 231, 235, 95 P.2d 169. Here, on the day following the fire, the defendant was at the office of the district attorney in response to his request that she answer some questions. She gave answers to all of his questions regarding her activities, and at the conclusion of the conference, he said: "From the information I have, I am satisfied this is a criminal fire. I am accusing you of setting fire." The defendant responded to this direct accusation by saying: "What would I set the fire for, if you think I did set the fire to get insurance, I can write a check now for \$10,000." The evidence supports the action of the trial court in giving such an instruction and leaving to the jury the question of its applicability.

[7] Defendant next complains of an instruction given in the language of CALJIC Instruction No. 29-C Alternate, as suggested in CALJIC Instruction No. 29-C. Since it is not claimed that defendant ever confessed to the crime charged, the instruction, as given, correctly states the law in reference to an admission, and the refusal to include the word "confession" in the instruction was proper. *People v. McMonigle*, 29 Cal.2d 730, 177 P.2d 745.

[8] The jury was properly instructed as to the necessary elements of the offense charged. No error resulted in instructing the jury that it was not necessary that the building involved be completely destroyed.

[9] Defendant next claims that the giving of an instruction in the language of Section 7, subdivision 4 of the Penal Code, defining malice, was error. The argument is that the section is a general section and that it has no application to this case, and accordingly could have misled the jury. We see no merit to this contention. The same result obtains as to another instruction claimed to be erroneously given pertaining to the proving of arson by circumstantial evidence.

[10] Lastly, defendant complains that the court erroneously refused to give several instructions requested by her in reference to the burden and quantum of proof required in reference to proving that defendant wilfully and maliciously set fire to the building. These proffered instructions were sufficiently covered by instructions given and were, accordingly, properly refused. *People v. Eggers*, 30 Cal.2d 676, 688, 185 P.2d 1.

We have examined the entire record of the evidence and of the instructions given and refused. We are convinced that there was sufficient substantial evidence of defendant's guilt, that the jury was fairly instructed as to the law, and that no prejudicial error occurred.

[11] When defendant was arraigned for judgment the court suspended further proceedings and granted her probation. Since no judgment was pronounced or entered, the attempted appeal therefrom is dismissed. *People v. Jones*, 36 Cal.2d 373, 224 P.2d 353; *People v. Guerrero*, 22 Cal.2d 183, 184, 137 P.2d 21.

The order denying a new trial is affirmed.

BARNARD, P. J. and MUSSELL, J.
concur.

101 Cal.App.2d 314

MAGUIRE et al. v. CORBETT et al.

Civ. 14497.

District Court of Appeal, First District,
Division 1, California.

Dec. 21, 1950.

Action by Theodore Maguire and others against Edward J. Corbett, also known as Edward J. Korbutt, and another for damages. Judgment in favor of plaintiffs was rendered May 12, 1939, and on October 31, 1949, plaintiffs filed a notice of motion for an order directing that execution issue. The Superior Court, in and for the County of Santa Clara, John D. Foley, J., entered an order directing that execution issue and the defendant Corbett, appealed. The District Court of Appeal, Fred B. Wood, J., held that record disclosed no abuse of discretion by trial court in impliedly finding that plaintiffs exercised due diligence in locating and levying on property of defendant debtor during five years after entry of judgment, and subsequently, and that entry of order was not an abuse of discretion.

Order affirmed.

1. Appeal and error ⇨225

Where record did not indicate that at the hearing of plaintiff's motion for an order directing that execution issue after five years from entry of judgment, or at any time prior to filing of his opening brief on appeal, defendant objected to any portion of any of plaintiff's affidavits on ground of hearsay or on any other ground, it was too late to object on appeal that affidavits contained statements which were hearsay or which amounted to mere conclusions.

2. Appeal and error ⇨1011(1)

It is function of trial court, not of an appellate court, to resolve conflicts in evidence.

3. Execution ⇨73

A judgment creditor seeking an order directing that execution issue after five years from entry of judgment must show that both before and after expiration of five year period he exercised diligence in seeking to enforce his judgment. Code Civ. Proc. §§ 681, 685.

4. Execution ⇨73

Under statutes relating to issuance of execution more than five years after entry of judgment, court is authorized to give creditors an execution only if, during five years following entry of judgment, creditor exercised due diligence in locating and levying on property owned by debtor or in following available information to a point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ.Proc. §§ 681, 685.

5. Execution ⇨73

Record established that judgment creditor exercised due diligence during five year period after entry of judgment in attempting to find property of defendant on which execution could be had and that granting of creditor's application for execution after five year period was not an abuse of discretion. Code Civ.Proc. §§ 681, 685.

W. Frank Butters, San Jose, for appellant.

Hardy, Carley & Brenner, Palo Alto, for respondents.

FRED B. WOOD, Justice.

Defendant Edward J. Corbett appeals from an order directing that execution issue after five years from entry of judgment.

The judgment was rendered May 12, 1939, for damages in the sum of \$1,665.15 in favor of plaintiffs and respondents Theodore, Rita, Bert, and Beverly Maguire, against defendant and appellant Edward J. Corbett, also known as Edward J. Korbutt, and his father, defendant Felix K. Korbutt, also known as Felix K. Corbett.

On October 31, 1949, respondents filed a notice of motion for an order directing that execution issue. After hearing, upon affidavits and other evidence, the court, on December 5, 1949, granted the motion by an order which recited that the "judgment remains wholly unsatisfied, that plaintiffs have been unable prior to this time to find property of the defendants in this state which might be applied to the satisfaction

of said judgment, and that there is now in this state property of the defendants subject to execution which may be seized to satisfy said judgment.”

Appellant assigns as error that the evidence is insufficient to support the order. He asserts that the affidavits of respondent Theodore Maguire contain statements based on hearsay and mere conclusions, and that many of his statements are directly controverted by other statements in his and other affidavits, and that all of such statements should be given little or no weight or be entirely disregarded.

[1, 2] The record does not indicate that at the hearing of the motion, or at any time prior to the filing of his opening brief upon this appeal, appellant objected to any portion of any of respondents’ affidavits upon the ground of hearsay or upon any other ground. It is too late now to object that they contain statements which are hearsay or which amount to mere conclusions. *Fallon v. Fallon*, 86 Cal.App.2d 872, 873-874, 195 P.2d 878, and cases cited. *Hatch v. Calkins*, 21 Cal.2d 364, 132 P.2d 210, upon which appellant relies, is consonant with this principle, for the debtor in that case made timely objection to hearsay statements in the creditor’s affidavits. As to conflicts in the evidence, it is the function of the trial court, not of an appellate court, to resolve them. *John P. Mills Org. v. Shawmut Corp.*, 29 Cal.2d 863, 865, 179 P.2d 570, and *Fuller v. Lindenbaum*, 29 Cal.App.2d 227, 230, 84 P.2d 155.

[3] Appellant also directs attention to the fact that respondents’ affidavits narrate efforts of respondents to locate the defendants and their property after, as well as before, the expiration of the five-year period after entry of the judgment, and claims that nothing which happened after the five-year period is competent in the consideration of this motion. That is not correct. A judgment creditor must show that during both periods he exercised diligence in seeking to enforce his judgment. *Butcher v. Brouwer*, 21 Cal.2d 354, 358, 132 P.2d 205.

The applicable statute is section 685 of the Code of Civil Procedure. It declares that a judgment “may be enforced or car-

ried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code.” Section 681 declares that the party in whose favor a judgment is given “may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement”; tolled by such period of time as execution is stayed or enjoined by judgment or order of court or by operation of law. Section 685 then states that “The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.”

[4] This means that a court may give such a creditor an execution only if “during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time”, and, even though he satisfies the court that he proceeded with due diligence during the five-year period, “the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment.” *Butcher v. Brouwer*, supra, 21 Cal.2d 354, 358, 132 P.2d 205, 207.

It appears from the affidavits of respondent Theodore Maguire that in September 1939 respondent notified the State Department of Motor Vehicles that the judgment had not been satisfied, pursuant to which defendants’ privilege of operating vehicles was suspended. On December 12, 1939, respondents recorded an abstract of the judgment in Santa Clara County, where the defendants then resided; that respondents were then unable to locate any property of defendants which might be subjected to said judgment; that from the time of the judgment until the time of a divorce between Felix and his wife in 1944 affiant caused the

tax rolls of Santa Clara County to be searched each year, which search disclosed no property other than their residence at 470 Williams Street, Palo Alto, which could not be levied upon because it was homesteaded. In evidence are abstracts of a 1927 deed of trust on that property to secure \$2,000, and a 1938 homestead reciting \$2,500 as the value of the property.

Affiant Maguire states that after recording the abstract of judgment respondents continued to search for property of defendants until April 1943, when a writ of execution was issued and delivered to the Palo Alto constable for service, and returned unsatisfied. On May 11, 1944, respondents commenced an action (No. 60042, Superior Court, Santa Clara County) against the defendants based on the judgment, summons in which was delivered May 16 to the constable at Palo Alto with instructions to serve on the defendants and he located the wife of defendant Felix K. Corbett at 470 Williams Street, Palo Alto Township, Santa Clara County, but was unable to locate either of defendants. These statements are corroborated by the constable's affidavit, in which he states that on April 29, 1943, he received a writ of execution in this action with instructions to make a demand levy upon defendant Felix K. Korbutt and to attempt to ascertain the address of defendant Edward J. Corbett; that he went to 470 Williams Street, Palo Alto, the reported residence of Felix, where he found and talked with the wife of Felix; that though he tried to obtain from her the whereabouts of both defendants he was unable to learn the whereabouts of either of them. The constable further states that he received summons in action No. 60042 with instructions to serve the defendants; that he again found and talked with the wife of Felix at 470 Williams Street, Palo Alto, but was unable to ascertain the whereabouts of either of the defendants; that during approximately two years thereafter and at the request of the then attorney of respondent, affiant made numerous attempts to discover one of said defendants at said address and spoke with the wife of Felix on several occasions; that at no time was af-

fiant able to ascertain the whereabouts of said defendants.

Affiant Maguire states that during each year after rendition of the judgment, respondent Theodore Maguire has attempted to locate defendants and property of defendants which might be applied to satisfaction of the judgment; that during each year after the judgment he attempted to keep track of the assets and activities of defendants through inquiries of Mr. and Mrs. Willie J. Kelley, who were neighbors of defendants at the time the cause of action arose and who resided at 420 Williams Street, Palo Alto. From such inquiries affiant learned that Felix was employed at the Crystal Palace Plunge and later as an elevator operator at an unknown address in San Francisco and was seen in Palo Alto only rarely on Sundays. From such inquiries affiant was unable to learn where Felix was staying other than he was staying in San Francisco. This is corroborated by Mr. Kelley who in his affidavit states that he lives near the property formerly occupied by Felix K. Korbutt and Edward J. Corbett, father and son; that during the ten-year period last past respondent Theodore Maguire has inquired of affiant, at intervals and at least once each year, as to the activities and whereabouts of Felix and Edward; that on none of said occasions has affiant told Maguire or been able to tell him the exact address of Felix or of Edward; that on several such occasions affiant informed Maguire he understood that Felix and Edward were living in San Francisco.

Maguire states that in 1939 and 1940 respondents attempted to locate Felix at the Crystal Palace Plunge in San Francisco where he reputedly was employed but was unable to obtain information there other than that Felix was not there and later that he was not known there; that since the judgment he has searched for Felix K. Korbutt in each San Francisco telephone book that has been issued.

Maguire states that, prior to the trial of the action, he had, through his attorneys, correspondence with the attorney who represented defendants and that attorney rep-

resented that the only possible source of settlement of the claim was Felix Korbutt; affiant through his attorneys verified through independent sources that Edward was only partially self-supporting and owned no assets; from his inquiries of Mr. and Mrs. Willie J. Kelley, affiant learned that Edward J. Corbett had reputedly moved to San Francisco, and in 1945 learned that Edward was reputedly living in the Sunset district of San Francisco; that since being informed that Edward was residing in San Francisco affiant has searched the San Francisco telephone directory for Edward; that since 1945 he has searched the Palo Alto telephone directory for the defendants, at least once each year; informed that a Mrs. E. J. Corbett lived at 495 Twelfth Avenue in San Francisco, affiant in October 1945 caused the sheriff to attempt to serve summons at that address, but it was returned unserved because neither of the defendants resided or could be located there; that in March 1949 affiant learned of an Edward J. Corbett at 324 Thirteenth Street, Seal Beach, California, and caused investigation to be made, but the investigation failed to disclose either of the defendants or any property of either of them. In September 1945, affiant Maguire inquired of the State Department of Motor Vehicles in an effort to ascertain the whereabouts of both defendants and whether any vehicle was registered in the name of either, which inquiry disclosed no vehicle so registered, nor the whereabouts of either defendant. In 1947 and 1948, affiant searched the tax rolls of San Francisco for the names of both defendants, but neither name appeared thereon. At all times since the action arose, Thomas Maguire has resided in San Francisco; never lived in San Mateo County.

According to the affidavit of Marilyn Corbett, wife of Edward, he lived at 470 Williams Street, Palo Alto, prior to their marriage on July 5, 1940; thereafter, in Brisbane, San Mateo County, until May 1, 1942, when they purchased in joint tenancy real property at 902 Ruth Avenue, Belmont, San Mateo County, under contract whereby deed thereto would be delivered upon completion of down payment, which

payment was completed in June 1943, and deed transmitted to a title company for recordation in July 1943, and recordation made on March 7, 1944; that on August 10, 1942, telephone service was installed in the name of Edward J. Corbett at said Belmont address, and has been continuous to date, and his name has been listed continuously in the San Mateo County telephone book since the second publication thereof in 1942 or the first publication in 1943; that Edward registered with his draft board in San Mateo County in 1940; that he was employed by Western Pipe and Steel Company, South San Francisco, from July 5, 1940, to September 23, 1943, when he entered the merchant marine and served therein until December 1944; that from January 1945 to September 24, 1947, he was employed by various employers in San Francisco and on the Peninsula, including Western Pipe and Steel Company at South San Francisco, and was a member of Boiler Makers, etc., Union Local 6, San Francisco; that from January 1 to July 1, 1946, he was in partnership with William McBurnie in the tree surgery business in San Mateo County under the name Corbett & McBurnie and during that time advertised in the San Mateo Times, using the firm name; that on September 24, 1947, Edward went to Arabia where he has been employed except for the period April 1949 to July 1949; that all during the married life of Edward and Marilyn they had charge accounts in San Francisco at Roos Bros., and City of Paris; and that at all times Josephine Corbett, mother of Edward, lived at 470 Williams Street, Palo Alto, and knew the whereabouts of Edward.

[5] This record discloses no abuse of discretion by the trial court in impliedly finding that the respondents exercised due diligence in locating and levying upon property of the debtors during the five years after entry of judgment, and subsequently. Their search was in the county where the defendants resided during the trial and where appellant resided for over a year after the trial, until available information indicated that appellant and his father were in San Francisco, and search there proved unavailing. The inquiries which they made

of appellant's mother, through the constable, during the third to seventh years, and of the neighbors during each of the ten years, though not fruitful, represented the tapping of available information, and the negative results thus obtained may well have discouraged a wider, more extended search than that which respondents did conduct. No search of public records during the first five years, except the very last two months of that period, would have disclosed property in appellant's name, for the June 1943 deed to his Belmont property was not recorded until March 7, 1944. Incidentally, that was after the tax lien date in 1944, suggesting that the property would not appear in appellant's name on the San Mateo County tax rolls until the following tax year. Also, until some time had elapsed, it evidently did not appear to the respondents fruitful to make as vigorous a search for appellant and his assets as for the father, Felix, and his assets, in view of the information obtained prior to the trial, from appellant's attorney and other sources, that Edward was only partially self-supporting and had no assets. The fact that appellant was employed and had charge accounts did not of itself cast upon the respondents a duty to make inquiries concerning him of merchants and employers up and down the Peninsula, from Palo Alto to San Francisco, on a blind search for him.

This case differs from *Becutti v. Colombo Baking Co.*, 21 Cal.2d 360, 132 P.2d 207; *Hatch v. Calkins*, 21 Cal.2d 364, 132 P.2d 210, and *Bank of America Nat. Trust & Savings Ass'n v. Williams*, 84 Cal.App.2d 562, 191 P.2d 17, upon which appellant relies. In the *Becutti* case, it appeared that for some 13 years after judgment the debtor owned real property in the county of his residence, the county in which the judgment was rendered, and examination of the tax collector's and tax assessor's records would have shown property valued in excess of the judgment; the debtor's name and address appeared in telephone and city directories in that county; and he owned trucks and pleasure automobiles, registered with the State Department of Motor Ve-

hicles. Those facts indicated that if the creditor had exercised even slight diligence he would have discovered property subject to execution. In the *Hatch* case, the application for writ of execution was made 29 years after judgment, and it appeared, among other things, that the judgment creditor knew that the debtor was in Truckee, and traded at his stores; that the debtor owned and operated a business and owned real property in Truckee; and a check of the assessor's index would have revealed the existence of a lot which stood in the debtor's name from 1911 to 1916. The creditor was not excused, from making an investigation, by town gossip that the debtor was without assets. Appellant herein invokes the *Hatch* case and says that Maguire could not excuse his lack of a more extended investigation upon the basis of hearsay information received from Corbett's attorney at the time of the trial and later from the neighbor, Kelley. There are several differences between the two situations. In the *Hatch* case, but not in this case, the debtor objected to the hearsay evidence at the time of the hearing in the trial court. Information given by the debtor's own attorney and by the neighbor was reasonably more authentic than mere town gossip. Also, the creditor in this case pursued other available sources of information, which the creditor in the *Hatch* case did not. In the *Bank of America* case (an affirmation of an order denying the writ, as distinguished from the *Becutti* and *Hatch* cases, in each of which an order granting the writ was reversed), it was deemed not an abuse of discretion by the trial court to deny execution after five years when it appeared that the creditor was informed that the debtor resided in San Francisco and maintained an office there but the creditor made no check of public records in that county and relied upon a hearsay report that the debtor was without assets.

The facts of the instant case are similar in certain respects to the facts in *Terrill v. Shepherd*, 57 Cal.App.2d 290, 134 P.2d 491, and *Helvey v. Castles*, 73 Cal.App.2d 667, 167 P.2d 492, in each of which it was held that the record did not disclose abuse

of discretion by the trial court in ordering execution after five years. In the Terrill case, the creditor from time to time searched the records of the county of the debtor's residence, and employed an investigator to make inquiries and find assets, without discovering assets, and, within about three years, the debtor acquired an interest in certain notes secured by deeds of trust but the deeds of trust were not recorded until nearly six years after entry of judgment. In the Helvey case, it appeared that the creditor lost track of the debtor about one year after judgment; that his search of public records in Los Angeles and 20 other counties and of the State Department of Motor Vehicles for ten years after judgment disclosed no assets; and that he filed suit for renewal within five years but was unable to locate the debtor.

As the record discloses no abuse of discretion by the trial court, the order is affirmed.

PETERS, P. J., and BRAY, J., concur.



In re DABNEY'S ESTATE

Civ. 18249.

District Court of Appeal, Second District,
Division 1, California.

Dec. 28, 1950.

Rehearing Denied Jan. 16, 1951.

Hearing Granted Feb. 15, 1951.*

Proceedings in the matter of the estate of Louise E. Dabney wherein Clifford R. Dabney and Alice M. Dabney petitioned for writ of supersedeas to stay orders for ratable distribution rendered by the Superior Court, Los Angeles County, Newcomb Condee, and Roy L. Herndon, JJ. The District Court of Appeal, Drapeau, J., held that there was no detriment to petitioners as the ratable distributions were to be paid out of current net earnings of the estate, and that therefore issuance of the writ was not necessary.

Writ denied.

* Subsequent opinion 232 P.2d 481.

1. Appeal and error ⇨458(1)

A writ of supersedeas may issue when it appears necessary to preserve rights of a litigant until final determination of his appeal.

2. Appeal and error ⇨458(1)

Where orders were made for ratable distribution of certain sums to heirs and petitioners thereafter sought a writ of supersedeas to stay ratable distribution, in view of fact that petitioners were appealing from judgment against them showing of petitioners' lack of interest was not sufficient to justify denial of writ.

3. Appeal and error ⇨458(1)

Where certain orders for ratable distribution to heirs were entered, and it appeared that ratable distributions were to be paid out of current net earnings and not from assets of estate no detriment to petitioners who sought to recover assets of estate, appeared which would require issuance of writ of supersedeas.

4. Supersedeas ⇨4

Whether circumstances of a particular case justify issuance of writ of supersedeas lies in sound discretion of court.

C. Paul Du Bois and John E. Sisson, Los Angeles, for petitioners.

Dolley, Knight, Woods & Hightower, Los Angeles, for respondent executor Milton H. Philleo.

Franklin L. Knox, Jr., Los Angeles, for respondent Melvin H. Mann.

DRAPEAU, Justice.

Petitioners, Clifford R. Dabney and Alice M. Dabney, allege that on February 1, 1950 they filed and instituted an action in the Superior Court of Los Angeles County to have certain rights adjudicated against the Estate of Louise E. Dabney, deceased. They prayed for declaratory relief, for the establishment of constructive and resulting trusts, to quiet title, for accounting, receiver and injunction—all with respect to properties of the estate.

Petitioners then allege that the following proceedings occurred in the estate, all of

them designed to defeat any recovery petitioners may secure in their action at law:

An order for ratable distribution of \$150,000 to the heirs of decedent, made August 22, 1950.

An order for ratable distribution of \$150,000 to said heirs, dated August 22, 1950.

An order for ratable distribution of \$300,000 to said heirs, dated September 26, 1950.

Petitioners further allege that they appeared before the Probate Court, objected to the making of said orders, and after they were made appealed therefrom; that nonetheless the executor will pay the money to the heirs before the appeals are determined.

Petitioners further allege that if such distribution is made the assets of the estate which they seek to recover will be irretrievably lost; that distribution will be made to a large number of heirs, residing in many different states, and that it will be unduly expensive, and in many cases impossible, to recover from said heirs; and that the bond of the executor being but \$100,000, and his personal assets being limited, petitioners will not be able to recover damages from him in excess of his bond.

Upon these allegations an order to show cause issued and was argued, as to the issuance of the writ of supersedeas. Also an order was made temporarily staying payment of the ratable distribution.

To the petition the executor demurred and answered.

The executor in his answer alleges:

That distribution of the \$300,000 ordered August 22, 1950 was made on August 28, 1950, prior to filing of appeal by petitioners, which said appeal was not taken until October 3, 1950.

That Petitioner Clifford R. Dabney has assigned to others his interest in the estate, and any recovery in his legal action, and is, therefore, not a proper party in interest in the present proceeding.

That the wife of Clifford R. Dabney, the other petitioner herein, filed no creditor's claim against the estate, and that she also is not a proper party in interest.

That in said legal proceeding demurrers to petitioners' complaint have been sustained without leave to amend, and that judgment was entered pursuant to said ruling October 6, 1950, from which judgment petitioners have appealed.

That the executor has distributed, and is now proposing to distribute only net taxable earnings of the estate to the persons entitled thereto; that the ratable distribution here questioned is to be made out of such earnings; and that any further stay of such distribution will result in loss to the estate by way of taxation.

The petition and the answer are verified. No affidavits in support of the averments of either have been filed. And, of course, no testimony has been taken by this Court.

[1] A writ of supersedeas may issue when it appears necessary to preserve the rights of a litigant until final determination of his appeal. *Dry Cleaners & Dyers Inst. v. Reiss*, 5 Cal.2d 306, 54 P.2d 470.

[2] The showing of lack of interest of petitioners is not sufficient to justify denial of the writ. The judgment against them is now being appealed from.

[3, 4] Respondent executor's allegations that the two ratable distributions of \$150,000 each are to be paid out of current net earnings are uncontroverted. Therefore, no detriment to petitioners appears which would require issuance of the writ. Whether the circumstances of a particular case justify the issuance of the writ lies in the sound discretion of the court. *Kim v. Chinn*, 20 Cal.2d 12, 123 P.2d 438.

It is ordered that the demurrer be overruled; that the order staying payment of distribution be dissolved; and that the petition for the writ of supersedeas be denied.

WHITE, P. J., concurs.

In re DOUGHERTY'S ESTATE.**DOUGHERTY v. GEORGE et al.**

Civ. 14794.

District Court of Appeal, First District,
Division 2, California.

Jan. 3, 1951.

Rehearing Denied Feb. 2, 1951.

Hearing Denied March 1, 1951.

Proceedings in the matter of the estate of E. L. Dougherty, deceased, involving an action by Cecile M. Dougherty against Ruth Ida George and Robert L. Bridges to contest a will. The Superior Court in and for the County of San Francisco, T. I. Fitzpatrick, J., rendered judgment for the defendants and plaintiff appealed. On motion to dismiss the appeal. The District Court of Appeal, Nourse, P. J., held that in absence of a valid excuse for the delay, in plaintiff's filing of record on appeal, there was no room for court's exercise of discretion and consequently that had duty to dismiss appeal.

Appeal dismissed.

1. Executors and administrators Ⓒ296

The policy of the law favors the speedy settlement of estates of deceased persons.

2. Appeal and error Ⓒ627(2)

Where judgment was rendered in July, 1949, and notice of appeal was filed in October, 1949, but neither reporter's nor clerk's transcript on appeal had been completed, nor were there any proceedings pending in court for preparation of record on appeal by November, 1950, and appellant offered no valid excuse for such delay but in affidavit in opposition to appellee's motion for dismissal of appeal, suggested that court employ its discretion, District Court of Appeal had duty to dismiss appeal. Rules on Appeal, rule 41(a).

NOURSE, Presiding Justice.

This motion to dismiss the appeal is made on the ground that appellant has failed to properly procure the filing of the record on appeal. The county clerk's certificate shows that the action was a contest of a will on the ground that the decedent lacked testamentary capacity. Pertinent dates are: July 20, 1949: Verdict of the jury that decedent was of sound mind at the time of making his will. July 26, 1949: Judgment that contestant (appellant herein) take nothing against defendants (respondents herein). October 15, 1949: Written notice of appeal from the judgment of July 26, 1949 was filed. October 25, 1949: Appellant filed notice to prepare reporter's and clerk's transcripts. November 21, 1949: Clerk's notice of the mailing of the estimate of costs filed. December 2, 1949: Reporter filed waiver of deposit of fees.

The clerk's certificate further discloses that: "No stipulation to prepare an agreed statement or Notice of Intention to Propose a Settled Statement has been filed to the date hereof (November 27, 1950), and no proposed narrative statement has been filed to the date hereof, and there has been no order extending time for the preparation of the record filed to the date hereof", and that, "The record on Appeal has not been certified to the date hereof by reason of the fact that neither the Reporter's Transcript on Appeal nor the Clerk's Transcript on Appeal have been completed, and there is no proceeding pending in the Superior Court for the preparation of the record on appeal."

The affidavit of Bruce Walkup, attorney for one of the respondents, discloses that inquiries made by Dan L. Garrett and attorneys for the other respondent from January to July, 1950, disclosed that little progress was being made to complete the record on appeal; that he called on the reporter on November 14, 1950, and was informed that the reporter was working on the records and that since the reporter had received a check from the appellant that the work would go much faster; and affiant Walkup further alleges, upon information and belief, that the dilatory action

Delany, Jarvis, Fishgold & Werchick,
San Francisco, for appellant.

Bruce Walkup, and Thelen, Marrin,
Johnson & Bridges, all of San Francisco,
for respondent.

of appellant in preparing the record for appeal is for the purpose of depleting the estate by receipt of a monthly family allowance, which has amounted to date to \$16,900, and is continuing currently at the rate of \$350.00 per month.

An affidavit in opposition to the motion to dismiss was filed by one of the attorneys for the appellant on December 6, 1950. This opposition was not served and filed at least ten days before the date designated for the hearing as required by Rule 41(a), Rules on Appeal.

The affidavit relates the following facts: that the trial consumed approximately six and one-half weeks; that the reporter's transcript alone is in excess of 2,000 pages; that on or about January 1, 1950, the official reporter working on the record was transferred from the trial court department to the department of the presiding judge, entailing a large amount of additional work; that the record in this cause was completed on December 4, 1950, and is now on file with the superior court clerk.

Appellant has ignored all the rules relating to the preparation and filing of the record on appeal. The opposition (which was filed contrary to Rule 41(a) makes no excuse for the long delay or the failure to apply for extensions of the times designated in the Rules. Though the affidavit denies that the appeal was taken for the purpose of continuing the family allowance to the widow-appellant the facts deny the assertion.

[1] "The policy of the law favors the speedy settlement of the estates of deceased persons, so much so that the Legislature has provided that appeals to this court in probate cases shall take precedence over all other cases except those to which the people of the state are parties. Code Civ. Proc. § 57. That this is a wise policy no one will deny." In re Estate of Heywood, 154 Cal. 312, 317, 97 P. 825, 827.

[2] Appellant has not requested relief from his default and has given no ground upon which such relief could be granted; he merely suggests that we use our discretion. But, without a valid excuse for the

delay there is no room for an exercise of discretion. The Rules on Appeal are positive and clear and it becomes our duty to follow them.

Appeal dismissed.

DOOLING, J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



101 Cal.App.2d 292

PEOPLE v. HARTUNG.

Cr. 2209.

District Court of Appeal
Third District, California.

Dec. 20, 1950.

Robert W. Hartung was convicted in the Superior Court, Butte County, Harry Delrup, J., of conspiracy to violate the statute against pimping, the statute against keeping house of ill fame, and the statute against possessing slot machines and he appealed from the judgment and from an order denying his motion for new trial. The District Court of Appeal, Peek, J., held that prejudicial error resulted from the giving of certain instructions.

Reversed.

I. Criminal law ⇨763(1), 1172(2)

In prosecution on counts charging conspiracy to violate statutes against pimping, keeping house of ill fame, and possessing slot machines, where two defendants had first count dismissed as to them and pleaded guilty to second and appeared as witnesses for prosecution, giving of instruction that if conspiracy alleged was committed by anyone, then under evidence witnesses and defendants on trial were accomplices and giving of defendant's instruction defining accomplice as one liable to prosecution for conspiracy as alleged in indictment in effect directed verdict of guilty and were prejudicial. Gen.Laws, Act 1907; Pen.Code, §§ 315, 330a.

2. Criminal law $\Rightarrow$ 780(1)

In proper case jury should be instructed that testimony of accomplice should be viewed with distrust. Code Civ. Proc. § 2061, subd. 4.

3. Criminal law $\Rightarrow$ 1172(2)

In prosecution on counts charging conspiracy to violate statutes against pimping, keeping house of ill fame, and possessing slot machines, where two defendants pleaded guilty to second count and prosecution was dismissed against them as to first count, and they appeared as witnesses for prosecution and defendant testified on his own behalf, giving of instruction that if conspiracy alleged was committed by anyone, then under evidence witnesses and defendants on trial were accomplices, and giving of instruction that as a matter of law testimony of accomplice ought to be viewed with distrust produced a prejudicial result. Gen.Laws, Act 1907; Pen. Code, §§ 315, 330a; Code Civ.Proc. § 2061, subd. 4.

4. Criminal law $\Rightarrow$ 1172(1)

Where jury was misdirected upon matters of vital importance to defendant, judgment of conviction would be reversed.

Robert B. Kutz, Chico, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant Hartung from a judgment of conviction finding him guilty on three counts as charged in an indictment filed by the grand jury of Butte County and from the order denying his motion for a new trial.

Count 1 of the indictment charged appellant, together with Edgar Pippin, James Echols, John Pursell and Joe Slavicek, with conspiracy to violate Act 1907, Deering's General Laws (pimping). Count 2 charged all defendants with conspiracy to violate section 315 of the Penal Code (keeping a house of ill fame). Count 3 charged appellant and defendant Pippin with conspiracy to violate section 330a of the

Penal Code (possession of slot machines). Appellant and defendant Slavicek entered pleas of not guilty to each count. Defendant Echols and Pursell entered pleas of guilty to count 2 and not guilty to count 1. At the outset of the trial, upon motion of the district attorney, count 1 was dismissed as to defendants Echols and Pursell and they appeared as witnesses for the prosecution. Defendant Pippin was not apprehended and did not appear. The jury found appellant guilty on all counts and defendant Slavicek not guilty as to count 1. On count 2 the jury failed to reach a verdict as to Slavicek, and as to that count a mistrial was declared.

The appeal is directed solely at certain instructions. The sufficiency of the evidence to support his conviction as charged is not questioned hence we have not detailed the testimony as disclosed by the record.

[1] It is appellant's first contention that People's Instruction No. 10A, when read in conjunction with the third paragraph of defendant's Instruction No. 21 is tantamount to a directed verdict of guilty and therefore is prejudicial. Such contention appears to be well taken.

People's Instruction No. 10A, as it appears in CALJIC, from which it was taken, and as it was submitted herein, reads as follows: "If the crime of conspiracy, the commission of which is alleged in the indictments, was committed by anyone, then, under the evidence in this case and as a matter of law, the witnesses, John Pursell and James Echols were accomplices."

However, it was modified by the court to read: "If the crime of conspiracy, the commission of which is alleged in the indictments, was committed by anyone, then, under the evidence in this case and as a matter of law, the witnesses John Pursell and James Echols *and the defendants on trial, as well as the defendant, Pippin* were accomplices." (Italics ours.)

Defendant's instruction No. 21 was an elaboration of the definition of an accomplice and the necessity and degree of corroboration of the testimony of such a per-

son as provided in Section 1111 of the Penal Code. Specifically the third paragraph thereof reads as follows: "In this case an accomplice is one who is liable to prosecution for the crime of conspiracy, as alleged in the indictment on file in this case. All persons concerned in the commission of an offense and who aid and abet in its commission are accomplices regardless of whether they are arrested or indicted as principals or not."

As previously stated the record herein shows that under count 1 all five defendants were charged with conspiracy to violate Act 1907, Deering's General Laws. To that count all defendants entered pleas of not guilty. However, upon motion of the district attorney said count was dismissed as to defendants Echols and Pursell following their plea of guilty to count 2 which charged all five defendants with conspiracy to violate section 315 of the Penal Code. To this latter count Hartung and Slavicek entered pleas of not guilty. Count 3 charged Hartung and Pippin with violation of section 330a of the Penal Code, and to this count Hartung also pleaded not guilty.

Here it should be noted that Hartung, while testifying in his own behalf, referred to conversations with the district attorney wherein he was told that if he would plead guilty to certain counts, turn state's evidence and thereby assist in the conviction of Pippin, the district attorney would dismiss the remainder of the indictment; that he agreed to plead guilty to the gambling count but that he refused to admit any guilt as to the other counts.

It is difficult to conceive that the jury would not have found the first element of said Instruction No. 10A—the existence of a conspiracy—not only because of appellant's own testimony regarding count 3 but by reason of the admitted guilt of Echols and Pursell as to count 2. The jury were next told that if it so found, then the defendant Hartung, under the evidence, was, as a matter of law, an accomplice, and by Instruction No. 21 that being an accomplice he was a person concerned with and who had aided or abetted

the commission of the crime, and therefore whether he was arrested or not he was liable to prosecution for that crime.

In other words the conclusion is incapable that under the particular situation presented and the evidence adduced at the trial, the jury, by virtue of said instructions, was for all practical purposes directed to find that defendant Hartung was guilty as charged as a matter of law.

Appellant next contends that said Instruction No. 10A, when read in conjunction with defendant Slavicek's Instruction No. 23, again produces a prejudicial result. Instruction No. 23 reads as follows: "As a matter of law the testimony of an accomplice ought to be viewed by you with distrust."

[2, 3] It is the rule that in a proper case the jury should be instructed that the testimony of an accomplice should be viewed with distrust, and the Code of Civil Procedure, section 2061, sub. 4, so provides. However, it is error to give such an "instruction when an accomplice is called as a witness on behalf of the defendant * * * as its effect is to discredit one of defendant's witnesses and thereby * * * trench upon his constitutional rights by invading the province of the jury." 8 Cal.Jur. pp. 303-304 and cases there cited. Surely such an instruction is no less prejudicial when the defendant testifies in his own behalf.

Respondent, however, argues that not alone because of the over-whelming weight of the testimony against appellant, but also because of the charge as a whole and particularly defendant Slavicek's Instruction No. 11, the error, if any, which resulted therefrom, could not have been prejudicial. In any event it was cured by said Instruction No. 11, which reads as follows: "The defendants are competent witnesses in their own behalf, and you have no right to discredit their testimony from caprice, nor merely because they are defendants. You are to treat them the same as any other witness, and subject them to the same tests, as are legally applied to other witnesses, and while you have the

right to take into consideration the interest they may have in the result of this trial, you have also the right, and it is your duty, to consider whether they have been corroborated by other credible evidence."

Obviously the jury could not weigh defendant's testimony by the same tests and standards as would apply to any other witness and at the same time view his testimony or that of his witness with distrust. The result in the minds of the jurors could have been no less confusing than was the situation presented to the jury in *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828. There the jury was first instructed that the testimony of an accomplice should be viewed with distrust and by a succeeding instruction it was told that the credibility of an accomplice was to be judged by the same standard as that applicable to any other witness. In holding such instructions to be erroneous, the court stated, 22 Cal.2d at page 653, 140 P.2d at page 834: "The giving of a formal instruction which stated the statutory rule did not cure the error, but instead created a serious conflict, which would normally have the effect of misleading the jury. It must be remembered that the strongest witnesses for the prosecution were the accomplices, and without their testimony the conviction could hardly have been possible. This being so, it was of the utmost importance that the jury be correctly advised as to the standards by which such testimony was to be weighed. Instead, the jury was misdirected by a clear and specific statement which in effect nullified the previous formal instruction, and no attempt was made to relate the two or explain the inconsistency. The result must inevitably have been a confusion in the jurors' minds on a matter vital to the judgment. Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. See for example: *Wells v. Lloyd*, 21 Cal.2d 452, 457, 132 P.2d 471; *Jolley v. Clemens*, 28 Cal.App.2d 55, 73, 82 P.2d 51; *Soda v. Marriott*, 118 Cal.App. 635, 643, 5 P.2d 675; 8 Cal.Jur. 633."

[4] Thus, here, as in the *Dail* case, the jury was misdirected upon matters of vital importance to the defendant, and for that reason the judgment must be reversed.

Since the judgment must be reversed because of the prejudicial error resulting from the giving of the instructions herein mentioned it becomes unnecessary to discuss the remaining questions raised by appellant.

The judgment and the order appealed from are reversed.

ADAMS, P. J., and VAN DYKE, J., concur.



101 Cal.App.2d 248

**TYRA v. BOARD OF POLICE AND FIRE
PENSION COM'RS OF CITY OF
LONG BEACH, et al.**

Civ. 17736.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Rehearing Denied Jan. 8, 1951.

Hearing Denied Feb. 15, 1951.

Proceeding by Joseph W. Tyra for a writ of mandate to compel the Board of Police and Fire Pension Commissioners of the City of Long Beach, and members thereof, to grant him a disability pension. The Superior Court, Los Angeles County, Fred Miller, J., rendered judgment for defendants, and petitioner appealed. The District Court of Appeal, Moore, J., held that petitioner was estopped by his contrary course through two former trials and appeals, from obtaining a pension for period immediately following his injury.

Judgment affirmed.

I. Appeal and error — 837(12), 931(1)

While evidence rejected by trial court is not considered on appeal in determining whether judgment is supported, every reasonable and deducible inference and presumption favorable to the judgment are invoked.

2. Appeal and error ⇨1010(1)

If the appellate court determines that there is any substantial evidence to support a finding, a judgment cannot be reversed upon the asserted insufficiency of the evidence.

3. Evidence ⇨43(2)

District Court of Appeal would take judicial notice of inconsistent allegations by a petitioner in his several petitions and appeals in prior cases.

4. Estoppel ⇨68(2)

Where disabled fireman contended in pleadings and arguments in other cases between years 1942 and 1949 that he was not so disabled during 3 year period following his injury that he could be required to retire, he could not subsequently reverse his position in a later proceeding and recover a disability pension for that 3 year period.

5. Estoppel ⇨68(2)

If disabled fireman was not foreclosed by doctrine of *res judicata*, from obtaining a pension for period prior to time in which he contended in pleadings and arguments in other cases that he was not so disabled following his injury as to necessitate his retirement, he was estopped and was in no better position than a litigant who in course of an appeal or on a second trial changes his theory from that originally asserted as basis for recovery.

6. Estoppel ⇨68(1)

Departures from a position once seriously declared in prior proceedings are not to be tolerated.

Kenneth Sperry, Long Beach, for appellant.

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for respondents.

MOORE, Presiding Justice.

By his second amended and supplemental petition appellant sued for a writ of mandate to compel respondents to grant him a disability pension from February 8, 1937, to February 1, 1940. From an adverse judgment he brings this, his third, appeal.

While engaged in the discharge of his duties as a fireman of the city of Long Beach on February 8, 1937, appellant sustained severe bodily injuries. On August 26, 1942, by his original petition, he sought to enforce his claim for a pension from February 1, 1940, and for such further payments as might become due him in accordance with section 187 of the City Charter of Long Beach. The judgment that his petition did not state a cause of action was reversed. 71 Cal.App.2d 50, 162 P.2d 35. Upon the second trial the court found that appellant was so permanently disabled as to render his retirement from active service necessary as of November 30, 1937, but since more than three years had elapsed prior to the filing of his claim, his action was barred by the three-year statute of limitations. That judgment was reversed September 29, 1948. 32 Cal.2d 666, 197 P.2d 710. Appellant filed another application for a disability pension with the city council which had in March, 1945, taken over the duties of the Board of Police and Fire Pension Commissioners. That body granted appellant a disability pension, commencing on February 1, 1940, instead of February 8, 1937, and ordered that the applicant was not entitled to a pension from the earlier date by reason of the decision of the Supreme Court last cited. Thereupon appellant filed his Second Amended Complaint. The issues of fact presented to the courts on each of the first two trials and on both appeals are significant and bear mightily upon the matters involved on this appeal.

During the course of the litigation there has been a controversy as to the extent of appellant's disability from the time of the accident until October, 1939, when he suffered a surgical operation with a view to removing the lingering effects of his injuries. In February, 1940, he was advised that his disability was of such a permanent nature that he would be unable ever to resume any duties as a fireman. Upon the third trial the court determined that prior to February, 1940, appellant was not so disabled as to render necessary his retirement from active service and that respondents had not abused their discretion

in denying appellant's application for pension prior to February 1, 1940.

[1, 2] The appeal is met at the threshold by three insurmountable handicaps. It is contended that the evidence supports the finding that appellant's disability was not such as to necessitate his retirement from active service and that he was able to perform certain duties required of a fireman between February 8, 1937, and February 1, 1940. While some of the proof strongly favors the claim of appellant, it is not that to which the reviewing court must look. On appeal, while evidence rejected by the trial court is not considered in determining whether the judgment is supported, yet every reasonable and deducible inference and presumption favorable to the judgment are invoked. *Ahern v. S. H. Kress & Co.*, 97 Cal.App.2d 691, 218 P.2d 108. It has become axiomatic that a judgment cannot be reversed upon the asserted insufficiency of the evidence if the appellate court determines that there is any substantial evidence to support the finding. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; *Crawford v. Southern Pacific Company*, 3 Cal.2d 427, 429, 45 P.2d 183.

While under examination by the court, appellant testified that in 1937 after his injury he could have made an effort to perform the duties of a dispatcher which was a sitting job. During that year he called upon the fire chief more than once and asked to be assigned to duty in the department. One physician who treated appellant in 1939 testified that he could sit at a desk but that the amount of work he could do would have been dependent upon the degree of pain he suffered. Two other doctors were unable to venture an opinion as to whether he could perform such duties. If physicians cannot tell whether appellant could have performed tasks such as that of dispatcher, after the injury and prior to February 1, 1940, since he himself urged his return to duty, it was a reasonable inference that pain would not have prevented the performance of his duties. Not only did appellant seek a return to his work as fireman, but throughout his continuous

effort to establish his rights, through the two former trials and the appeals from the adverse judgments, appellant earnestly contended that his disability was not such as to require his retirement until February, 1940. In his original petition he alleged "at first said injury did not appear to be particularly serious, although it did incapacitate petitioner from performing several of the duties required of him as a fireman * * * that his injuries were of a temporary nature and necessitated only a temporary cessation of his regular duties." On the first appeal, Mr. Justice Fox in commenting upon such pleading made the observation that "These allegations certainly do not indicate that his disability was, prior to February, 1940, such 'as to render necessary his retirement from active service.' On the contrary, the clear implication is that he was able to perform certain of his duties." 71 Cal.App.2d 53, 162 P.2d 37.

Subsequent to the return of the remittitur, appellant amended his petition (January, 1946) alleging that his "injury did not appear to be particularly serious * * * that prior to February, 1940, petitioner was of the opinion and had been advised by his attending physicians that his injuries were of a temporary nature and that he would be able to resume his duties within a short time." By that amended petition, appellant contended that he was entitled to a pension beginning in February, 1940. From the judgment declaring that the petitioner became so disabled as to necessitate his retirement in November, 1937, Tyra appealed. In his brief he declared, "the evidence without substantial dispute reveals that appellant's physical condition did not become such as to necessitate his retirement from active service until February 1, 1940 * * * the foregoing evidence is entirely inconsistent with the findings of the trial court, which are to the effect that on or before the 30th day of November, 1937, the petitioner was totally and permanently disabled as a direct and consequent result of said injuries. * * *

The evidence without dispute establishes the fact that appellant was experienced in

the Fire Alarm Bureau, and that at no time prior to his operation in October of 1939 was his physical condition such that he was unable to perform the duties attendant upon this position." He repeated such contentions in his petition for hearing in the Supreme Court. In its opinion, 32 Cal.2d 669, 197 P.2d 712, that tribunal declared, "plaintiff's possible limited capacity to perform certain duties in the fire department indicated an absence of necessity for his retirement".

[3,4] The evidence of appellant's pathetic condition, viewed most strongly in his favor is an eloquent plea for any relief that might be extended. But it is not that evidence that governs this decision. Appellant has heretofore contended with effect the very contradiction of his present arguments. He is in the anomalous position of requesting the court to reverse itself and to grant him a pension for the period prior to 1940 even though he contended at two former trials that he was not so disabled as to require retirement during the three-year period following his injury. On the basis of his inconsistent allegations alone in his several petitions and appeals the trial court was warranted in finding against his contentions. Such allegations are before the court under the doctrine of judicial notice. *Gackstetter v. Market Street Railway Company*, 10 Cal.App.2d 713, 716, 52 P.2d 998. If between the years 1942 and 1949 he seriously contended in pleadings and arguments that he was not so disabled following his injury as to necessitate his retirement he can lay his undoing to a most unfortunate practice of trying to achieve by contradictory courses.

[5,6] In fact, if it may not be said that appellant is foreclosed by the doctrine of res judicata, clearly he is estopped by his contrary course through two former trials and appeals. He is in no better position than that litigant who in the course of an appeal, or on a second trial, changes his theory from that originally asserted as the basis for recovery. Such departures from a position once seriously declared are not to be tolerated. *Adams v. Petroleum Mid-*

way Company, 205 Cal. 221, 225, 270 P. 668. There is no judicial action that can under existing ordinances gratify appellant's litigious longings.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.



101 Cal.App.2d 526

ROSENBERG et al. v. BERRY et al.

Civ. 14302.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1950.

Wrongful death action by Jennie Rosenberg, and others, against Clarence E. Berry and John Howard. The Superior Court in and for the City and County of San Francisco, William F. Traverso, J., rendered judgment on verdict for plaintiffs, and the defendants appealed. The District Court of Appeal, Schottky, J., pro tem, held that the evidence warranted a finding that the automobile driver was an agent operating the automobile as an employee of the defendant owner at time of accident in which plaintiffs' decedent was killed.

Judgment affirmed.

1. Automobiles ⇨244(26)

Evidence warranted finding that automobile driver was agent operating automobile as employee of defendant owner at time of accident in which plaintiffs' decedent was killed. Vehicle Code, § 402.

2. Death ⇨99(1)

\$18,000 for death of 64 year old man who had life expectancy of either 11.67 years or 15.4 years and who had given his wife \$40 a week from his earnings for household expenses was not excessive.

Francis N. Foley, San Mateo, for appellants.

Elmer P. Delany, Martin J. Jarvis, San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

Plaintiffs, heirs of Max Rosenberg, commenced an action for the wrongful death of the latter against defendants Berry and Howard. At the trial defendants stipulated that Max Rosenberg was injured and died as the result of the negligent operation of the automobile by defendant Berry, and that Berry was operating it with the permission of the owner, defendant Howard. The only issues left for determination were the amount of damages and whether the defendant Berry at the time of the accident was driving the automobile as an agent or employee of defendant Howard.

At the conclusion of the testimony defendant Howard moved the trial court to instruct the jury that the verdict against said defendant owner could not (under Vehicle Code, § 402) exceed \$5000, which motion was denied by the court. The jury returned a verdict against both defendants for \$18,000, a motion for a new trial was denied, and both appellants have appealed from the judgment.

Only two grounds are urged by appellants: 1. There is no substantial evidence sufficient to support the implied finding of the jury that defendant Howard was liable for defendant Berry's negligence under the doctrine of respondeat superior; and 2. The damages are excessive.

In view of the fact that the sufficiency of the evidence is the principal question involved, we shall first give a brief summary of the factual situation as disclosed by the record.

At the date of the accident, September 26, 1947, defendant John Howard was engaged in the used car business with a silent partner, Monroe McNaughton, under the name of Mid-Valencia Motors, 1236 Valencia Street, San Francisco. At that date and for about one year and five months prior thereto, Clarence Berry had been employed by Howard as a salesman. He testified that his duties also included cleaning and washing the cars, that his salary was \$300 per month and that his working

hours were from 8:30 a. m. to 6:30 p. m. Berry did not own an automobile at the time, but testified that there was an understanding that he could take any car he wanted from the lot, and that he usually parked whatever car he was using in front of his hotel all night.

Sometime during the day of September 26, 1947, the date of the accident, a 1937 Oldsmobile 8 sedan arrived at the Mid-Valencia Motors, having been purchased by the silent partner, McNaughton. At about 6:30 p. m. on that day, Berry left the lot driving the aforementioned Oldsmobile. He called for a friend Miss Sanders, took her to dinner, and then drove out to the home of Charles Huber, who lived near Daly City. Huber was a used car dealer with whom, according to the testimony of both Berry and Howard, there had been a course of business dealings in regard to buying and selling of used automobiles and the exchange of business information by Howard personally as well as through his employee, Berry. Berry testified that the purpose of his call on this occasion was "social". He left Miss Sanders sitting in the car in front of Huber's house. According to Miss Sanders' testimony, she had on prior and subsequent occasions gone to Huber's house with Berry. Huber was not at home. Berry then drove to the home of defendant Howard. He testified that he had probably told Howard that he would drop in on Howard that evening, that it wasn't definite. On recross-examination his deposition taken in February 1948 was read to him in which he testified that he had told Howard that he would be by his house that evening. Howard was not home when Berry and Miss Sanders arrived. Mrs. Howard served them a cocktail, while they waited about an hour until Howard arrived at about 9 or 9:30, according to Miss Sanders; 10 p. m. according to Berry. They remained at the Howard home until about 11:30 p. m. The accident occurred on Mission Street while Berry was enroute from the Howard residence to Miss Sanders' home. Berry testified that after the accident that night he returned the car to Howard's place of business, although he had originally intended to

park it at his hotel. The reason given for changing his mind was that because he was upset and disgusted he decided to walk home.

Howard in testifying did not clearly recollect when the Oldsmobile was acquired, but thought it had been procured about two days before the accident, but later, after examination of his records, he acknowledged that it was acquired on the day of the accident. Howard stated that he and Berry left the lot about the same time on the evening of September 26, 1947, that he didn't know whether or not Berry drove away in the 1937 Oldsmobile. When recalled as a witness for plaintiffs, and having had an opportunity to look over his records, Howard recalled that the Oldsmobile was delivered to his used car lot on September 26, but could not recall who delivered it or the time of day that it was delivered. Both he and Berry denied that Berry called for the car at the place of purchase. When Howard was asked if he met Miss Sanders for the first time when Berry brought her to the Howard home he replied, "No, I believe she was in the place of business before." However, Miss Sanders testified that she had been to Howard's home before the night of the accident with Mr. Berry, but never since that time.

Howard, Berry and Miss Sanders all testified that Berry's call at Howard's home was social. Berry stated he sometimes went out to play cards at Howard's, and that he also occasionally played cards at Huber's home. Neither Huber nor Mrs. Howard were called as witnesses.

Howard stated positively that he had no understanding with Berry about Berry coming to his home on September 26, that he did not even know he was coming out that night. Berry in both his deposition and his testimony at the trial stated that he had talked with Howard about calling there that evening.

We shall first discuss appellants' contention that the record does not support the implied finding of the jury that appellant Berry was acting as the employee or agent of appellant Howard at the time of the accident. Appellants assert that respondent

relied solely on the inference that Berry was acting as the employee of Howard because he was driving an automobile owned by his employer, Howard.

In the case of *Bushnell v. Yoshika Tashiro*, 115 Cal.App. 563, at page 565, 2 P.2d 550, (hearing denied) the court said:

"The decisions are uniform in holding that, in an action for damages against an employer for personal injuries caused by the negligence of his employee while operating the employer's automobile, proof that the automobile belonged to the employer and at the time of the accident was being operated by the employee, raises an inference sufficient to establish a *prima facie* case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment, and that the burden is then upon the defendant to overcome or dispel such inference by proof of facts to the contrary. Among the numerous cases so holding are *McWhirter v. Fuller*, 35 Cal.App. 288, 170 P. 417; *Brown v. Chevrolet Motor Co.*, 39 Cal.App. 738, 179 P. 697; and *Wagnitz v. Scharetz*, 89 Cal.App. 511, 265 P. 318. And it is further held that such inference is not destroyed or overcome as a matter of law merely because it is contradicted by the testimony of the employee or of other witnesses produced on behalf of the defendants, but that the issue remains one of fact for the determination of the jury, for the reason that, as sole judges of the weight of the testimony and the credibility of the witnesses, the members of the jury are not bound to accept such testimony as true, but may, if not convinced thereby, reject any portion or the whole thereof. (Citing cases.)"

In *Westberg v. Willde*, 14 Cal.2d 360, at page 371, 94 P.2d 590, 596, the court said:

"The defendant Talsky further contends that the court erred in refusing to direct a verdict for him on the ground that Willde was not acting in the scope of his employment when the accident took place. The facts that Willde was an employee of Talsky and driving a car owned by him, give rise to an inference that Willde was acting

in the scope of his employment. *Pozzobon v. O'Donnell*, 1 Cal.App.2d 151, 36 P.2d 236; *Kruse v. White Bros.*, 81 Cal.App. 86, 253 P. 178; *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198. This inference was not dispelled as a matter of law by the evidence."

In *Nash v. Wright*, 82 Cal.App.2d 467, at page 474, 186 P.2d 686, 690, the court said:

"Moreover, the truck was driven by Belyea's employee. It is not to be denied that in an action for personal injuries caused by the negligence of an employee while operating his employer's motor car, it is reasonable to infer that the use of the vehicle was authorized by the owner and that the employee was acting within the scope of his employment. *Shields v. Oxnard Harbor District*, 46 Cal.App.2d 477, 487, 116 P.2d 121; *Bushnell v. Tashiro*, 115 Cal.App. 563, 565, 2 P.2d 550; *Blank v. Coffin*, 20 Cal.2d 457, 460, 126 P.2d 868. The general manager of Belyea testified that Wright was in the employ of Belyea on November 15, and that he was at the shop all day of the 14th."

In *Blank v. Coffin*, supra, 20 Cal.2d at page 460, 126 P.2d at page 870 the court said:

"An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. Cal.Code Civ.Proc. §§ 1958, 1960, 1832; see cases cited in 10 Cal. Jur. 736-738, § 59. It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn,

in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738-739, § 60."

That an inference of agency arose under the facts of the instant case is clear. Appellants contend that said inference was wholly dispelled by "clear, positive and rationally believable testimony." Appellants cite *Maupin v. Solomon*, 41 Cal.App. 323, 183 P. 198, a case in which the court was able to say that the testimony was so clear, uncontradicted, and unequivocal, that the court could hold as a matter of law that the inference had been rebutted. The employee in that case, after having spent the afternoon of a legal holiday in recreation at the Elks Club, took some friends riding and crashed into a parked car at a high rate of speed. Apparently there was no testimony in the case that there was any business relationships with the friends who were accompanying him, or that, as in this case, he was spending the evening in calling upon people with whom business relationships existed.

Appellants also cite *Hicks v. Reis*, 21 Cal. 2d 654, 134 P.2d 788, 791, and notes that the court there quoting from *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868, said: "If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law," citing *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059; *Crouch v. Gilmore Oil Co., Ltd.*, 5 Cal.2d 330, 54 P.2d 709; *Maupin v. Solomon*, 41 Cal.App. 323, 183 P. 198." The remainder of the paragraph not quoted by appellant continues as follows: "In the same case, after pointing out that the jury is the sole judge of the credibility of the witnesses and may disbelieve an uncontradicted witness if there is any rational ground for doing so, the court stated 20 Cal.2d at page 461, 126 P.2d [868] 870: 'In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference.'"

We are convinced from a careful reading of the record in the instant case that it cannot be held as a matter of law that the inference of agency was rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. We are convinced also that even in the absence of the inference the jury might well have concluded from the evidence that on the night of the accident Berry was on a mission for his employer.

Enough discrepancies and contradictions appear in the accounts of the three witnesses whose testimony has been discussed above, aside from considerations of motive, to demonstrate that the state of the record is not such that this court must say as a matter of law that the testimony could not rationally be disbelieved. Rationally, the jury could not believe all of them. If they believed Howard when he said he was not expecting Berry to come to his home the night of the accident, they could not have believed Berry when he said that he had told his employer that he would be by there that evening. Berry testified that he had an understanding with his employer about dropping in on him that evening socially; but Berry went first to Huber's home on what he insisted was a social call, driving the car which had been acquired that very day; not finding Huber at home he went on to his employer's home and had to wait some time before Howard returned. Howard denied that there was any understanding that Berry was to call on him that evening. Both Howard and Berry admitted to business dealings with Huber. From this state of the evidence the jury may well have concluded that Berry was asked to take the car that had been purchased that day out to Huber to see if he had a customer for it, and that Howard did not arrive home for sometime after Berry's arrival, because he had expected Berry to spend some time with Huber. Howard was not called by the defense to testify to a course of social relationships with Berry. And although Berry's friend, Miss Sanders said she had been to Howard's

home with Berry before, Howard only testified to having seen her on one prior occasion, and that was at his *place of business*. Huber was not called by the defense to testify to a course of social relationships with Berry. The trial judge in passing on appellant's motion to limit the verdict commented on how very nervous one of the witnesses appeared in testifying. The demeanor of the witnesses was of course observed by the jury, and testimony that may appear very convincing in print, may not be at all convincing to a jury because of the witness' manner of testifying.

[1] We conclude that the implied finding of the jury that appellant Berry was the agent operating the automobile as employee of appellant Howard at the time of the accident finds ample support in the record.

[2] Appellants' final contention that the amount of damages awarded is excessive has little merit. The victim of the accident was 64 years of age with a life expectancy of 11.67 years according to one set of mortality tables and 15.4 years according to another. According to the widow's testimony, he had given her from his earnings an average of \$40 a week to run the house, that he was a good husband, that she had never had to work in all the years of her marriage to him. With a life expectancy of just 11 years and earnings of \$40.00 a week an award in excess of the \$18,000 awarded by the jury would be sustained by the evidence. There was also evidence of medical and burial expenses totalling more than \$1300. Furthermore the denial by the trial court of appellants' motion for a new trial indicates that he did not believe the amount awarded to be excessive. Certainly there is nothing in the record to justify us in saying that the amount awarded is such as to suggest passion or prejudice on the part of the jury.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.

101 Cal.App.2d 361

**KENT v. FIRST TRUST & SAVINGS
BANK OF PASADENA.**

In re McKEE'S ESTATE.

Civ. 17475.

District Court of Appeal, Second District,
Division 2, California.

Dec. 22, 1950.

Action by Herbert Kent against First Trust & Savings Bank of Pasadena, a banking corporation, as executor of the estate of Mara McKee, deceased, to recover on a rejected claim on a promissory note signed by deceased. Defendant alleged affirmative defenses that there was no consideration for the note and that the note was obtained by undue influence. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that royalty deeds from decedent to plaintiff and which plaintiff allegedly did not record as consideration for the note, were obtained by undue influence and did not constitute a valid consideration.

Judgment affirmed.

1. Bills and notes ⇨493(4)

Evidence ⇨419(1), 432

The presumption that a promissory note is given in exchange for a sufficient consideration is rebuttable, and failure of consideration or actual consideration may be proved by parol evidence. Code Civ. Proc. § 1963.

2. Executors and administrators ⇨449

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, where executor pleaded affirmative defense that note was procured without consideration, but plaintiff asserted consideration for the notes was his agreement not to record certain royalty deeds he received from decedent but to reconvey them to decedent, validity of royalty deeds was in issue.

3. Bills and notes ⇨92(6)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, where executor pleaded affirmative defense that note

was procured without consideration, but plaintiff asserted that consideration for note was his agreement not to record eight royalty deeds he received from decedent but to reconvey them to decedent, if deeds were obtained by undue influence, they could not be a valid consideration.

4. Evidence ⇨434(3)

Where validity of a deed is in issue, parol evidence is always admissible to show fraud. Code Civ. Proc. § 1856.

5. Evidence ⇨591

The rule that a party who introduces documentary evidence is not allowed to impeach or contradict it, but is bound by its recitals for all purposes, does not apply where a document is introduced for purpose of impeaching it on the ground of fraud. Code Civ. Proc. § 1856.

6. Executors and administrators ⇨221(9)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, evidence established that a confidential relationship existed between plaintiff and decedent.

7. Trusts ⇨110

The amount of evidence necessary to establish a confidential relationship ordinarily rests with the trier of facts, and it is not essential to show a relationship by affinity or consanguinity, or that business transacted established a particular relationship between the parties, but if parties are friends, and grantor reposes confidence in grantee, and grantor is of advanced age, an implied trust may result.

8. Trusts ⇨107

Where a confidential relation exists, and one of parties to relationship has shown great activity in procuring the execution of instruments by which he or she greatly benefits by the transaction, activity of such person becomes an important factor for court or jury to consider in determining whether transaction was free from undue influence, and if such relations are found to exist, burden of showing that no undue advantage was taken shifts to the other side.

9. Evidence Ⓒ317(18)

Alleged declarations of a deceased grantor are the weakest evidence that may be produced.

10. Executors and administrators Ⓒ59

It is presumed that a decedent would contradict testimony of living witness that during her lifetime decedent gave away her property.

11. Trusts Ⓒ107

In action against executor of estate to recover on a rejected claim on a promissory note signed by a decedent, evidence established as a fact that relationship between plaintiff and decedent was a confidential one, and burden was upon plaintiff to overcome presumption of undue influence by evidence that would be clear, positive, uncontradicted and of such a nature that it could not rationally be disbelieved.

12. Trusts Ⓒ110

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, plaintiff failed to sustain burden that decedent gave him deeds for services rendered and that plaintiff did not record deeds at her request as consideration for the note.

13. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, testimony of transactions between plaintiff and third party and whether third party received any money or checks between certain periods of time, was admissible to impeach plaintiff's testimony that he had rendered kindnesses and services to decedent and to show inception of confidential relationship between plaintiff and decedent, the formation of a scheme and conspiracy to defraud decedent and that plaintiff sought decedent's confidence to obtain her property. Code Civ. Proc. § 1870 subd. 15.

14. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, admission of testimony by a third party concerning his visit to bank where decedent kept her

securities which proved existence of confidential relationship between plaintiff and decedent and obtaining of decedent's property through scheme, artifice and fraud, was not erroneous.

15. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, admission of a cashier's check and testimony of third party that check represented a part of purchase price of land which he and plaintiff had sold to decedent indicated plaintiff's course of conduct in profiting from confidential relations with decedent and provided basis for an inference by jury of abuse and violation of that confidence, and was not erroneous.

16. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, admission of testimony by decedent's physician concerning his professional services to her during time note was signed, was pertinent to determination of decedent's mental condition, which was an issue, and was not error.

17. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, admission of testimony by witness that plaintiff had stated to him that he had destroyed all documents decedent had signed, which tended to indicate a guilty knowledge by concealment, was not error.

18. Executors and administrators Ⓒ221(3)

In action against executor of estate to recover on a rejected claim on a promissory note signed by decedent, admission of testimony by third party that he gave plaintiff a commission on a sale to decedent of certain oil royalties, which indicated influence plaintiff exerted over decedent to extent that she invested large sums of money in whatever he chose to have her purchase, was not error.

19. Executors and administrators Ⓒ451(3)

In action against executor of estate to recover on rejected claim on a promissory note signed by decedent, where there was

evidence of undue influence by plaintiff in obtaining certain royalty deeds, which he allegedly failed to record in consideration for the note, instructions, relating to fraud or undue influence as to the deeds, were not erroneous.

20. Trial $\Rightarrow$ 203(1), 260(1)

The jury must be fully and fairly instructed on all issues presented, and the court is not required to give every instruction requested even if, considered by itself, it may state a correct and pertinent principle of law.

21. Trial $\Rightarrow$ 260(1)

Where all instructions given substantially covered omitted instructions, and given instructions correctly stated the law, refusal to give omitted instructions did not constitute reversible error.

22. Trial $\Rightarrow$ 260(1)

If subject matter of proposed instructions is substantially incorporated in others which court has given, it is not error to refuse a requested instruction.

Daly B. Robnett and Benjamin F. Kosdon, Los Angeles, for appellant.

Reynolds, Painter & Cherniss, Los Angeles, for respondent.

WILSON, Justice.

Ignoring the established rule that on appeal this court will view the evidence in the light most favorable to the prevailing party, plaintiff-appellant in this action has recited only that evidence which is favorable to him.

The action was brought against the executor of the estate of Mara McKee, deceased, to recover on a rejected claim on a promissory note signed by decedent. Plaintiff is appealing from the judgment after a verdict in favor of defendant.

The note, for the principal sum of \$30,000, is dated November 4, 1943, payable to plaintiff's order three years after date, with interest at the rate of two percent per annum payable at maturity. Mrs. McKee died prior to the maturity date of the note

and no payments of either principal or interest had been made thereon.

As affirmative defenses defendant alleged that (1) there was no consideration for the note and (2) it was obtained by undue influence.

Mara McKee was a wealthy widow, leaving at her death an estate worth in excess of a half million dollars. Her assets consisted mainly of government and mining corporation bonds, corporate shares in select insurance and oil companies and cash. On February 1, 1941, she had appointed defendant her agent for the management of her estate.

For some years preceding her death she was under regular medical care and treatment. Among other afflictions she suffered from high blood pressure and in June, 1943, she had a slight stroke. She had periods of mental confusion and during 1942 and 1943 there was a gradual decline and breakdown in her physical and mental powers. She suffered from lapses of memory with increasing frequency. At the time she executed the note she was about 77 years of age.

Plaintiff was about 57 years of age when he first met Mrs. McKee in August, 1940. He had had wide experience in various phases of the oil and gas business in California, including the drilling of wells and the selling of oil lands in various counties. He arranged an introduction to her pursuant to a scheme concocted with one Harry White for the purpose of selling her speculative oil lands which White had sought unsuccessfully to interest her in purchasing during the month of July, 1940. White had no interest in these lands but had an arrangement whereby he could procure deeds on paying the sum of \$40.00 an acre to an individual who owned various parcels of land in Kings County.

White told plaintiff that Mrs. McKee was a wealthy widow and that it would be necessary to obtain her confidence before attempting any sale to her. Shortly after meeting Mrs. McKee plaintiff told White that "the lady would be pretty good for a big deal." Plaintiff and White then dis-

cussed the most feasible method of selling her the land and agreed between them that the approach should be made by plaintiff's introducing White to Mrs. McKee; that White would represent to her that he was blocking out oil lands for large companies and that she had an opportunity to make an advantageous purchase. Actually, White was not employed by any oil company which plaintiff well knew. Although some of the major oil companies owned property in Kings County and had drilled for oil, none of them had any flowing wells. In fact no oil had ever been discovered in that locality.

Plaintiff called at Mrs. McKee's residence and by prearrangement White telephoned him there requesting permission to see him at her home. White then came to the house and was introduced to Mrs. McKee, who failed to recognize him although but a month previously he had endeavored to sell her speculative oil lands. Plaintiff told Mrs. McKee that White was blocking out lands for major oil companies and that plaintiff had persuaded White to "let her in on the ground floor." Mrs. McKee agreed to purchase 160 acres which she would pay for by securities which she had in her safety deposit box. White and plaintiff accompanied her to the bank and she handed plaintiff a group of securities telling him to pick out whatever stocks he desired. Plaintiff selected certificates representing 200 shares of Corn Products Company which Mrs. McKee endorsed and gave back to him. Plaintiff transferred them to White, who sold the shares for approximately \$33,800 and out of the proceeds paid \$6,200 to purchase the property which was conveyed to Mrs. McKee and \$16,200 to plaintiff as his share of the profits, retaining the balance.

At the conclusion of the first transaction plaintiff stated to White: "Before we are going to be through with this lady we should be able to get at least a quarter of a million dollars." Plaintiff knew that Mrs. McKee had some Standard Oil stock and he suggested to White that they try to sell her some additional land. Using the same tactics they had used in the first sale they succeeded in selling her 20 acres for which

she delivered to White 240 shares of Standard Oil Company stock. He sold this stock for \$4,400 and paid \$800 for the land which was conveyed to Mrs. McKee and \$1,950 to plaintiff as his share, keeping the balance of the proceeds, amounting to \$1,650, for himself.

Two or three weeks later plaintiff and White in the same manner induced Mrs. McKee to purchase an additional 30 acres of land from White who paid plaintiff \$1,800 for his efforts.

After the third transaction Mrs. McKee took a trip to Chicago. At that time plaintiff was in New York and upon learning that she was in Chicago he telephoned White to meet him there, stating that Mrs. McKee kept the bulk of her securities in Chicago and that she had about \$60,000 worth of Canadian oil securities which she had told him she was willing to exchange for California properties. White immediately went by airplane to Chicago, meeting plaintiff there the following day. They called upon Mrs. McKee and upon plaintiff's suggestion she agreed to exchange the Canadian bonds for land in California. Before the transaction was consummated, however, Mrs. McKee was advised by her Chicago banker not to make the purchase. She asked plaintiff and White to discuss the matter with her banker, stating that if he would recommend it she would be glad to turn over the stock to them. Plaintiff thought they might invite trouble with respect to the prior sales if they did not comply with her request and therefore sent White who called upon the banker and assured him that they would not sell Mrs. McKee any more speculative investments.

Shortly after their return from Chicago, and in order to recoup the expenses of that trip the two men, using the same methods they had previously followed, persuaded Mrs. McKee to purchase 30 acres of land in exchange for Standard Oil Company stock. Plaintiff told her there was one parcel of real property left in which a major oil company was interested but he had persuaded White to allow her to purchase it. Plaintiff's profit on this transaction amounted to \$1,900.

After the latter sale White did not participate in any further sales to Mrs. McKee. Having taken in excess of \$50,000 from her he felt that was sufficient and informed plaintiff he did not want to have any further transactions with her. Plaintiff replied that if White did not want to continue making sales to her "I will get somebody else who will."

After the termination of his association with White, plaintiff continued his relationship with Mrs. McKee. He was already addressing her as "Lady Mara" or "Lady McKee." He continued to visit her home at least once a week during 1941, and more frequently in 1942. He dined with her at her home and in public places. He borrowed sums of money from her without security from time to time which by 1943 had totaled as much as \$5,000. This was during the time when Mrs. McKee had periods of mental confusion, lapses of memory and when there was a gradual decline and breakdown in her physical and mental powers.

During 1942 plaintiff introduced one Kay Stone to Mrs. McKee. Stone, whom plaintiff had known for many years, was a real estate broker and was associated with one Johnston. Through their joint efforts sales of oil royalties to Mrs. McKee were effected for a purchase price of \$21,000. Out of this transaction Stone received a commission which he shared with plaintiff, giving him approximately \$1,550. Subsequently Johnston sold some additional royalties to Mrs. McKee. During April of 1943, plaintiff obtained from Mrs. McKee the legal description of one of the royalty interests which she had in her possession, the other instruments being in the possession of her bank. Plaintiff prepared a document for her signature authorizing him to examine the royalty interests held by the bank. He presented this authorization to the bank stating that he desired to see the descriptions on the ground that the royalties were sold to her at too great a profit. Plaintiff was shown and learned the value of the royalties and the dividends which were being paid thereon. The eight royalties had been purchased from Johnston at a total cost of \$38,892. Plaintiff by

means of a second authorization obtained from the bank photostatic copies of the conveyances of the mineral interests. He thereupon prepared four mineral deeds and four sales of oil and gas royalty instruments providing for the transfer by Mrs. McKee to plaintiff of the royalty interests she had acquired from Johnston.

On July 13, 1943, plaintiff took the deeds he had prepared to Mrs. McKee's residence for the purpose of obtaining her signature to them. On his way there he stopped at a notary's office and made arrangements for the notary to respond to a subsequent telephone call for the purpose of acknowledging the documents. He then proceeded to Mrs. McKee's home and told her that the deeds were ready to be notarized. The notary was summoned and Mrs. McKee signed seven of the instruments without any conversation concerning them. The eighth document was signed the following day.

Plaintiff paid nothing to Mrs. McKee for the deeds. He did not record them but retained them in his possession. He made no demand upon the bank for the payment of the royalties which it was collecting on behalf of Mrs. McKee nor did he notify any of the companies paying the royalties that he was the owner or entitled to any of the payments. Mrs. McKee continued to collect the royalty payments through the bank and in October, 1943, she sold one of the royalties.

In September, 1943, an attorney acting for Mrs. McKee asked plaintiff what documents she had signed and given to him and of which she had no recollection except that she had signed and delivered them. Plaintiff replied that he had destroyed all the documents which she had signed.

Plaintiff testified that Mrs. McKee gave him the royalties "in consideration of my advice and counsel and my kindnesses over the period of time"; in August, 1943, Mrs. McKee stated to him that she had thought the matter over and that if he recorded the deeds the royalty checks would no longer go to the bank and the bank would wonder what happened to them and harass her;

she asked him not to record the deeds and said that in their place she would pay him by cash or by stock or some other way; in the latter part of October, 1943, she said she had thought the matter over and preferred giving him a promissory note; she suggested a note in the amount of \$30,000 "because the royalties cost her a little more, but she felt the man who sold them to her had made some money and thought \$30,000 would be an equitable sum." A few days later, on November 4, 1943, plaintiff returned to Mrs. McKee's home with the promissory note which he had prepared. No one was present except plaintiff and Mrs. McKee, who signed the note which is the subject of this action and handed it back to him. Plaintiff did not at that time nor at any time subsequently return the royalty deeds to Mrs. McKee nor reconvey to her the interests covered by the deeds.

Plaintiff contends that (1) the evidence was insufficient to support the verdict because there was no proof of want of consideration for the note or of undue influence; (2) the court erred in admitting certain evidence; (3) the court erred in giving and refusing certain instructions; (4) it was error to deny his motions for instructed verdict and for judgment notwithstanding the verdict.

Plaintiff maintains that the consideration for the note was the eight royalties which he agreed to sell back to Mrs. McKee and which were worth \$38,892; that the validity of the deeds covering the royalties is not in issue since defendant did not raise that issue in his pleadings and that defendant having introduced those deeds in evidence is bound by the provisions thereof and cannot impeach their validity.

[1] That a promissory note was given in exchange for a sufficient consideration is a rebuttable presumption, Code Civ.Proc. § 1963, and failure of consideration or actual consideration may be proved by parol evidence. *Sandrini v. Branch*, 32 Cal.App. 2d 707, 708, 90 P.2d 593; 19 Cal.Jur. p. 1027, sec. 169 and cases cited; 8 Cal.Jur. Ten Year Supp., p. 468, sec. 169 and cases cited.

[2,3] Defendant pleaded as an affirmative defense that the note was procured without consideration. Since, as asserted by plaintiff both at the trial of the action and on appeal, the consideration for the note was the eight royalty deeds which he maintains he agreed not to record but to reconvey to Mrs. McKee, the validity of those deeds is in issue. Moreover, as stated by the court in *McCroskey v. Ladd*, 96 Cal. 455, 457, 31 P. 558. "The action upon the note, being between the original parties thereto, is subject to an inquiry into its consideration, and is also subject to any equities existing between the parties which arise out of the execution of the note, or are connected therewith." (Emphasis added.) In the *McCroskey* case the note and the agreement were executed at the same time, as part of the same transaction. In the instant case the deeds were executed in July and the note in November but they are between the same parties and allegedly the one is consideration for the other. Plaintiff himself testified that shortly after the execution of the deeds Mrs. McKee asked him not to record them, that she wished to give him cash or stock or something else in their place; in October she informed him she would give him a note in lieu of the deeds. The execution of the deeds and the execution of the note are parts of the same transaction and plaintiff cannot divorce them by drawing a curtain on the circumstances surrounding the execution of the deeds and for expediency stating that the deeds were the consideration for the note and that since they exceeded the value of the note *ipso facto* there was consideration for the note. If the deeds which allegedly are the consideration for the note were obtained by undue influence they cannot be a valid consideration.

[4] Plaintiff contends, however, that the exception to the parol evidence rule does not apply to a recitation of consideration in a deed and that evidence of this character is not admissible for the purpose of varying, contradicting or defeating covenants by which rights are expressly vested, citing *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23; *Hendrick v. Crowley*, 31

Cal. 471, 472, and Winchester v. Winchester, 175 Cal. 391, 165 P. 965. It may be conceded that the rule is as laid down in those cases but the obvious answer to plaintiff's contention is that in none of those decisions was fraud or undue influence sought to be proved. Where the validity of a deed is in issue parol evidence is always admissible to show fraud. Code Civ.Proc. § 1856; Fernald v. Lawsten, 26 Cal.App.2d 552, 562, 79 P.2d 742.

[5] Ordinarily, as contended by plaintiff, a party who introduces documentary evidence is not allowed to impeach or contradict it but is bound by its recitals for all purposes. This rule does not apply, however, where a document is introduced for the purpose of impeaching it on the ground of fraud. Although usually when offering a document for a specific purpose the offer is limited in some way, where the issues before the court are clear that is not always necessary. Snell Isle, Inc. v. Comm'r of Int. Rev., 5 Cir., 90 F.2d 481, 482; 20 Am.Jur. 771.

[6] There is no merit in plaintiff's contention that a confidential relationship was not pleaded nor proved. It is alleged in the answer that by reason of Mrs. McKee's age and physical condition her mental faculties were impaired and she was easily influenced by those in whom she had confidence; that she reposed trust and confidence in plaintiff and for a long period prior to and after the execution of the note she did whatever he suggested or instructed her to do.

[7] The amount of evidence necessary to establish a confidential relationship ordinarily rests with the trier of facts. "It is not essential to show a relationship by affinity or consanguinity, or that the business transacted established a particular relationship between the parties, such as attorney and client or principal and agent. If the parties be friends, and the grantor repose confidence in the grantee, especially if in addition there exist an advisory business relationship, and the one reposing confidence be of advanced age, an implied trust may result." Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775, 778.

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At the outset and pursuant to the scheme he had with White, plaintiff deliberately undertook to gain Mrs. McKee's trust and confidence so that he and his companion could obtain from her "at least a quarter of a million dollars." He succeeded in establishing his relationship by flattery, by developing social relations with her, seeing her with increasing frequency, visiting her at her home and escorting her to dinner and lunches. She implicitly followed his advice in her transactions with White. Plaintiff accompanied her to the bank where she withdrew from her safety deposit box securities of substantial value and permitted him to select whichever he desired in effecting the sale of White's land. She gave him access to the records reflecting her business affairs and income. She discussed various business deals of a speculative nature with him.

[8] Plaintiff obtained the legal description in the royalty deeds from the bank; he prepared the instruments conveying Mrs. McKee's interest in the royalties to him, took the documents to her house and made the arrangements to have the notary acknowledge her signature. As stated in Herbert v. Lankershim, 9 Cal.2d 409, 481, 71 P.2d 220, 256, "The line of authorities is unbroken to the effect that where a confidential relation exists and one of the parties to the relationship has shown great activity in procuring the execution of the instrument by which he or she greatly benefits by the transaction, the activity of such person becomes an important factor for the court or jury to consider in determining whether the transaction was free from undue influence. If such relations are found to exist the burden of showing that no undue advantage was taken shifts to the other side."

[9, 10] There is no evidence, other than plaintiff's testimony, of the circumstances surrounding the transfer of the royalty deeds and the execution of the promissory note. Alleged declarations of a deceased grantor are the weakest evidence that may be produced. Cox v. Schnerr, 172 Cal. 371, 379, 156 P. 509; Herbert v. Lankershim, supra 9 Cal.2d at page 472, 71 P.2d

220. Moreover, it is presumed that a decedent would contradict the testimony of a living witness that during her lifetime she gave away her property. *Bard v. Kent*, 35 Cal.App.2d 434, 437, 95 P.2d 957; *In re Estate of Reinicke*, 44 Cal.App.2d 271, 277, 112 P.2d 311.

[11,12] The evidence and the reasonable inferences therefrom are ample to establish as a fact that the relationship between plaintiff and Mrs. McKee was a confidential one. The burden, then, was upon plaintiff to overcome the presumption of undue influence by evidence that is clear, positive, uncontradicted and of such a nature that it could not rationally be disbelieved. *Bank of America v. Crawford*, 69 Cal.App.2d 697, 701, 160 P.2d 169; *Hicks v. Reis*, 21 Cal.2d 654, 661, 134 P.2d 788; *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868. This burden plaintiff has failed to sustain. Mrs. McKee was 77 years of age and was under medical care. Her physician testified that during the years 1942 to 1944 she suffered from high blood pressure, dizzy spells, blurred vision, lapses of memory for periods of time and in 1943 there was evidence of sclerotic changes. Considering her age and physical condition and that plaintiff from the beginning sought to gain her confidence for the avowed purpose of obtaining her money and property, the jury was justified in believing that he obtained the royalty deeds from Mrs. McKee by undue influence and in rejecting his testimony that she gave him the deeds, which were admittedly worth \$38,892, in consideration of services rendered by him.

[13] Plaintiff asserts that the court erred in overruling his objections to the interrogation of White and himself regarding the transactions between them and whether he received any money or checks between 1939 and November 4, 1943. Plaintiff testified he had rendered services for Mrs. McKee and it was proper to determine what those services were and whether he had been compensated. The testimony of White that he told plaintiff he had been out to see Mrs. McKee and was unable to sell her any speculative oil properties and that plaintiff should see what he could do with

her but should gain her confidence before he tried to sell her was competent, relevant and material. It was admissible as tending to impeach plaintiff's testimony that he had rendered kindnesses and services to Mrs. McKee and to show the inception of the confidential relationship between plaintiff and Mrs. McKee. *Adams v. Harrison*, 34 Cal.App.2d 288, 300, 93 P.2d 237. It was also admissible to show the formation of a scheme and conspiracy to defraud Mrs. McKee, *People v. Gordon*, 71 Cal.App.2d 606, 628, 163 P.2d 110 and to show that it was logically inferable that plaintiff sought her confidence for the purpose of obtaining her property. Code Civ.Proc. § 1870 subd. 15.

[14] Plaintiff urges it was error for the court to permit White to testify concerning the visit to the bank where Mrs. McKee kept her securities. The testimony was admissible as tending to prove the existence of the confidential relationship and the obtaining of Mrs. McKee's property through scheme, artifice and fraud. Moreover, plaintiff did not object to a long series of questions concerning what he, White and Mrs. McKee talked about at the bank and after they returned to her home.

[15] Plaintiff complains of the admission into evidence of a cashier's check in the sum of \$6,200 and the testimony of White that the check represented a part of the purchase price of the land which he and plaintiff had sold to Mrs. McKee. The evidence was admissible as indicating plaintiff's course of conduct in profiting from the confidential relations and providing the basis for an inference by the jury of the abuse and violation of that confidence and trust.

[16] Plaintiff asserts the court erred in allowing Mrs. McKee's physician to testify concerning his professional services to her from 1936 to 1939 and from January, 1942, to November, 1944. Evidence of the physical and mental condition of Mrs. McKee was admissible and pertinent to the determination of her mental condition which was an issue. There is no merit in the claim that the testimony is remote as that bears only on the probative value to be giv-

en to such evidence and not to its admissibility. In re Estate of Pierce, 32 Cal.2d 265, 273, 196 P.2d 1.

[17] Plaintiff complains that it was error to allow a witness to testify that plaintiff had stated he had destroyed all the documents Mrs. McKee had signed. He maintains that since the conversation was nearly two months before Mrs. McKee executed the note, it was irrelevant. That testimony has a direct bearing upon the issues. Plaintiff maintains that the consideration for the note was the reconveyance of the royalty interests referred to in the deeds which he said he had destroyed. The evidence was admissible as it tended to indicate a guilty knowledge by concealment. Longmire v. Kruger, 80 Cal.App. 230, 241, 251 P. 692.

[18] Plaintiff contends it was error to admit the testimony of Stone that he gave plaintiff a commission of \$3,300 on the sale to Mrs. McKee of \$21,000 worth of oil royalties. The evidence was admissible as indicating a course of conduct pertinent to the issues in the case and to show the influence plaintiff exerted over Mrs. McKee to the extent that she invested large sums of money in whatever he chose to have her purchase.

[19] Plaintiff assigns as error the giving of certain instructions because there was no evidence to justify them or if there was evidence it was improperly admitted. He maintains that since there was no pleading of fraud or undue influence as to the royalty deeds, which he asserts constituted good and valid consideration for the note, and since there was no proof of a confidential relationship and no proof of undue influence or that any advantage was gained by plaintiff in procuring the note,

the instructions were not within the issues of the case. The evidence of undue influence in obtaining the royalty deeds, the validity of which was in issue, the advantage gained thereby and the consequent failure of consideration for the note and the admissibility of such evidence has been hereinabove pointed out. Plaintiff's objections to the instructions are therefore untenable.

[20-22] Plaintiff contends it was reversible error for the court to refuse to give certain instructions which he requested. The court is not required to give every instruction requested even if considered by itself it may state a correct and pertinent principle of law. All that is required is that the jury be fully and fairly instructed on all the issues presented. In re Estate of Bucher, 56 Cal.App.2d 135, 137-138, 132 P.2d 257. An examination of all the instructions given reveals that the omitted instructions are all substantially covered by other instructions which correctly state the law. If the subject matter of the proposed instructions is substantially incorporated in others which the court has given, it is not error to refuse a requested instruction. Luis v. Cavin, 88 Cal.App.2d 107, 115, 198 P.2d 563.

In view of the conclusions hereinabove set forth that the evidence supports the verdict and the implied findings of the jury, plaintiff's contention is without merit that his motion for a directed verdict was improperly denied and that the motion for judgment notwithstanding the verdict should have been granted.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

101 Cal.App.2d 427

**HOLDEN v. CALIFORNIA EMPLOYMENT
STABILIZATION COMMISSION et al.**
Civ. 14543.

District Court of Appeal, First District,
Division 1, California.

Dec. 27, 1950.

Petition by Bartley E. Holden against the California Employment Stabilization Commission, and others for a writ of mandate to review a decision of the California Unemployment Insurance Appeals Board denying him unemployment benefits. The Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., granted the respondent's motions to dismiss and the petitioner appealed. The District Court of Appeal, Peters, P. J., held that where it was apparent that petitioner sought a review of an order of dismissal and notice of appeal was filed in ample time from either entry of order or judgment, and notice of appeal was addressed to all respondents and to their attorneys so that no one was misled and no prejudice to respondents existed, notice of appeal would be treated as being from appealable order even if notice incorrectly designated order as a judgment and erroneously gave date of entry of judgment rather than that of order and that trial court erroneously dismissed petition for writ of mandate.

Order reversed.

1. Appeal and error ⇨123

Minute order granting motion of unemployment insurance appeals board to dismiss employee's petition for writ of mandate to review decision denying employee unemployment benefits was an appealable order and since order did not provide that it was to be followed by a formal order or judgment, appeal should have been taken from minute order and not from judgment and judgment was functus officio and no valid appeal could be taken from that judgment.

2. Appeal and error ⇨417(1)

Notices of appeal, are to be liberally construed to permit, if possible, a hearing on merits.

3. Appeal and error ⇨419(1)

A misdescription of an order as a judgment or vice versa, will not invalidate a notice of appeal.

4. Appeal and error ⇨417(1)

An incorrect date in notice of appeal will not necessarily invalidate it.

5. Appeal and error ⇨419(1)

Where appellant sought review of an order of dismissal and notice of appeal was filed in ample time from either entry of order or judgment, and notice of appeal was addressed to all respondents and to their attorneys so that no one was misled and no prejudice to respondents existed, notice of appeal would be treated as being from the appealable order, even though notice incorrectly designated the "order" as a "judgment," and erroneously gave date of entry of judgment rather than that of order. Rules on Appeal from Municipal Courts, rule 2 (a,b) (2).

6. Pleading ⇨354(1)

It is error to dismiss a complaint for sham pleading if it contains at least one cause of action which is unassailable.

7. Administrative law and procedure ⇨722,
723

Master and servant ⇨78.3(72)

Where Director of Employment and employee's union allegedly agreed that a group appeal could be taken from order of Employment Stabilization Commission denying unemployment benefits, and that any individual who was a union member and whose name was omitted by error or mistake from master list would be treated in an identical manner with all union members included in group appeal, alleged agreement either amounted to an agreement to extend time to appeal by employee whose name was erroneously omitted or created an estoppel against commission to urge that appeal was not filed in time. St.1945, p. 2558, § 67.

8. Administrative law and procedure ⇨722
Master and servant ⇨78.3(72)

Provision of Unemployment Insurance Act that claimant or any party to determination may file an appeal from initial determination within 7 days after notification thereof, or within 7 days after date such notification was mailed to his last known address, provided that said 7-day limitation may be extended for good cause authorizes Employment Stabilization Commission to extend limits in a proper case. St. 1945, p. 2558, § 67.

9. Appeal and error ⇨787

Where affidavit of respondents averred that petition for mandate was filed February 7, 1949, and that petitioner was not ready for trial September 14, 1949, but respondent's demurrer to petition was filed April 6, 1949, and demurrer was not overruled until September 30, 1949 and a motion to dismiss was filed November 3, 1949 and there was no showing of prejudice to respondents, even if court possessed inherent power in its discretion to dismiss for failure to prosecute for less than 2 years, dismissal 10 months after petition was filed, on showing made, constituted an abuse of discretion. Code Civ.Proc. §§ 581a, 583.

10. Appeal and error ⇨787

Statute conferring power on a trial court in its discretion to dismiss any action for want of prosecution on motion of defendant whenever plaintiff has failed for 2 years after action is filed to bring such action to trial and providing that action must be dismissed if not brought to trial within 5 years, fixes minimum period of two years during which a court is prohibited from dismissing for mere delay although statutory provisions are not exclusive and it is an inherent power of court to grant motions to dismiss for reasons not set forth in statute. Code Civ.Proc. §§ 581a, 583.

Charles P. Scully, San Francisco, for appellant.

Fred N. Howser, Atty. Gen. of the State of California, Charles W. Johnson, Deputy Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondents.

Brobeck, Phleger & Harrison, San Francisco, for respondent Bethlehem Alameda Shipyard, Inc.

PETERS, Presiding Justice.

Petitioner, in the trial court, filed a petition for a writ of mandate seeking a review of a decision of the California Unemployment Insurance Appeals Board (hereafter referred to as the Appeals Board) denying him unemployment benefits. Nine months later the respondents, who had filed returns to the alternative writ of mandate, moved to dismiss the petition on the ground that it was sham and vexatious. The mo-

tions to dismiss were granted by minute order and by formal judgments. Petitioner appeals.

There is some dispute as to whether petitioner has any valid appeal pending, and, if he has, as to who are the respondents. The following table sets forth the procedural background of the proceeding:

February 7, 1949—petitioner filed, in the trial court, his petition for a writ of mandate and the alternative writ issued. Named as respondents were the Appeals Board and its members, the California Employment Stabilization Commission, and its members (hereafter referred to as the Commission), the State Director of Employment, and Bethlehem-Alameda Shipyard, Inc. (hereafter referred to as Bethlehem).

April 4, 1949—Bethlehem filed its return by way of answer.

April 6, 1949—the other respondents filed as their return a general and special demurrer and answer. The demurrer was later overruled.

November 3, 1949—the respondents, other than Bethlehem, filed a motion to dismiss the petition upon the ground that "the petition is fictitious, groundless, vexatious, sham, annoying and harassing." Bethlehem filed a separate and similar motion the same day. The motion filed by the respondents, other than Bethlehem, was supported by affidavit, and petitioner filed a counter-affidavit.

December 12, 1949—the trial court by minute order granted *both* motions to dismiss. This minute order did not recite that it was to be followed by a formal order or judgment.

December 14, 1949—a formal judgment was entered in favor of the respondents other than Bethlehem, the latter being expressly excluded from this judgment.

December 15, 1949—for some reason not entirely clear, a formal order granting the motion to dismiss of the respondents, other than Bethlehem, was entered. This order specifically excluded Bethlehem from its operation.

December 16, 1949—petitioner filed his notice of appeal, the notice stating that the appeal was "from the judgment entered * * * on the 14th day of December, 1949, in favor of the respondents and

against the petitioner, and from each and every portion of that judgment." This notice was addressed to all respondents and to their attorneys, including respondent Bethlehem, but the appeal is from a judgment that specifically excludes Bethlehem. This is the only notice of appeal that has been filed.

December 22, 1949—a formal order and a judgment granting Bethlehem's motion to dismiss were filed.

[1] The question immediately presented is whether there is any appeal at all pending. The minute order of December 12, 1949, dismissing the petition, was an appealable order. *Boyer v. City of Long Beach*, 47 Cal.App. 617, 618, 191 P. 35. This is conceded by all the parties to this appeal. Since that order did not provide that it was to be followed by a formal order or judgment, the appeal should have been taken from the minute order and not from the judgment. The judgment of December 14, 1949, was *functus officio*, and no valid appeal could be taken from that judgment. *Gwinn v. Ryan*, 33 Cal.2d 436, 438, 202 P.2d 51; *Nealis v. Carlson*, 98 Cal.App.2d 65, 219 P.2d 56; *Pessarra v. Pessarra*, 80 Cal.App.2d 965, 966, 183 P.2d 279; Rules on Appeal, Rule 2(b) (2). Predicated upon this analysis, Bethlehem contends that no appeal at all is pending, and certainly no appeal as against it. The Attorney-General, representing all respondents, other than Bethlehem, concedes that the appeal is effective as to his clients, and expresses the belief that the appeal is also effective as to Bethlehem.

It will be noted that the notice of appeal was filed within four days of the entry of the appealable order of December 12th, and within two days of the entry of judgment. Thus, the appeal was filed well within the time prescribed by Rule 2(a)—within 60 days from the date of the entry of the order or judgment. It will also be noted that the notice of appeal was addressed to all respondents, including Bethlehem, and to their counsel. Although the notice of appeal refers to the judgment of December 14th as the judgment appealed from, the intent of appellant to seek a review of the

action of the trial court in dismissing his petition is crystal clear. No one connected with this appeal was or could have been misled by the misdescription of the order of December 12th as the judgment of December 14th.

[2-4] Notices of appeal, of course, are to be liberally construed to permit, if possible, a hearing on the merits. It has been held that a misdescription of an "order" as a "judgment," or vice versa, will not invalidate a notice of appeal. *Seven Up Bottling Co. v. Grocery Drivers Local Union*, 97 Cal.App.2d 623, 218 P.2d 41; *Crane v. Livingston*, 98 Cal.App.2d 699, 220 P.2d 744; *Kellett v. Marvel*, 6 Cal.2d 464, 471, 58 P.2d 649. An incorrect date in the notice of appeal will not necessarily invalidate it. *Title Guarantee & Trust Co. v. Lester*, 216 Cal. 372, 374, 14 P.2d 297. Even closer to the present case is *Estate of Stone*, 173 Cal. 675, 161 P. 258, where the notice of appeal referred to a "judgment on the verdict" entered on a certain date, and the only appealable judgment was one of a later date—in fact, entered four days after the notice of appeal was filed. The court held, 173 Cal. at page 677, 161 P. at page 259, that, although there was, as here, an incorrect designation of the proceeding appealed from and a wrong date, the appeal was effective.

[5] Rule 2(b) (2) was intended to clarify the law for the benefit of practicing attorneys, not to constitute a trap for the unwary or inexperienced. Where it is perfectly apparent, as it is here, that appellant seeks a review of an order of dismissal, and where, as here, the notice of appeal is filed in ample time from either the entry of the order or judgment, and where, as here, the notice of appeal is addressed to all respondents and to their attorneys so that no one is misled, and where, as here, no prejudice to respondents exists, the notice of appeal should be treated as being from the appealable order even if the notice incorrectly designates the "order" as a "judgment," and erroneously gives the date of the entry of the judgment rather than that of the order. It is therefore held that the notice of appeal is effective as to all respondents.

On the merits, it is quite clear that the trial court erroneously dismissed the petition for a writ of mandate.

The petition for mandate was filed February 7, 1949. It discloses that petitioner was a member of a designated union and worked for Bethlehem until October 29, 1945; that thereafter members of his union were unable to work because of a trade dispute between Bethlehem and another union; that the Commission held that members of petitioner's union were not entitled to unemployment benefits; that petitioner's local union thereupon perfected an appeal to the Appeals Board on behalf of its members; that on such appeal it was held that the members of petitioner's union were entitled to unemployment benefits; that the Appeals Board has ruled that petitioner is not entitled to the benefits of that decision because his name was inadvertently omitted from the list of the litigants. The key allegations, so far as the present appeal is concerned, are as follows:

"That it had been agreed by the Department, by and through the Director, that any individual who was a member of Local 9 and whose name was omitted by error or mistake from the master list attached to such group appeal, would be treated in an identical manner with all those members of said Local 9 included in said group appeal, namely Case No. 5252;

"That through error the name of petitioner was omitted from the master list in said group appeal and that although petitioner relied upon the representation of the Director hereinabove mentioned, contrary to such representation petitioner was not similarly treated but on the contrary was denied benefits, with the result that his reliance upon such representation caused him irreparable damage."

It is also alleged that petitioner, upon discovering the omission of his name, attempted to perfect his appeal from the decision denying him benefits, but that such benefits were denied him; that an appeal was taken to a referee who reversed the department and directed that benefits be paid; that the Appeals Board reversed the referee.

The opinion of the Appeals Board is attached to the petition as an exhibit. From that opinion it appears that petitioner filed a claim for benefits on November 23, 1945, which was denied on December 21, 1945. Notice of this denial was mailed to petitioner, and he admits receipt of this notice. This notice, among other things, informed petitioner that he must appeal to a referee within seven days of the receipt of this notice. It is admitted that within this seven-day period petitioner went to the office of his labor union and signed a form designated as a blanket appeal. The union perfected the group appeal on behalf of its members, but petitioner's name was inadvertently omitted. The Appeals Board decided that the union members who appealed were entitled to benefits. That thereafter petitioner sought to appeal. The Appeals Board held that petitioner's claim was not timely and had been filed too late; that the failure of the union to list petitioner in the group appeal was a failure of his agent to act properly. In connection with the contention of petitioner that the Department had agreed with the Union that any individual whose name was inadvertently omitted should nevertheless be entitled to the benefits of the group appeal, the Appeals Board in the decision sought to be reviewed stated:

"We do not think that the agreement between the Department of Employment and the claimant's labor organization which the latter alleges existed goes as far as contended for by counsel for the claimant. As we understand the alleged agreement it provided that:

"1. Labor organizations could act as agents for members to file appeals for them to a Referee, grouping the members in a so-called blanket or group appeals.

"2. Only those members who were listed on a blanket or group appeal and who had claims for benefits on file with the Department of Employment prior to the time a Referee held a hearing would be considered actual parties to the appeal and Referee's decision."

The Board added: "Under the terms of this alleged agreement as we interpret them

it could not have been the intention of the Department that individuals who had been omitted from a blanket or group appeal be added as parties once a Referee had held his hearing and issued his decision."

It is this portion of the decision of the Appeals Board that petitioner seeks to have reviewed in the mandate proceeding—he contending that there was a positive agreement by the Director of Employment with the Union that all names of members inadvertently omitted from the group appeal would be entitled to the benefits of that appeal. This issue has never been passed upon by the trial court because that court dismissed the petition as being sham and vexatious on the motion of respondents.

[6] The trial court's order of dismissal was apparently based on the theory that the petition for a writ of mandate did not state a cause of action against any of the respondents. There seems to be some doubt in the cases as to whether a complaint may be dismissed as sham because of a failure to state a cause of action.¹ Whatever the true rule may be where the complaint does not and cannot be amended to plead a cause of action, the rule is well settled that: "It is error to dismiss a complaint for sham pleading if it contains at least one cause of action which is unassailable." *Saunders v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 738, 740, 146 P.2d 683, 684; see, also, *Kelley v. Kriess*, 68 Cal. 210, 212, 9 P. 129. That is this case.

The petition for the writ of mandate alleges a definite agreement between the Director of Employment and the Union to the effect that a group appeal could be taken, and that "any individual who was a member of Local 9 and whose name was omitted by error or mistake from the master list attached to such group appeal, would be

treated in an identical manner with all those members of said Local 9 included in said group appeal." While it is true that the Appeals Board has found a different agreement and found that the pleaded agreement did not exist, it is the propriety of that decision that is sought to be reviewed in the trial court. If the agreement pleaded in the petition for a writ of mandate actually existed, it either amounts to an agreement to extend petitioner's time to appeal, or it creates an estoppel against the Commission to urge that the appeal was not filed in time.

The pertinent statute is section 67 of the Unemployment Insurance Act as it read between 1945 and 1947. Stats. of 1945, p. 2558, Chap. 1369; repealed Stats. of 1947, p. 3003, Chap. 1436. Although that section then provided that an appeal to a referee had to be taken within seven days after receipt of notice, such provision was not absolutely mandatory as apparently are the time provisions for the taking of appeals in civil and criminal actions generally.² Section 67, as it read in 1945, contained no such rigid requirement. The section, in part, then read: "The claimant or any party to the determination may file an appeal from such initial determination within seven days after notification thereof, or within seven days after the date such notification was mailed to his last known address; provided that said seven-day limitation may be extended for good cause."

[7] Thus, the section, as it read during the times here pertinent, recognized that the seven-day period could "be extended for good cause." If the Director of the Department of Employment made the agreement here alleged, it is quite apparent that he agreed for good cause to extend the period of seven days so as to permit the inclusion of names of union members inad-

1. In *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 10, 74 P. 352, it was held that a motion to dismiss cannot be used to attack a complaint defective because it does not state a cause of action. The same rule, supported by many cases, is stated in 9 Cal.Jur. p. 522, § 14. However, the contrary rule was announced in *Monahan v. Blossom*, 88 Cal.App.2d 951, 952, 199 P. 2d 738.

2. In *Estate of Hanley*, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, and *People v. Lewis*, 219 Cal. 410, 27 P.2d 73, it was held that in civil and criminal cases the time requirements for taking an appeal are mandatory, and the courts cannot, for any reason, extend such time provisions. These rules were somewhat qualified as to criminal cases, at least, in *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868.

vertently omitted. Thus, the petition pleads, in effect, that the seven-day period was extended by agreement. Even if this were not so, if such an agreement as pleaded was made, the respondents are estopped from urging that the petitioner failed to comply with section 67.

Although there is a general policy against finding an estoppel against government or one of its agencies, there can now be no doubt that in a proper case a governmental agency may be estopped. *County of San Diego v. California Water & Telephone Co.*, 30 Cal.2d 817, 825, 186 P.2d 124, 175 A.L.R. 747. Several of the cases on this subject have involved the late filing of claims against governmental agencies in tort actions. The leading case is *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. That was an action against the county for injuries alleged to have been caused because of the defective condition of a bridge approach maintained by defendant. The applicable claims statute required that such a claim must be filed within 90 days of the accident. This statutory requirement had not been complied with, plaintiff alleging that she had been induced not to file a claim by reason of the representations of certain county officials. It was held that the county was estopped from complaining of the late filing of the claim. In so holding the court stated, 23 Cal.2d at page 630, 145 P.2d at page 573: "Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature [citations omitted] and is analogous to a statute of limitation. [Citations omitted.] It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. * * *

From the standpoint of the agency it has general power to pay claims arising from

the liability imposed by the public liability act. Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel. There are cases where the procedure specified in the statute is manifestly the measure of the power. [Citation omitted.] There are instances where the procedural steps are not the measure of the power and estoppel may be invoked against a governmental agency from relying upon irregularities therein. [Citations omitted.] This court has held that compliance with the claim statute is not jurisdictional with respect to the power of a court to give judgment against the governmental agency where no claim was filed. *Redlands High School Dist. v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490."

The respondent agency has, on at least two occasions, had an estoppel successfully invoked against it. *La Societe Francaise v. California Employment Comm.*, 56 Cal. App.2d 534, 554, 133 P.2d 47; *Garrison v. State of California*, 64 Cal.App.2d 820, 829, 149 P.2d 711. While these last two cases differ factually from the instant one, they do demonstrate that in a proper case an estoppel may be invoked against the state in general and this very agency in particular.

[8] Once it is determined that the seven-day limit provided in section 67 is not the measure of the power of the Commission, and that such time limit may, in a proper case, be extended, the reasoning of the *Farrell* case is here directly in point. Of course if, as found by the Appeals Board, no such agreement was made, then no basis for the estoppel exists. But if the trial court, which must exercise an independent judgment on the facts in such a proceeding, on substantial evidence, finds that the agreement pleaded in the petition for a writ of mandate was made, then an estoppel exists. It is quite apparent, therefore, that petitioner has either pleaded an extension of the seven-day period by agreement, or he has pleaded an estoppel against the Commission urging non-compliance.

Respondents urge that even if the petition states a cause of action, the dismissal by the trial court must be upheld because the record shows lack of diligence on the part of petitioner in prosecuting his claim. The affidavit of respondents, other than Bethlehem, in support of their motion to dismiss avers that the petition for a writ of mandate was filed February 7, 1949, and that "numerous continuances of hearing on the merits of the petition have occurred herein," but the affidavit fails to disclose at whose request such "numerous continuances" were granted, or the circumstances involved. The affidavit continues as follows: "that on September 14, 1949, 10 a.m., petition for writ of mandate was called for hearing in Law and Motion Department before Judge Shoemaker presiding; that respondents appeared in said hearing prepared to resist the petition on the merits and accompanied by numerous witnesses in support of respondents; that on September 14, 1949, the petitioner through his counsel, Charles P. Scully, appeared and urged that the administrative record, duly prepared herein, was incomplete and that because of the press of other business falling on September 14, 1949, counsel was not prepared to try the merits of the petition." The attorney for petitioner filed a counter-affidavit averring that petitioner has a meritorious cause of action, and that the purpose of the litigation is not to annoy, vex or harass the respondents, but is instituted in good faith.

It will be noted that the affidavit of respondents, other than Bethlehem, does not aver that the representation that the administrative record was incomplete was untrue.

[9] There are some dates that must be considered. The affidavit of respondents avers that the petition for mandate was filed February 7, 1949, and that petitioner was not ready for trial on September 14, 1949. The motion to dismiss was filed November 3, 1949. Respondent's demurrer to the petition was filed April 6, 1949, and this demurrer was not overruled until September 30, 1949. It is quite apparent that on September 14, 1949, when the cause came on for hearing, the demurrer had not yet been ruled upon. With the demurrer still out-

standing, it is questionable whether petitioner was obliged on September 14th to try the case on its merits. Moreover, what happened on September 14, 1949, does not appear in the record. Apparently the judge granted a continuance because the motion to dismiss was not filed until November 3, 1949.

[10] Such a record does not justify a court in dismissing a petition that states a cause of action on the ground of lack of diligent prosecution. The code sections dealing with power to dismiss for lack of prosecution or undue delay are sections 581a and 583 of the Code of Civil Procedure. Section 581a deals with the service of summons and is not here applicable. Section 583 is the key section. It confers the power on a trial court in its discretion to "dismiss any action for want of prosecution on motion of the defendant * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial," and must be dismissed when not brought to trial within five years. The present action was filed February 7, 1949, answers were filed in April, and the petition dismissed December 12, 1949—ten months after it was filed, and eight months after the answers were filed. While the statutory provisions are not exclusive, and the courts have recognized that it is an inherent power of the court to grant motions to dismiss for reasons not set forth in the statute (see cases collected in note 36 Cal.L.Rev. 465), it has several times been held that section 583 fixes a minimum period of two years during which a court is prohibited from dismissing for mere delay. *Johnston v. Baker*, 167 Cal. 260, 139 P. 86; *Romero v. Snyder*, 167 Cal. 216, 138 P. 1002; *Jackson v. Thompson*, 47 Cal.App.2d 405, 118 P.2d 31; *Cohn v. Rosenberg*, 62 Cal.App.2d 140, 144 P.2d 399. As held in these cases, if this were not so, the minimum period of two years and the maximum period of five years set forth in section 583 would be meaningless. Even if the court possesses inherent power in its discretion to dismiss for failure to prosecute for less than two years, a dismissal in the present case, ten months after the petition was filed, on the showing made, would constitute an abuse of discretion.

There is no showing at all that the ten months' delay was caused by petitioner. There is no showing of prejudice to respondents. For the foregoing reasons it must be held that the order appealed from cannot be supported on the theory that petitioner was guilty of lack of due diligence.

The order of December 12, 1949, granting the motions to dismiss is reversed.

BRAY and FRED B. WOOD, JJ.,
concur.



101 Cal.App.2d 606

**ENOS v. CALIFORNIA EMPLOYMENT
STABILIZATION COMMISSION**

et al.

Civ. 7866.

District Court of Appeal, Third District,
California.

Jan. 5, 1951.

Rehearing Denied Jan. 25, 1951.

Hearing Denied March 5, 1951.

Action by Frank Enos against the California Employment Stabilization Commission and another to recover certain contributions assessed and paid under protest. The Superior Court, Sacramento County, M. C. Glenn, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Steel, J. pro tem., held that labor performed by plaintiff's employees while engaged in contract hay baling on various farms was not agricultural labor and therefore was not exempt from contributions pursuant to Unemployment Insurance Act.

Judgment affirmed.

1. Taxation $\Rightarrow$ 111.22

Labor as performed by plaintiff's employees while engaged in contract hay baling on various farms was not "agricultural labor" within Unemployment Insurance Act and services rendered were not exempt from contributions pursuant to act. Gen. Laws, Act 8780d, § 7(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Agricultural Labor".

2. Taxation $\Rightarrow$ 111.22

Contract hay baling operations performed by plaintiff on various farms with men and machines furnished by plaintiff was not "harvesting" within term agricultural labor in Unemployment Insurance Act excluding such services from required contributions. Gen.Laws Act 8780d, § 7(a); Administrative Code, Tit. 22, § 43.

See publication Words and Phrases, for other judicial constructions and definitions of "Harvesting".

3. Taxation $\Rightarrow$ 111.22

Where a crop of hay is sown, grown, mown and raked in windrows or shocked, it has been "harvested" irrespective of whether it is thereafter stacked in field, or hauled to barn and stored as loose hay, and mere circumstance that on occasions farmer may engage some independent operator to come to farm and bale hay adds nothing to "harvest" of crop within Unemployment Insurance Act. Gen.Laws, Act 8780d, § 7(a); Administrative Code, Tit. 22, § 43.

Norman A. Eisner, San Francisco, Charles A. Rummel, Berkeley, for appellant.

Fred N. Howser, Atty. Gen., by Irving Perluss and Wm. L. Shaw, Deputies, for respondents.

STEEL, Justice pro tem.

Plaintiff has appealed from a judgment rendered in the Superior Court of Sacramento County in favor of the defendant California Employment Stabilization Commission in an action for refund of certain contributions assessed and paid under protest. The action is based upon the theory that the services rendered were agricultural labor and exempt from contributions pursuant to the Unemployment Insurance Act. Deering's General Laws, Act No. 8780d.

After finding that all preliminary statutory procedure had been duly followed and complied with, the trial court, so far as material here, found the following facts:

"That it is not true that the labor in which the employees of Enos were engaged in hay baling constituted agricultural labor.

"That it is not true that the baling of hay, as herein performed, is a part of the harvesting of hay and so constitutes agricultural labor.

"That it is not true that labor performed in connection with the baling of hay is, in its nature, and in truth and in effect, agricultural.

* * * * *

"That it is not true that plaintiff, Enos, acted with good cause in believing that his labor, engaged in hay baling, is agricultural and exempt.

"That it is true that plaintiff is the owner of two hay baling machines, one of which was purchased in 1941 and the other in 1946. That each hay baling machine operates independently. That each machine has a capacity for baling between 65 and 70 tons of hay per day. That two tractors, two cook houses and other industrial equipment are owned by the plaintiff and used in his hay baling operations. That the plaintiff contracts with the farmer, who has grown the hay, to bale the hay at a stipulated price per ton. That subsequent to an agreement with the farmer, the plaintiff moves his men, machines and equipment to the farms upon which the hay is grown. That in all instances the plaintiff baled the hay upon the farm upon which it was grown. That in connection with the plaintiff's hay baling operations, excluding the cook, an eight man crew is normally employed on the baler. That the crew consists of a lever tender; a spool tender who operates the hoist to the baler; three feeders who push the hay into the baler; a wire poker; a bale piler and a roustabout. That approximately 60% of the hay grown in California is baled.

"That in farming operations, the harvesting of a crop, as generally understood and known by farmers, is a matter of cutting the hay, and if desired by the farmer, baling and storing on his farm; however, the harvesting of a crop, including the baling of hay, is not agricultural labor if done in the course of conducting an enterprise such as the plaintiff is here conducting."

From the foregoing findings the trial court determined that hay baling operations as performed by plaintiff are not exempt

from contributions under the Unemployment Insurance Act, and are not agricultural labor under Section 7(a) of the said Act; that the hay baling as done by plaintiff was not harvesting within the meaning of Section 43 of Title 22 of the California Administrative Code.

Agricultural labor as defined by Rule 7.1 adopted by the Unemployment Insurance Commission, prior to its replacement June 1, 1945 by said Section 43 of the Administrative Code, included all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising, feeding, management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations."

It is the contention of appellant that the hay baling operations in which he engaged herein are part of harvesting the crop and under Section 43, supra, are agricultural labor and therefore exempt. Agricultural labor was defined by that regulation in part as follows:

"Agricultural labor exempted from 'employment' by Section 7(a) of the Act includes all services performed:

"(a) On a farm, in the employ of any person, in connection with cultivating the

soil, or in connection with raising or harvesting of any agricultural or horticultural commodity; the raising, feeding, and management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto.

"(b) In the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced, in connection with the drying, processing, packing, packaging, transporting, and marketing of such materials."

During the trial, plaintiff called witnesses, in the nature of experts in the field of agriculture, who testified that hay baling according to custom and usage is considered to be a part of the harvesting of a crop, baling being one of the methods used in gathering the crop. It was stipulated at the trial that 90% of plaintiff's activities in hay baling were for other farmers and growers and 8% of his total operation was confined to his own hay growing.

The sole issue presented upon this appeal therefore is whether or not the hay-baling operations so conducted by plaintiff constituted "agricultural labor" within the contemplation of said Section 7(a) of the Unemployment Act.

This court has had before it for consideration two cases, California Employment Commission v. Rose, 67 Cal.App.2d 864, 155 P.2d 702, and People v. Giesbrecht, 90 Cal. App.2d 569, 203 P.2d 101, which involved factual situations almost identical to that which exists in the instant case, and in each of the said cases it was held in substance that "contract hay baling is not agricultural labor."

It is the contention of the appellant that the Rose case, supra, wherein it is held that the services performed, regardless of their nature, do not constitute agricultural labor unless the workmen are employees of the owner or tenant on the farm upon which the materials are produced, has in that respect been disapproved by the Supreme Court in California Employment Commission v. Kovacevich, 27 Cal.2d 546,

165 P.2d 917. He further contends that the hay baling in the Rose case, having been done both on and off the farm where it was grown, that case cannot be controlling in the instant one where all of the baling operations were performed upon the premises of the growers of the hay.

In the Kovacevich case, supra, the Supreme Court distinguished between services performed for farmers or growers under Rule 7.1, paragraph (1) "in connection with the cultivation of the soil, the raising and harvesting of crops" which are agricultural by their very nature, from what may be termed "commercial operations" under paragraph (2) of the Rule, and in discussing the Rose case stated as follows, 27 Cal.2d at pages 559-560, 165 P.2d at page 924:

"Apparently out of line with such uniform construction is certain language in the recent opinion of California Employment Commission v. Rose, 67 Cal.App.2d 864, 155 P.2d 702 (hearing not requested before this court), purporting to follow the case of California Employment Com. v. Butte County Rice Growers Ass'n, supra, 25 Cal.2d 624, 154 P.2d 892, in stating 67 Cal.App.2d at page 868, 155 P.2d at page 704, that 'the services performed, regardless of their nature, * * * do not constitute "agricultural labor" * * * unless the workmen are employees of the owner or tenant of the farm * * *.' While, as aforesaid, the Butte County Rice Growers case is concerned wholly with a warehouse enterprise and services in connection therewith falling wholly within subdivision (2) of rule 7.1, it is plain from the import of the quotation from the Butte County Rice Growers case, hereinbefore set forth, that 'on the farm' services in 'the cultivation of the soil, the raising and harvesting of crops,' as stated in subdivision (1) of the rule, always constitute 'agricultural labor' irrespective of the status of the employer, and that the latter factor incident to the owner-tenant limitation enters only into the classification of the services specified in subdivision (2). Accordingly, to the extent that language of the Rose case may carry implications contrary to the import of the Butte County Rice

Growers opinion, or of the opinion herein, it is hereby disapproved. *However, the actual decision in the Rose case is entirely in line with the views herein expressed.* There the employer was engaged in the business of *baling hay on contract* for various farmers. Sometimes the hay was baled on the farms where it was produced, but usually it was hauled to a central location nearby to save the cost and inconvenience of moving the hay-baling equipment. *As so conducted, such independent enterprise was distinct from the farmers' 'cultivation of the soil, the raising and harvesting of crops,' and the hay-baling labor would properly come within subdivision (2) of our rule as services 'in connection with the drying, processing, packing, packaging, * * * of materials which are produced on the farm.'* Labor so identified would not be agricultural unless *'performed by an employee of the owner or tenant of the farm on which the materials * * **

'From these observations it is clear that hay baling is an admirable example of 'the nature of the work, modified by the custom of doing it,' affecting the category into which the work falls—agricultural or industrial. See H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23, 28.' (Italics added.)

This court in *People v. Giesbrecht*, supra, again held that hay baling operations engaged in by the defendant under contracts with various farmers who grew the hay did not constitute "agricultural labor" under the Act.

The question arises therefore whether the findings and judgment of the trial court herein are in harmony with the foregoing authorities.

In the *Rose* case, as heretofore mentioned, appellant urges that *there* the hay baling having been done both on the farm and off the farm is an important factor in considering this case in that *here* the baling operations were all performed on the farm where the hay was grown. We find no logic or merit in that contention. Clearly if baling is not harvesting when done at a location near the farm, it would appear to be rather difficult to conceive how, the same facts existing, the operations

could become harvesting when moved to the farm. The modus operandi in so far as the actual hay baling operations are concerned would be identical. Appellant argues in this connection that the language of the Supreme Court in the *Kovacevich* case in referring to the *Rose* case and baling operations being performed on or off the farm wherein the court stated "As so conducted," should be interpreted to mean or apply only to the off farm operations, and therefore inapplicable to the instant case where the operations were performed upon the farm where the hay was grown. We cannot agree with that interpretation of what the court stated or implied, but rather are impelled to the conclusion that the court intended what it said, to wit: "However, the actual decision in the *Rose* case is entirely in line with the views herein expressed", and in effect that all of the hay baling activities of the defendant *Rose*, regardless of their location, were an independent enterprise distinct from the farmers' "cultivation of the soil, the raising and harvesting of crops," and properly comes within subdivision (2) of the rule as services "in connection with the drying, processing, packing, packaging," etc. Then follows the familiar quotation, "From these observations it is clear that hay baling is an admirable example of 'the nature of the work, modified by the custom of doing it,' affecting the category into which the work falls—agricultural or industrial."

[1-3] Appellant finally contends that this court in deciding the *Giesbrecht* case assumed that hay baling was not a part of the harvesting of the crop and therefore that case is not authority in support of the trial court's decision in the instant case. We are unable to follow appellant in this respect, but to the contrary we find nothing in the *Giesbrecht* case in material conflict with the decision of the trial court herein. To put it plainly, it would appear quite apparent that when a crop of hay is sown, grown, mown and raked in windrows or shocked, it has been harvested irrespective of whether it is thereafter stacked in the field, or hauled to the barn and stored as loose hay, and the mere circumstance that on occasions the farmer may decide to

engage some independent operator to come to his farm and bale the hay adds nothing to the harvest of the crop within the meaning of Section 7(a). Such a baling operation the Kovacevich case has very properly held comes within subdivision (2) of Rule 7.1—packing, packaging of materials which are produced on the farm.

Upon the law as established by the foregoing authorities as well as upon the facts herein involved, we conclude that the judgment of the trial court finds ample support.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.



101 Cal.App.2d 322

PEOPLE v. SULLIVAN.

Cr. 2650.

District Court of Appeal, First District,
Division 1, California.

Dec. 21, 1950.

William B. Sullivan was convicted in the Superior Court of the State of California in and for the City and County of San Francisco, Albert C. Wollenberg, J., of rape, and he appealed from the judgment and from an order denying his motion for a new trial. The District Court of Appeals, Wood, J., held, *inter alia*, that evidence justified the conviction.

Judgment affirmed.

1. Rape ☞51(1)

Evidence justified rape conviction.

2. Criminal law ☞1159(2, 4)

Determination of jury as to weight of evidence and credibility of witnesses in rape prosecution would not be disturbed on appeal from conviction where there was evidence that amply supported conviction.

3. Criminal law ☞372(1)

In rape prosecution, testimony of rape of another woman allegedly committed by defendant about two months prior to

charged rape was properly admitted in evidence where defendant's alleged conduct on such other alleged occasion bore such similarity in significant respects to defendant's conduct in connection with rape charged as to indicate a general plan and that defendant's alleged conduct was directed by design.

4. Criminal law ☞1168(2)

In rape prosecution, alleged suppression by prosecution of evidence, through failure to introduce all available evidence, was not prejudicial to defendant, where defendant knew of existence of such evidence, and it did not appear that defendant could not have adduced such evidence.

5. Criminal law ☞730(3, 7)

In rape prosecution, failure of trial court to assign the asking of a question by district attorney upon cross-examination of a witness as misconduct after objection to question was sustained, and refusal of trial court to permit defendant to read testimony from record, when district attorney in oral argument made a statement not wholly borne out by evidence, was not error requiring reversal of conviction in view of given instructions.

6. Criminal law ☞455

Witness was competent to answer question as to whether witness was pregnant, over objection that question called for a conclusion of witness.

7. Criminal law ☞185

Where jury had not reached verdict in rape prosecution after five hours of deliberation, and all but one juror told trial judge that they did not believe further deliberation would result in verdict, and trial judge discharged jury, discharge was not an "acquittal" and did not furnish basis for dismissal of subsequent rape prosecution on ground that defendant had been once placed in jeopardy. Pen.Code, § 1140.

See publication Words and Phrases, for other judicial constructions and definitions of "Acquittal".

8. Indictment and Information ☞4

Rape prosecution could be prosecuted by information, such prosecution being authorized by state Constitution and not

being in contravention of federal Constitution. Const. art. 1, § 8.

9. Criminal law $\S$ 628(2)

Statutory requirement that names of witnesses be inserted at foot of an indictment or be indorsed thereon before presentation to court has no application to an information. Pen.Code, § 943.

William B. Sullivan, in pro per.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Wm. M. Bennett, Deputy Attys. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant appeals from the judgment rendered upon a verdict convicting him of the crime of rape, and from an order denying his motion for a new trial.

Appellant assigns as error: (1) Insufficiency of the evidence to support the verdict, (2) improper admission of evidence of another alleged offense, (3) errors of law occurring during the trial, (4) prior jeopardy, and (5) that he was prosecuted by information instead of indictment, and the names of witnesses were not endorsed upon the information.

[1] Our examination of the record demonstrates that the evidence supports the verdict. It appears that R. W., the complaining witness, met defendant at a dance studio. He introduced himself as Bill Murphy. Three days later he telephoned her and arranged for a date the following evening, March 29, 1949. He called for her on the 29th in a two-door 1933 Plymouth sedan. She entered the car through the driver's door because the other door was broken. On the way from her home to a certain restaurant, defendant offered her a drink from a whisky bottle which he was carrying. She refused the drink but he took one. At the restaurant they both ate, and defendant had another drink. They left the restaurant and drove to a tavern on the Bayshore Highway. On the way defendant offered her another drink from the bottle which he was carrying. She refused, but he took a drink. At the tavern

they danced, and defendant had several more drinks. She drank no alcoholic beverages. They left the tavern shortly after 10 o'clock p. m., and she asked him to drive her home. Instead, he drove her to McLaren Park, parked the car and told her she was going to be raped and that she might as well relax and enjoy it. She told him that she did not want to be raped, whereupon defendant ripped off one of her undergarments. She screamed, and defendant struck her repeatedly in the face with his fist. During part of the time which followed, she was dazed and unconscious. Defendant dragged her into the back seat of the car, and every time thereafter that she started to scream or hit him he struck her in the face. He tore her stockings from her girdle, forced her legs apart and committed an act of sexual intercourse upon her. The act was accomplished without her consent.

Thereafter, defendant drove her home, and she got out through the driver's door. She went to bed, and the next morning was unable to report to work. That day she reported the incident to the San Francisco Police Department. Two evenings later, defendant telephoned R. W., and asked her for another date. She made a date with him for 8:00 o'clock that evening at her home. Defendant asked her whether the police were there and she answered "No." When defendant arrived, two members of the police department were present by prearrangement, and one of them recognized defendant as a man whom he had previously arrested on a rape charge, as "William Sullivan." Defendant claimed that he had come over to pay R. W. for her eyeglasses which had been broken during their previous date, and denied raping her. The police officers inspected defendant's car and found that the right door would not open. On defendant's person they found a half pint of the same brand of whisky as that which defendant had been carrying on the previous Tuesday night and which he had offered R. W. while they were driving.

[2] As against this evidence, appellant opposes his own testimony, claims that some of the evidence offered on behalf of the respondent was not wholly convincing, and

asserts that the testimony of the complaining witness was not corroborated at every point by the testimony of the doctor who examined her on the day after the alleged commission of the offense. That relates to the weight of the evidence and the credibility of witnesses, which it was the function of the jury to determine. Their determination adversely to appellant may not be disturbed on appeal when, as here, there was evidence that amply supported the verdict.

The evidence of another offense came in through the testimony of one B. R., concerning a similar attack upon her about two months prior to the offense of which appellant was convicted herein. She met him on the evening of January 29, 1949, at a dance hall in Oakland, and had several dances with him. During the course of the evening, at intervals between dances, she had three drinks with him in a bar-room near by. He offered to take her and her girl friend home to San Francisco in his car, and they left with him about a quarter to twelve. After returning her girl friend to her home, he started toward B. R.'s home. After they had gone a couple of blocks he offered her a drink from a flask he was carrying, but she refused. He then suggested they go to his apartment for a drink and she refused, insisting that she wanted to go home. He said he would not take her home and drove over to the Mission district, kept driving around and then started out Dolores Street, saying he would hit 19th Avenue out farther, which was in the direction of her home; while they were driving he again offered her a drink which she refused. They did not hit 19th Avenue. He kept driving until near Tanforan race track. She kept arguing and pleading with him and telling him she had to get home. Finally, he said he would take her home; he drank every once in a while; came to a place where he saw a sign that said "Sharp's Park"; drove a little farther, stopped the car, and indicated his intentions. She reminded him he had given her his card, and cautioned him to desist. He then grabbed her and beat her with his fist while they were in the front seat. She struggled for a time, then got

the car door open and slid onto the ground. He kept hitting her and forced her into the back seat. She was sick and felt faint and was fighting him as best she could. He pulled off her undergarments and had sexual intercourse with her. He then drove back to San Francisco. Enroute, he told her he would take her to his apartment. She protested as soon as they got back into the city. Later, he said he would take her home, and then changed his mind. When he slowed down at a street intersection she jumped out of the car, ran to a near-by filling station, the station attendant telephoned the police, she made a report to the police, and then went home.

[3] The testimony of B. R. concerning the other offense was properly admitted. Appellant's conduct upon that occasion bore such similarity in significant respects to his conduct in connection with the crime charged herein as to indicate a general plan and that his conduct was directed by design. It was admissible for precisely the same reason that the testimony of R. W. concerning the offense herein charged was deemed admissible upon the trial of appellant for the offense concerning which B. R. testified herein, in *People v. Sullivan*, 96 Cal.App.2d 742, 216 P.2d 558. The jury was properly instructed as to the limited scope and purpose of such testimony herein by an instruction the same in all material respects as the instruction given and approved in *People v. Sullivan*, supra, 96 Cal.App.2d 742, at page 744, 216 P.2d 558, at page 560.

[4] We have considered appellant's assignments of errors occurring at the trial and do not find that they present a basis for reversal of the judgment. He claims that the prosecution suppressed evidence by not introducing all of the available evidence, such as the testimony of the physician, Dr. Moran, who examined the complaining witness 10 to 12 hours after the alleged assault, and the testimony of the person who made laboratory tests of specimens taken at that examination. We find no error in that. Appellant knew of the existence of such evidence, and it does not appear that he could not have adduced it

himself had he desired. In fact, he did put Dr. Moran on as a witness.

[5] Appellant also claims error because one question asked by the district attorney of Dr. Moran, upon cross-examination, was not based wholly upon the evidence in the case. Objection upon that ground was made and sustained, whereupon appellant's counsel assigned the asking of the question as misconduct and requested the court to so assign it. In declining to do so, the court said, "I have sustained the objection," and in the instructions later given admonished the jury that if any counsel intimated by any of his questions that certain hinted facts were or were not true, they must disregard any such intimation and must not draw any inference from it. During oral argument after the evidence was in, the district attorney made one statement not wholly borne out by the evidence, to which appellant's counsel objected, stating his version of that phase of the testimony and proposing to read from the record. The court declined to permit such reading and said, "The jurors heard the testimony and they are the ones who will know what was testified to. * * * The jurors are the judges of the facts," and in the instructions told the jury they were exclusive judges of the facts and of the effect and value of the evidence, and that as to any statement made by counsel they must not regard such statement as evidence, save as to facts stipulated to by both parties or a fact admitted by a party.

[6] Appellant also claims error in the allowance of the question asked of B. R. whether or not she was pregnant, asked over the objection that it called for the conclusion of the witness. It appears from the record that she was competent to answer the question. His other assignments of error occurring at the trial are equally without support in the record.

Appellant also assigns as error the denial of his motion to dismiss the action, upon the ground that he had been once in jeopardy, acquitted upon a prior trial because the judge improperly discharged the jury. We find no error in that regard. According to the affidavit tendered in support of

the motion to dismiss, after the jury had been deliberating about five hours the judge called them into the courtroom and asked the forewoman if they had agreed on a verdict; she replied, "We have not" and that the jury stood "five to seven"; the judge asked the jury if they thought they could arrive at a verdict if sent back for further deliberation and the jurors, with the exception of the forewoman, answered "No," she answering "Yes," if they had further time to deliberate; the judge said the hour was getting late and he did not wish to keep the jury out any later; the forewoman suggested "Put the matter over until Monday morning and when we convene, I am sure we can reach a verdict"; and thereupon the judge discharged the jury.

Appellant claims that a jury that has been discharged while deliberating on a verdict, unless all the members of the jury state they cannot agree, constitutes an acquittal; that the jury must send in word to the court that they cannot agree before they can be discharged.

[7] This point is not well taken. The applicable statute is section 1140 of the Penal Code, which declares that except as otherwise provided by law the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties or "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." This clearly commits to the trial judge, not to the jury, the determination of the question whether or not "there is no reasonable probability that the jury can agree." The statute does not say, nor have we found any judicial decision construing the statute which holds that the judge may not determine that there is no reasonable probability that the jury can agree if one of the jurymen expresses a different view. As stated by the Supreme Court in *People v. Greene*, 100 Cal. 140, at page 142, 34 P. 630, at page 630. "The reasons upon which the court deems it proper to discharge the jury are

not required to be placed on record. It is sufficient that it shows the jury were unable to agree. The judge is not bound to take as final the statement of the jury that they cannot agree upon a verdict, but, when such a statement is made, the court below, familiar with the nature of the evidence, and probably the temperaments of the men who compose the jury, is better qualified to say whether there is a reasonable probability of an agreement than the appellate court. Certainly, the latter ought not to interfere with the ruling, except in cases of clear abuse of discretion."

The same reasoning applies here. The judge who presided at the former trial had before him an expression of opinion upon the part of all but one of the jurors that the jury could not agree upon a verdict. In addition, he was familiar with the nature of the evidence and doubtless with the temperaments of the persons who composed the jury, and thus was qualified to determine that there was no reasonable probability of an agreement. His discharge of the jury under those circumstances did not constitute an acquittal, nor furnish appellant a basis for dismissal of the present action upon the asserted ground of his having been once in jeopardy.

[8,9] Appellant's points that it was incompetent to prosecute his case by information and that the names of witnesses should have been endorsed upon the information are not well taken. The state Constitution authorizes prosecution by information, art. I § 8, and is implemented by the Penal Code, section 809 of which prescribes the form of the information. This procedure is not in contravention of the federal Constitution. *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232. There is no requirement that the names of witnesses be endorsed upon the information. The requirements of section 943 of the Penal Code that the names of witnesses be inserted at the foot of an indictment or be endorsed thereon before presentation to a court has no application to an information. See *People v. Neary*, 104 Cal. 373, 377, 37 P.

943, and *People v. Overacker*, 15 Cal.App. 620, 625, 115 P. 756.

The judgment and order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



101 Cal.App.2d 572

In re STICKNEY'S ESTATE.

Civ. 4227.

District Court of Appeal, Fourth District,
California.

Jan. 2, 1951.

Hearing Denied March 1, 1951.

Proceeding in the matter of the estate of Ida A. Stickney, deceased, a judgment denying admission to probate of a purported holographic will was entered by the Superior Court of San Diego County, C. M. Monroe, J., and an appeal was taken. The District Court of Appeal, Mussell, J., held that evidence supported finding that envelope and papers therein offered for probate as holographic will had been altered, torn and cancelled by testatrix with intent and for purpose of revoking it, and did not constitute testatrix' last will.

Judgment affirmed.

1. Wills ⇐290

Where there was evidence that envelope and papers therein offered for probate as holographic will were in possession and control of testatrix until her last illness, the inference was that any changes and alterations therein were made by testatrix.

2. Wills ⇐306

Evidence supported finding that envelope and papers therein offered for probate as holographic will had been altered, torn and cancelled by testatrix with intent and for purpose of revoking it and was not testatrix' last will.

3. Wills ⇐72

Before an instrument may be admitted to probate as a will, it must appear from its

terms, viewed in light of surrounding circumstances, that it was executed with testamentary intent.

4. Wills ⚡72

Testator must have intended by the particular instrument offered for probate to make a revokable disposition of her property to take effect upon her death.

5. Wills ⚡93

Extrinsic evidence is admissible, regardless of language of allegedly testamentary instrument, to show absence of testamentary intention, even though it does so by showing a different intention.

6. Wills ⚡93

Oral declarations made by testatrix before and after execution of instrument offered for probate are admissible if offered for purpose of ascertaining the intent with which instrument was executed.

7. Wills ⚡384

On appeal from a judgment in a will contest, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold verdict if possible, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial judge or jury.

8. Appeal and error ⚡1010(1)

Where there is substantial evidence to support trial court's findings and judgment, appellate courts will not interfere.

Henry C. Gardiner, San Diego, for appellants.

Robert C. Thaxton, San Diego, and Robert C. Thaxton, Jr., San Diego, for respondents.

MUSSELL, Justice.

In this probate proceeding five sheets of paper found in an envelope with other papers, in a desk in decedent's residence, were offered for probate as the holographic will of Ida A. Stickney, deceased.

A trial was had without a jury and the court found that the offered document was

not the last will and testament of Ida A. Stickney; that the alleged will had been altered, torn and cancelled by the decedent with the intent and for the purpose of revoking it; that the said instrument is not, and was not, intended by the decedent to be her last will and testament.

The instrument presented as a will was denied admission to probate and this appeal followed. The sole question here presented is the sufficiency of the evidence to support the findings and judgment.

The envelope containing the purported will and other papers had been sealed and marked "to be opened in case of my death. Kirby's trust deed to be added". When found, it had been opened and the five sheets offered as a will were folded and held together with a "slip-on" paper clip. On the last sheet, folded around the others, the following notation in the handwriting of the testatrix appears: "Use this to make will from Put Kirby trust deed in".

The papers in the envelope, other than those offered as a will, consisted of five separate sheets. One was a typewritten copy of what purported to be a will of one Ella Patterson, and the other four were in the handwriting of the decedent and appear to be partial drafts or parts of a will dated May 9, 1946. Two of these loose sheets had paragraphs so numbered that they could have been used to logically follow and fit in sequence with the first sheet of the offered document. In both of these loose sheets, provision was made for the brother and sister of the decedent. However, in one, a sister was to receive \$500 and a brother and his wife \$1,000, and in the other, the sister and brother were each to receive \$1,000. Changes appear in each sheet of the offered document, except the first. The last sheet is signed and dated May 9, 1946. As evidenced by the renumbering of paragraphs and the shortness of the paper, two paragraphs of the second sheet, as originally written, had been eliminated by cutting off the top part. Paragraph three of the offered document, formerly paragraph five, originally referred to Mrs. Stickney's property located at 4366, 4368, 4370 Utah Street. However, a line

was drawn through the numbers and the words "Utah Street" and the words and figures "2861—Howard" substituted therefor. The word "sold" was written over the reference in said paragraph to a house at 4370 Utah Street. (This property was sold on or about March 16, 1948, and the Howard Street property purchased April 1, 1948.) There is no reference to "Kirby's trust deed" in the purported will other than the notation on the back of the last sheet after the words "use this to make a will from".

Helen Carson, mentioned in the will, a close friend of the decedent, testified that the decedent, during a period of six or eight months prior to her death, stated that she had made a will before she took a trip to visit her brother (In June, 1947); that the will she had made was not the will she wanted at all and that she was making a new one and that she wanted to make a new will; that two or three weeks before her last illness, Mrs. Stickney phoned and asked to be taken in to see a lawyer and stated that she wanted to make a will.

One of Mrs. Stickney's neighbors, a Mrs. Collins, testified that some time in 1948, Mrs. Stickney said that she was going to make a will. Mrs. Kidder, a neighbor and close friend, testified that in July of 1949, Mrs. Stickney stated "that she didn't have any will and it worried her; that she wasn't feeling good and didn't have a will made out; that she should go and have one made out and that she didn't have her affairs fixed up"; that on August 18, 1949, when decedent became ill and was taken to a hospital, she said "If anything happens to me, I don't know what is going to happen to my things, because I don't have things in order and I don't have a will and don't have it the way I want it and I asked you girls to take me and nobody ever took me."

Mrs. Letha Phelps, sister of decedent, testified that in June, 1947, decedent stated that she did not have her affairs straightened up and had no will.

[1] The evidence is sufficient to support the findings and judgment. It is evident that Mrs. Stickney wrote out a will some time in 1946; that she placed it in an en-

velope and labeled it "Will of Ida A. Stickney, to be opened in case of my death". There is evidence that the envelope and contents were in the possession and control of the decedent until her last illness. Under the circumstances shown the inference is that any changes and alterations were made by the testatrix. Estate of Hewitt, 63 Cal.App. 440, 447, 218 P. 778.

[2] The numerous changes and alterations in the offered document; the statements made by the testatrix that she had no will; the fact that the Kirby trust deed (of approximately \$4,000) was not disposed of; the presence of the miscellaneous papers in the opened envelope and the endorsement "use this to make a will from", are amply sufficient to support the finding that the offered document was not the last will and testament of Ida A. Stickney or intended by her as such. It is apparent that the testatrix executed an holographic will in 1946, and put it in an envelope which she sealed and marked "to be opened in case of my death". Later she opened the envelope and made numerous attempts to execute a new will, none of which were successful.

[3-6] In Estate of Sargavak, 35 Cal.2d 93, 216 P.2d 850, it was held that before an instrument may be probated as a will, it must appear from its terms, viewed in the light of the surrounding circumstances, that it was executed with testamentary intent; that the testator must have intended, by the particular instrument offered for probate, to make a revokable disposition of his property to take effect upon his death; that regardless of the language of the allegedly testamentary instrument, extrinsic evidence may be introduced to show that it was not intended by the testator to be effective as a will and that oral declarations of a testatrix before and after the execution of the instrument in question are admissible if offered for the purpose of ascertaining the intent with which the instrument was executed.

[7] In the instant case, as was said in Estate of Trefren, 86 Cal.App.2d 139, 142, 194 P.2d 574, 575: "All conflicts must be resolved in favor of the respondent and

all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; *Estate of Teel*, 25 Cal.2d 520, 154 P.2d 384."

[8] Where, as here, there is substantial evidence to support the trial court's findings and judgment, the appellate courts will not interfere.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 555

PEOPLE v. CARSON.

Cr. 4551.

District Court of Appeal, Second District,
Division 3, California.

Dec. 29, 1950.

A. C. Carson, Jr., was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of keeping and occupying a store with books, papers, paraphernalia, etc., for purpose of recording bets on horse races, and of recording and registering a bet or bets on horse races, and he appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to prove both offenses, and that defendant could not properly complain that his sentences were made to run consecutively.

Judgments affirmed.

1. Gaming $\S$ 98(3, 5)

Evidence was sufficient to prove offenses of keeping and occupying a store with books, papers, paraphernalia, etc., for purpose of recording bets on horse races, and of recording and registering a bet or bets on horse races. Pen.Code, $\S$ 337a, subds. 2, 4.

2. Criminal law $\S$ 1216(2)

Where defendant was convicted of separate offenses of keeping and occupying a store, with books, papers, paraphernalia, etc., for the purpose of recording bets on horse races and of recording and registering a bet or bets on horse races, he could not properly complain that his sentences were made to run consecutively. Pen.Code, $\S$ 337a, subds. 2, 4.

G. Vernon Brumbaugh, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was convicted in a trial to the court of two offenses: (1) for gain or hire, keeping and occupying a store, with books, papers, paraphernalia, etc., for the purpose or recording bets on horse races, and (2) for gain, hire, etc., recording and registering a bet or bets on horse races, in violation of section 337a, subdivisions 2 and 4 of the Penal Code. He was sentenced to terms in the county jail to run consecutively and he appeals from the judgments.

Defendant's principal contention is that the evidence was insufficient to prove either offense. There was evidence of the following facts: At the location in question there was a pool hall and bootblack stand on Central Avenue in Los Angeles; at the time of his arrest defendant was asked by the arresting officer, "Do you own this place", and replied, "Yes, I am in partnership with a man by the name of Joe Stone." The officer, one Kubiak, in citizen's clothes, entered the premises with two other officers; he observed and heard defendant talking over a wall telephone but did not understand what he was saying; defendant had two small pieces of paper in his left hand and was looking at them; when he observed the officer he turned his back, stooped down, and tore up the pieces of paper and dropped them to the floor close to his feet where the officer picked them up. The pieces, restored to their original condition, were introduced as People's Exhibit A. Written on them were various

numbers and two sets of initials "J. S." and "R. B.". The officer, whose qualifications as an expert were stipulated to, testified that one of the numbers was the index number of a horse "Top's Boy", another number indicated a \$1.00 win bet, and the initials "J. S." were descriptive of the bettor. Another numeral was the index number of a horse "Take Wing". The numeral "1" would indicate a \$1.00 bet and the initials "J. S." were descriptive of the bettor. Two other numbers indicated two other horses running at Santa Anita, the numbers being placed to indicate a parlay from one horse in the sixth race to the other in the eighth race, the bet being a \$2.00 bet and the initials "R. B." being descriptive of the bettor. Defendant denied that the writing on the paper was his own and declared to the officer that he had never taken a bet. Another police officer, a qualified handwriting expert, made a study of the writing Exhibit A and the writing on a card from the police department files which latter, it was stipulated, contained pencil writing on both sides in the handwriting of defendant. This was introduced as People's Exhibit D. The witness having made a comparison of the writing on Exhibits A and D, testified to an opinion that all the pencil writings were made by the same person. There was also introduced in evidence by the People as Exhibit B a small pad upon the top page of which there was pencil writing. This pad was found by the officer on the shoeshine stand about two feet from where defendant was standing at the time of his arrest. Defendant denied to the officer that the writing on Exhibit B was his own. The writing on Exhibit B, according to the testimony, was similar to that on Exhibit A and was descriptive of bets on horses running at several tracks throughout the country. The handwriting expert, having compared the writing on Exhibit B with that on Exhibit D, testified to his opinion that all the writing was in the handwriting of the same person. Another Exhibit, C, was described as a "scratch sheet", which is one of the devices commonly used by bookmakers. This was found by the cash

register, about five feet from where defendant was standing. At the time of his arrest defendant was asked to whom he was talking on the telephone and he answered that he was talking to his wife. He was asked why he tore up the papers he had in his hand and answered that he did not know. He did not testify either at the preliminary hearing or at the trial. The entire evidence at the trial was the testimony given at the preliminary hearing, with some additional cross-examination of the arresting officer.

[1] Defendant's argument consists chiefly of quotations from decisions in which it was held, for various reasons, that the proof failed to establish some element of the offense of bookmaking. The facts in each of the cases relied upon differed in material respects from those of the present case. We find here no insufficiency of the evidence to prove the offenses charged. In the view we must take of the case, the trial court believed that defendant was one of the proprietors of the place of business, the shoe shining stand, or poolroom, or both; that he had in his hand papers upon which he had written notations of bets on horse races made by others; that he tore up these papers when he saw the officer approaching; that he had close at hand a pad of paper upon which he had made notations of bets such as bookmakers usually employ in keeping the records of the bets of their customers and the results of races, and in addition had at hand a scratch sheet as one of the papers which he used in bookmaking activities. The facts were not in dispute. The incriminating circumstances were not explained by defendant at the trial and are not explained in his brief. They pointed unerringly to defendant's guilt as laid by each count of the information. See *People v. Hinkle*, 64 Cal.App. 375, 221 P. 693.

[2] Since defendant was convicted of separate offenses he cannot properly complain that his sentences were made to run consecutively.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

PHALANX AIR FREIGHT, Inc., v. NATIONAL SKYWAY FREIGHT CORP. et al.
Civ. 14447.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1950.

Rehearing Granted Jan. 27, 1951.*

Phalanx Air Freight, Inc., a corporation, sued National Skyway Freight Corporation, a corporation, and others, to recover damages for breach of contract. The Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Dooling, J., held that since the purported contract between plaintiff, as a freight forwarder, and the named defendant, as an uncertified air carrier, provided for monthly renegotiation as to guaranteed volume and rates to be charged, contract was unenforceable.

Reversed.

1. Carriers ⇨69(3)

In breach of contract action brought by freight forwarder against uncertified air carrier based on fact that defendant had ceased its operations by air to and from San Francisco, evidence sustained finding that San Francisco Airport was "originating airport mutually agreed upon by parties" within meaning of language used in contract whereby carrier was bound to load merchandise to be forwarded at "originating airports mutually agreed upon by parties".

2. Contracts ⇨154

Contract is to be construed to give it reasonable effect. Civ. Code, § 1643.

3. Contracts ⇨10(1)

Provision for termination of contract by one party at will has effect of rendering contract illusory, but a provision for termination after notice for fixed period does not have that effect.

4. Contracts ⇨10(3)

Where freight forwarder agreed to ship all freight over which it had control in airplanes operated by uncertified air car-

rier and carrier agreed to load merchandise for shipment at times and at originating airports mutually agreed upon by parties, contract was not illusory because of lack of mutuality, notwithstanding provision making contract terminable by forwarder at any time by giving carrier at least 30 days' notice. Civ. Code, §§ 1605, 1643.

5. Contracts ⇨25, 39

Neither law nor equity provides remedy for breach of agreement to agree in future, but where matter left for future agreement is minor or subsidiary to main contract, contract may be enforced despite failure to agree on minor or subsidiary matters.

6. Carriers ⇨62

Where purported contract between freight forwarder and uncertified air carrier provided that rates and guaranteed volume were to be renegotiated monthly, essential term of contract was left to future agreement of parties and there was no enforceable contract.

7. Appeal and error ⇨173(2)

In breach of contract action brought by freight forwarder against uncertified air carrier, where defendant's contention that plaintiff could not recover because its operations were illegal under Civil Aeronautics Act was not urged in trial court and depended upon questions of fact raised for the first time on appeal, appellate court would not consider question. Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq.

8. Carriers ⇨69(4)

In breach of contract action by freight forwarder against uncertified air carrier, plaintiff could not recover both for office expenses and loss of gross profit, since office expenses are element of cost which would have been incurred in earning profits, nor could plaintiff recover both value of stationery rendered useless by defendant's conduct and cost of new stationery to replace it.

Burns & McKeever and James E. Burns, all of San Francisco, for appellant.

* Subsequent opinion 232 P.2d 510.

Dudley Harkleroad, Rudolph J. Scholz, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff had judgment against defendant for damages for breach of contract. Defendant was operating airplanes as an uncertified carrier, i. e., it was not authorized to hold itself out as a common carrier but was authorized only to operate as a contract carrier. Being thus unable to solicit freight in less than plane-load shipments defendant arranged with plaintiff to engage in the business of freight forwarding, whereby plaintiff would enter into contracts with individual shippers for the shipment by air of less than plane-load lots and after combining such individual shipments into plane-load lots forward them by defendant's planes. Pursuant to this arrangement defendant engaged in the business of freight forwarding in San Francisco using the facilities of defendant for the air-transportation.

On November 15, 1946 the parties reduced their contract to writing and it is for the breach of this written contract that plaintiff recovered, based on the fact that on January 10, 1947 defendant ceased its operations by air to and from San Francisco.

[1-4] On this appeal defendant argues that the written contract did not bind it to maintain air-operations to and from San Francisco and that the contract was illusory because of lack of mutuality. By the terms of the writing defendant bound itself "to transport said shipments for Forwarder (plaintiff), all upon and subject to and in accordance with provisions set forth in this contract * * * Air Carrier (defendant) shall load said merchandise on the airplanes of Air Carrier at the times and at the originating airports mutually agreed upon by the parties." Attached to the agreement as an exhibit was a schedule of rates which included rates "San Francisco and New York" and "San Francisco and Chicago". The evidence further showed that both before and after the execution of this writing plaintiff's business with defendant was in San Francisco. The conduct of

the parties fully supports the finding that the San Francisco airport was an "airport mutually agreed upon by the parties" within the meaning of that language as used in the contract. It is hornbook law that a contract is to be construed to give it a reasonable effect, Civ.Code, sec. 1643; 6 Cal.Jur., Contracts, sec. 169, p. 271, and any other construction of the contract here in question would do violence to this salutary rule.

The contract contained a provision making it terminable by plaintiff "at an time by giving Air Carrier at least thirty (30) days notice." This did not render the contract illusory as contended by defendant. While a provision for termination by one party at will has that effect a provision for termination after notice for a fixed period does not. *Brawley v. Crosby Research Foundation, Inc.*, 73 Cal.App.2d 103, 113 et seq., 166 P.2d 392; 1 Williston on Contracts, Rev. Ed., sec. 105, p. 365; 17 C.J.S., Contracts, § 100(g), p. 453. Plaintiff bound itself to ship by defendant's planes "all freight over which it has control" and it was bound to do this until notice of termination and for thirty days thereafter. It thus agreed to confer a benefit and suffer a prejudice which afforded consideration for defendant's promises to it. Civ.Code, sec. 1605.

[5,6] By paragraph eleventh of the writing: "The rates which are enumerated on Schedule A and the volume guaranteed by Forwarder will be renegotiated monthly; but this renegotiation does not affect any provisions set forth in this contract." Defendant argues that "it is clear that if no rate or volume guarantees were negotiated for a specific point, as none were negotiated for San Francisco after January, 1947, plaintiff cannot recover for any damages purported (sic) caused by defendant's termination of the instant contract, since, in effect, we have here a contract which was to be renegotiated monthly and no renegotiations having occurred no binding contract existed for subsequent months."

We can see no escape from the validity of this argument. When an essential term of a contract, as the guaranteed volume and rates to be charged must be held to be in this case, is left to the future agreement

of the parties there is no enforceable contract. "There is no dispute that neither law nor equity provides a remedy for breach of an agreement in the future." *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 152, 180 P.2d 888, 893; *Watson v. Talpey-Arnold Syndicate*, 202 Cal. 656, 262 P. 716; *Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp.*, 61 Cal.App. 2d 55, 141 P.2d 938; *Los Angeles Soda Works v. Southern California Aquazone Co.*, 103 Cal.App. 105, 284 P. 253; *Dillingham v. Dahlgren*, 52 Cal.App. 322, 198 P. 832; *Fly v. Cline*, 49 Cal.App. 414, 193 P. 615; *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal.App. 666, 117 P. 936; 1 Williston on Contracts, Rev. Ed., sec. 45, p. 131. Where the matter left for future agreement is minor or subsidiary to the main contract the contract may be enforced despite the failure to agree on the minor or subsidiary matter, 1 Williston on Contracts, Rev. Ed., sec. 48, pp. 136-138, but the rates to be charged and the volume to be guaranteed are too integral and important to the contract here involved to fall under the latter rule.

Since the proof may show an agreement on rates and volume for the month of January or a waiver by acceptance of freight without such agreement for that month the plaintiff may still be entitled to a recovery for failure to perform to the end of January, but the damages actually allowed covered a longer period of time.

[7] The contention that plaintiff cannot in any event recover because its operations were illegal under the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq., was not urged in the trial court and depends on questions of fact which are raised for the first time on appeal. For this reason we will not consider that question. *Levitt v. Glenn L. Clark & Co.*, 91 Cal.App.2d 662, 205 P.2d 747; *Svistunoff v. Svistunoff*, 94 Cal.App.2d 651, 211 P.2d 352; *Gelb v. Benjamin*, 78 Cal.App.2d 881, 178 P.2d 476; *Grimes v. Nicholson*, 71 Cal.App.2d 538, 162 P.2d 934.

[8] Certain elements of damage allowed are obvious duplications. Plaintiff cannot recover both for office expenses and loss of

gross profits since the office expenses are an element of cost which would have been incurred in earning the profits; nor can plaintiff recover both the value of stationery rendered useless by the defendant's conduct and the cost of new stationery to replace it.

Judgment reversed.

NOURSE, P. J., concurs.



101 Cal.App.2d 586

PEOPLE v. MARINGER.

Cr. 696.

District Court of Appeal, Fourth District,
California.

Jan. 3, 1951.

Fred C. Maringer was convicted of murder and he appealed from an order of the Superior Court of Riverside County, Russell S. Waite, J., denying a petition for a writ of coram nobis. The District Court of Appeal, Mussell, J., held that a writ of coram nobis did not lie under the circumstances.

Order affirmed.

1. Criminal law ☞997

Attack on sufficiency of evidence adduced in murder prosecution was not within scope of writ of coram nobis.

2. Criminal law ☞997

A writ of coram nobis does not lie to correct error in judgment of court, nor to contradict or put in issue any fact directly passed upon and affirmed by judgment itself, and where remedies of right to appeal and to make a motion for a new trial are provided for by statute, to that extent an application for writ of error coram nobis cannot be entertained.

3. Criminal law ☞997

The qualifications of medical experts to testify in murder prosecution are not reviewable on petition for writ of coram nobis.

4. Criminal law ⚡1030(1)

On appeal from murder conviction objections may not be raised for first time where they were not made at trial.

conviction, and no such motion appeared to have been made and there was no appeal from original judgment, writ of coram nobis did not lie.

5. Criminal law ⚡997

Trial court properly denied petition for writ of coram nobis filed by petitioner who had been convicted of murder of an aged woman in her cabin, on ground that petitioner had a fair trial and a full and complete hearing, and that evidence of petitioner's guilt was overwhelming.

Fred C. Maringer, in pro. per.

Fred N. Howser, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

6. Criminal law ⚡997

Record did not establish that a defendant convicted of murder of aged woman in her cabin had been inadequately defended by public defender.

Defendant was charged with, and found guilty of, the murder of Mrs. Eugenia Howell. Life imprisonment was recommended in the verdict of the jury and defendant was, on April 5, 1949, sentenced to the state prison. On February 8, 1950, he filed a "Notice and Application for a Writ of Error Coram Nobis. To set aside and vacate the judgment." The district attorney filed an affidavit in opposition to the application and after a hearing thereon, at which time defendant was represented by the public defender, the petition was denied. This appeal, presented in propria persona, is from the order of the court denying the application.

7. Criminal law ⚡997

Contention that a defendant convicted of murder had been inadequately defended by public defender could not be considered in a coram nobis proceeding.

In the proceedings before the trial court on his application for a writ, defendant contended that it was not established in the trial that a murder had been committed and in support of his contention, filed and submitted an affidavit denominated "Statement of Facts", as follows:

8. Criminal law ⚡553

"Inherent improbability" of evidence introduced by prosecution in prosecution for crime is not present unless there exists either a physical impossibility that facts are true or when their falsity is apparent without resorting to inferences or deductions.

"I was convicted of murder in the first degree on circumstantial evidence.

9. Homicide ⚡250

Testimony given in murder prosecution as to what witness saw upon entering victim's cabin, and testimony of public officer that he heard defendant ask what excitement was about and that defendant had raped the victim, and other evidence, showed no inherent improbability.

"During my trial a photograph of the decedent was introduced by the State as evidence. This photograph bore marks, or discolorations on the throat of the decedent. The state contended that these marks, or discolorations, were resultant of manual strangulation.

10. Criminal law ⚡742(1)

Homicide ⚡268

In prosecution for murder of an aged woman in her cabin by strangulation, credibility of witnesses and weight to be given to their testimony were for determination of triers of facts.

"My attorney, during his attack on these marks cross examined a pathologist, one Dr. Baisinger, who had performed an autopsy on the decedent.

11. Criminal law ⚡997

Where all contentions presented related to matters which were put in issue in trial of murder prosecution and could have been considered and passed upon on a motion for a new trial or in an appeal from

"During this cross examination this Dr. Baisinger admitted that he had returned a diagnosis of manual strangulation because the police of the city of Banning,

California had told him that the decedent had been strangled.

"No other professional testimony regarding the cause of death was produced in this case.

"It is therefore my contention that, at no time during my trial, had it been established that a murder had been committed."

In addition to the foregoing affidavit, defendant, in a separate document, claimed that he was deprived of his constitutional rights and of a fair and impartial trial; that the court erred by permitting the misconduct of the district attorney; that the verdict is contrary to the evidence; that the trial court erred in its decision of questions of law and in the improper admission of evidence.

[1] The affidavit of the district attorney set forth at length the direct and cross-examination of the testimony of Dr. Baisinger relating to the condition in which he found the victim and the cause of her death. There was no contention before the trial court that the doctor's testimony, as set forth by the district attorney, was not a correct transcript thereof. The doctor testified that the victim died from strangulation and defendant's attack on his testimony is not sustained by the record. Moreover, this is merely an attack on the sufficiency of the evidence which is not within the scope of the writ here sought.

[2-4] The writ of coram nobis does not lie to correct error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself and where the remedies of the right to appeal and to make a motion for a new trial are provided for by statute, to that extent an application for a writ of error coram nobis cannot be entertained. *People v. James*, 99 Cal.App.2d 476, 222 P.2d 117; *People v. Tuthill*, 32 Cal.2d 819, 822, 198 P.2d 505; *People v. Reid*, 195 Cal. 249, 256, 232 P. 457, 36 A.L.R. 1435; *People v. Coyle*, 88 Cal.App.2d 967, 200 P.2d 546; *People v. Young*, 88 Cal.App.2d 601, 199 P.2d 384. The qualifications of medical experts are not reviewable in the proceedings herein, *People v. Goold*, 90 Cal.App.2d 640, 203 P.2d 118, and on

appeal objections may not be raised for the first time where they were not made at the trial. *People v. Messerly*, 46 Cal.App. 2d 718, 116 P.2d 781.

In the proceedings before the trial court nothing other than the quoted "Statement of Facts" was offered to support the general allegations of error. The trial judge who heard the evidence in the case also presided at the hearing on the application for the writ, and, as is evidenced by his decision, considered all of the evidence produced at the trial, as well as the rulings made.

A summary of the evidence is set forth in the affidavit of the district attorney, as follows: Mrs. Eugenia Howell, the victim, lived in a small cabin at the Banning Auto Camp at Banning, California. She was a woman about eighty-two years of age and in poor health. On the date of the murder, January 3, 1949, Mrs. Howell had been to see her doctor relative to her asthmatic condition. At about 9:30 in the evening the defendant came to Mrs. Howell's cabin to see an acquaintance of his, Mrs. Catherine Knight, who was looking after Mrs. Howell that evening. Defendant was in a drunken condition and was requested by Mrs. Knight to leave. This he refused to do. Mrs. Knight asked the defendant where her car was that he had borrowed earlier in the day and he stated he had left it out along the highway "some place." Mrs. Knight then went out to locate her car and after finding it, returned to the cabin with her sister shortly before 11:00 p. m. An unsuccessful attempt was made to enter the cabin and Mrs. Knight then went to the residence of Harry Goldwasser, a short distance away, and informed him that there was a drunk in the cabin with Mrs. Howell.

Mr. Goldwasser, proprietor of the auto camp, called the police department and armed himself with a large rubber hose. He then went to Mrs. Howell's cabin and upon entering the door, saw the defendant astride the body of Mrs. Howell, with both feet off the floor, and both knees on the edge of the bed. The defendant was clothed in only his socks and undershirt. (The other gruesome details of the appear-

ance of the victim and the defendant are here omitted.) Mr. Goldwasser, seeing what he saw, knocked the defendant to the floor with the rubber hose. The defendant continuously pleaded with Mr. Goldwasser to "be a good fellow, give me a break, let me put my clothes on and go away." Two members of the Banning police department arrived within a few minutes and saw the condition of the defendant and the victim. At that time the defendant stated to one of the officers "What's all the excitement about? I raped the woman, so what?" Recent bruises were found on the neck of the victim, and Dr. Baisinger, a pathologist, who performed an autopsy on the body of Mrs. Howell, ascertained that her death was due to strangulation. The defendant, in his first reported statement to the officers, denied ever being in the cabin and claimed to have completely blacked out at noon on January 3, 1949, from excessive drinking. He claimed to know nothing that occurred after that hour. At the trial the defendant remembered everything that occurred that day to the extent of being in Mrs. Howell's cabin, but he claimed to have been in a very drunken condition and having passed out, upon awakening found the victim there dead.

[5] The court, after a consideration of all the evidence, concluded that the defendant had a fair trial and a full and complete hearing, and stated that the evidence of defendant's guilt was overwhelming and the defendant was fortunate in that the jury recommended life imprisonment. There was no error in the order denying the application.

In an affidavit and a "Statement of Facts" in his opening brief on appeal, defendant again attacks the qualifications and testimony of Dr. Baisinger. He argues that he was inadequately defended by the public defender, particularly in that he was not protected by having a doctor of his own choice called as a witness and that the testimony of Dr. Baisinger was not otherwise properly opposed; that the evidence offered by the prosecution is in certain respects improbable and incredible; that the jury should have believed defend-

ant's story; that the district attorney asked improper questions on cross-examination and made improper statements to the jury.

[6, 7] The various contentions set forth are entirely without merit. The record does not sustain defendant's contention that he was inadequately defended by the public defender. Furthermore, such a contention cannot be considered in a coram nobis proceeding. *People v. Krout*, 90 Cal.App. 2d 205, 208, 202 P.2d 635.

The contention as the improbability of certain evidence introduced by the prosecution is directed principally to the testimony of one Harry Goldwasser as to what he saw upon entering the victim's cabin, and to the testimony of a public officer that he heard the defendant state "What's all the excitement about? I raped the woman, so what?"

Other claimed improbabilities are: (1) That it is "incredible" that defendant would have allowed himself to be found in the incriminating position by Mr. Goldwasser when the door of the cabin was unlocked and the lights were burning; (2) That the jury should have believed his story that he was undressed and helped to bed in Mrs. Howell's cabin; that he awakened thereafter and found her body on the same bed where he was lying; that he jumped out of bed to see what he could do to revive her; and that he was standing thus when Mr. Goldwasser burst into the cabin; (3) That it was improbable that he made the statement to officer Bovin, "What's all the excitement about? I raped the woman, so what?" because he had just been beaten with a hose by Mr. Goldwasser and also because neither Goldwasser nor any one else testified that he heard the statement in question; and, finally, that Mrs. Howell's watch was missing and appellant's watch and money "disappeared".

[8, 9] Inherent improbability is not present unless there exists either a physical impossibility that the facts are true or when their falsity is apparent without resorting to inferences or deductions. *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758; *People v. Rivas*, 92 Cal.2d 663, 666,

667, 207 P.2d 1062; *People v. Lindsey*, 90 Cal.App.2d 558, 563, 203 P.2d 572. Under the rules announced in these cases it is quite apparent that no inherent improbabilities were shown.

[10] The credibility of the witnesses and the weight to be given to their testimony were for the determination of the triers of fact. *People v. Neal*, 97 Cal.App. 2d 668, 218 P.2d 556; *People v. Murray*, 91 Cal.App.2d 253, 256, 204 P.2d 624.

[11] All of the contentions presented relate to matters which were put in issue in the trial of the case and could have been considered and passed upon on a motion for new trial or in an appeal from the judgment. No such motion appears to have been made and there was no appeal from the original judgment. Under such circumstances a writ of coram nobis does not lie.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



101 Cal.App.2d 476

NUTTMAN v. CHAIS et al.

Civ. 17923.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1950.

Action by D. Nuttman against George J. Chais, and others, to foreclose mechanics' liens. The Superior Court of Los Angeles County, Charles A. Paulsen, J., rendered judgment for plaintiffs, and entered order denying defendants' motion for a new trial, and defendants appealed. The District Court of Appeal, Wilson, J., held that evidence supported finding that contractors fully completed and performed their work,

Judgment affirmed and purported appeal from order denying new trial dismissed.

1. Appeal and error ⇨882(3)

Appellants will not be permitted to present a theory contrary to that on which case was tried.

2. Mechanics' liens ⇨280(2)

In action to foreclose mechanics' liens, where defendants ordered a much larger and more expensive structure than originally contracted for, evidence was properly admitted as to amount and value of extra work.

3. Contracts ⇨238(2)

Where oral agreement modifying written contract to construct a den, shower house and improvements on defendants' residence was fully executed, and work was completed as ordered, defendants were liable for the additional expense.

4. Mechanics' liens ⇨281(1)

In action to foreclose mechanics' liens, evidence supported finding that contractors fully completed and performed their work.

5. Mechanics' liens ⇨290(3)

Findings that contractors fully completed and performed their work under contract for construction of a den, shower house and improvements on defendants' residence, and under defendants' order for additional work, were within issues presented by complaint alleging that work, labor and materials required by contract for construction of a den, shower house and improvements on defendants' residence, and by defendants' order for additional work, had been furnished and delivered by contractors to and for defendants.

6. Appeal and error ⇨223

Alleged variance between pleadings and findings and judgment, which was not raised at trial, was waived.

7. Pleading ⇨237(1, 8)

Allowance of amendment to complaint to conform to proof rests in sound discretion of trial court, and where an abuse of discretion was not shown and new and entirely different issues were not brought into case, allowance of amendment was not error.

8. Pleading ⇨250

An amendment to a complaint praying for damages greater than originally sued for, is properly allowed if evidence justifies such increase and relates solely to the identical cause of action in the original pleading.

9. New trial ⇨102(3, 8)

Where defendants knew of architect who was expected to give evidence concerning work performed by contractors, and knew of his connection with the work, and failed to make any attempt to have him present at trial, and failed to move for a continuance, denial of defendants' motion for a new trial on ground of newly discovered evidence based upon testimony architect was expected to give was not error.

Desser, Rau, Christensen & Hoffman, Los Angeles, for appellants.

Harry J. Miller, Los Angeles, for respondent.

WILSON, Justice.

John Bonin & Sons Construction Company entered into an agreement in writing with defendant George J. Chais for the construction of a den, shower house and improvements on defendants' residence property in accordance with plans and specifications. The Bonin Company engaged Leon A. Chernus as subcontractor on the work. Upon the completion of the contract, together with extra work ordered during the progress of the construction, defendants failed to pay the full amount agreed upon, whereupon the construction company and Chernus filed mechanics' liens for the balance remaining unpaid and assigned the liens to plaintiff. This action is against Chais and his wife and others to foreclose the liens. Judgment was rendered in favor of plaintiff from which defendants have appealed. Defendants have also purportedly appealed from the order denying a new trial.

After the contractors had commenced the work and laid out the foundation defendants determined that they would like

a larger building and other improvements not provided for in the original contract, plans and specifications. The improvement was completed under the revised plans and specifications.

[1] Defendants contend that the trial court erred in receiving parol evidence of the modification of the original agreement and in basing its findings thereon. The evidence was admitted without objection and in fact much of it was brought out by defendants on cross-examination. The case having been tried on the theory that the contract had been orally modified, and the question being whether the contract had been completed according to the modification, defendants will not be permitted to present a contrary theory on appeal. *Grimes v. Nicholson*, 71 Cal.App.2d 538, 543, 162 P.2d 934; *Priebe v. Sinclair*, 90 Cal.App.2d 79, 87, 202 P.2d 577; *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750.

[2] Moreover, there was no attempt to vary the terms of the contract, as that term is ordinarily understood and expressed in the decisions cited by defendants. Defendants ordered a much larger and more expensive structure than originally contracted for. Evidence was properly admitted as to the amount and value of the extra work. *Gutleben Bros. v. Stevenson*, 92 Cal.App. 513, 520, 268 P. 379; *Lacy Mfg. Co. v. Gold Crown Mining Co., Ltd.*, 52 Cal.App.2d 568, 577-578, 126 P.2d 644; *Wyman v. Hooker*, 2 Cal.App. 36, 41, 83 P. 79.

[3,4] The oral agreement modifying the written contract was fully executed and the work completed as ordered by defendants, and having been fully executed defendants were liable for the additional expense. *State Finance Co. v. Hershel California Fruit Products Co.*, 8 Cal.App. 2d 524, 529, 47 P.2d 821. The evidence supports the finding that the contractors fully completed and performed their work. Chernus, the subcontractor, testified that for three and a half months he spent almost 75 percent of his time in the construction of defendants' improvements; that all the work provided for in the con-

tract, plans and specifications was performed, and that all the extra work was completed as defendants ordered. He testified in detail as to extra work performed and as to its reasonable value. Such evidence sustains the finding although there was conflicting evidence on the part of defendants as to certain features of the work.

[5,6] Defendants also maintain that the findings and judgment are not supported by the pleadings. The complaint alleged that the work, labor and materials required by the contract and by defendants' order for additional work had been furnished and delivered by the contractors to and for defendants. The execution of the contract, the order for extra work, and the allegation that all had been supplied by the contractors, is a sufficient pleading and supports the findings. Furthermore, the alleged variance was not raised at the trial and is therefore waived. *Colbert v. Colbert*, 28 Cal.2d 276, 281, 169 P.2d 633.

[7,8] Defendants assign error made at the conclusion of the case allowing plaintiff to amend the complaint to conform to the proof by alleging a greater amount due than that alleged in the original complaint. When at the close of the evidence plaintiff asked leave to amend the complaint to conform to the proof no objection was raised by defendants and they apparently acquiesced in the order. The allowance of such amendment rests in the sound discretion of the trial court and since an abuse of discretion is not shown, and new and entirely different issues were not brought into the case, the court did not err in allowing the amendment. *Crown Products Co. v. California Food Products Corp.*, 77 Cal.App.2d 543, 550, 175 P.2d 861. An amendment to a complaint praying for damages greater than originally sued for is properly allowed if the evidence justifies such increase and relates solely to the identical cause of action in the original pleading. *Babcock v. Jewell*, 110 Cal.App.

323, 325-326, 294 P. 30; *Stohlman v. Martin*, 28 Cal.App. 338, 346, 152 P. 319; *Hoffman v. Southern Pacific Co.*, 101 Cal.App. 218, 229, 281 P. 681.

[9] Finally, defendants contend that the trial court abused its discretion in denying their motion for a new trial on the ground of newly discovered evidence. The witness defendants desired to call was an architect who was expected to give evidence concerning the work performed by the contractors. Such evidence could not strictly be classed as "newly discovered" since the witness was defendants' architect on the job and was known to defendants for a considerable period prior to the making of the contract. The action was commenced in April, 1948. On November 4, 1948, the trial was set for May 25, 1949. The affidavits show that the architect was listed in the Los Angeles telephone directory with an office and residence in Los Angeles and that he had been in the County of Los Angeles a month prior to the trial. Defendants never sought to take his deposition or to cause the issuance of a subpoena requiring his presence at the trial. When the case was called for trial on May 25, 1949, defendants did not apply for a continuance and no point was made of the absence of the witness. Evidence was introduced by both parties and the cause was submitted without any motion by the defendants for a continuance.

Since for more than a year prior to the trial defendants had known of the existence of the architect and had known of his connection with the work and failed to make any attempt to have him present at the trial, and failed to move for a continuance, there was no error in denying the motion. *Broads v. Mead*, 159 Cal. 765, 768, 116 P. 46; *Crawford v. Rose*, 2 Cal.App.2d 734, 738, 39 P.2d 217.

Judgment affirmed. Purported appeal from order denying new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.

101 Cal.App.2d 271

CROSWELL v. ECKELS et al.

Civ. 17955.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

G. N. Croswell sued Ralph Eckels and others to establish his right to a quiet title. The Superior Court, Los Angeles County, Frederick F. Houser, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Moore, J., held that plaintiff could not prevail since he had not established that a predecessor in title had been a purchaser for value and in good faith, notwithstanding fact that deed to predecessor had been recorded prior to recordation of earlier deed by original grantor to different grantee.

Affirmed.

1. Deeds ⇨207

In quiet title action, evidence was insufficient to establish that conveyance made by original grantor to defendants' predecessor in title had been rescinded so as to vest title in plaintiff under subsequent conveyance of same land made by original grantor to plaintiff's grantor.

2. Deeds ⇨177

Recordation of deed to different grantee prior to recordation of grantee's deed is not equivalent to statutory requirement of notice of rescission. Civ.Code, § 1691.

3. Deeds ⇨177

Offer to restore consideration received from grantee is indispensable to legal rescission unless nothing of value was received as consideration for deed.

4. Evidence ⇨318(2)

In quiet title action, testimony that "someone" had written from Florida that original grantee did not own Florida land given as consideration for deed was hearsay.

5. Evidence ⇨158(3)

That vendor does not own realty situated in distant community can be proved only by competent witness who has searched

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deed records of county in which land was represented to be located.

6. Descent and distribution ⇨90(1)

Neither heirs nor their transferees are in position to prevail in quiet title action involving land purportedly owned by decedent until decedent's estate has been administered and her property distributed to her heirs.

7. Quietling title ⇨10(1)

Right to recover in quiet title action depends upon strength of plaintiff's title.

8. Vendor and purchaser ⇨228(2)

Where grantee had actual notice of delivery of deed by grantor to another grantee prior to delivery of grantee's deed to her, deed to grantee was ineffectual as conveyance of property. Civ.Code, § 1217.

9. Estoppel ⇨27(1)**Vendor and purchaser** ⇨235

Grant of real property is conclusive against grantor and those subsequently claiming under him, except purchasers or encumbrancers who in good faith and for valuable consideration acquire title or lien by instrument that is first duly recorded, but grantee by gift deed could not obtain estate in lots as against prior grantee. Civ.Code, § 1107.

10. Quietling title ⇨10(2)

In quiet title action, where plaintiff failed to prove that his predecessor in title had been purchaser for value and in good faith, plaintiff could not prevail, notwithstanding fact that deed to his predecessor had been recorded prior to recordation of deed by which original grantor had previously transferred land to different grantee.

Ernest W. Pitney, Los Angeles, for appellant.

Moidel, Moidel, Moidel & Smith, Los Angeles (by Leonard Smith, Los Angeles), for respondents.

MOORE, Presiding Justice.

Having failed to establish his right to a quiet title, appellant demands a reversal

of the judgment on the grounds that (1) the facts prove that the transaction whereby respondents' predecessor acquired a deed to two city lots was rescinded; (2) the grantor of Ralph and Emma Eckels had constructive notice of the rescission; (3) such respondents had constructive notice of the rescission.

The controversy arose out of the attempt of one Ezra Cubley to convey two city lots to some member of his family after he and his wife Edna had already transferred them to one Darol Roberts. Some five days before Roberts had recorded his deed, Ezra, without being joined by his wife, by deed transferred the same property without consideration to his mother Martha Belle Cubley who had knowledge of the Roberts' deed. Evidently conceiving that they had all or part ownership of the lots as heirs or legatees of Martha Belle, the latter's husband, W. M. Cubley, joined Ezra and his wife Edna in executing a deed to appellant on April 7, 1949, which was recorded on June 14 of the same year. No consideration was paid by either Martha Belle to Ezra or by appellant to his grantors.

[1-5] There is no proof that the conveyance to Roberts was rescinded. No notice of Ezra or his wife Edna was in evidence to prove a rescission of the conveyance or a demand for reconveyance. The recording of the deed to Martha Belle prior to the recordation of the Roberts' deed is not equivalent to the statutory requirements of a notice of rescission. See Civ.Code, sec. 1691. Such deed did not contain a suggestion that Martha Belle's grantor had rescinded his transaction with Roberts. Many reasons for the delivery or recordation of a second deed might be named without the remotest suggestion of the cancellation of a prior conveyance. Moreover, appellant's attempt at rescission fails inasmuch as no offer was made to restore the consideration received from Roberts. Such an offer is indispensable to a legal rescission Civ.Code, 1691; *McGue v. Rommel*, 148 Cal. 539, 547, 83 P. 1000, unless nothing of value was received. *Esau v. Briggs*, 89 Cal.App.2d 427, 436,

201 P.2d 25. The consideration furnished by Roberts was a deed to certain Florida property, and although Mr. Cubley testified that this consideration failed, his testimony fell far short of establishing this fact to the satisfaction of the trial court. Testimony that "someone" had written from Florida that Roberts did not own the Florida land in question was hearsay at its best. That a vendor does not own realty situate in a distant community can be proved only by a competent witness who has searched the deed records of the county in which the land was represented to be located. There is another vice inherent in appellant's title. The deed to Martha Belle was by Ezra alone. However, the significance of that fact lies not so much in the want of a complete transfer of presumptively community property but rather in the fact that it evidences a hasty attempt on the part of Ezra to get his deed first on record in order to circumvent the deed to Roberts.

[6, 7] Also, the insignia of appellant's ownership do not clearly appear. No pleading or proof indicates that Martha Belle died testate. Appellant is therefore not shown to have received a transfer of the two lots in question. Until Martha Belle's estate has been administered and her property distributed to her heirs, neither the latter nor their transferees are in a position to prevail in a quiet title action. The right to recover in such an action depends upon the strength of the plaintiff's title. *McGrath v. Wallace*, 116 Cal. 548, 551, 48 P. 719; *DeFlon v. Van Lue*, 83 Cal.App. 2d 288, 291, 188 P.2d 301.

[8, 9] Inasmuch as Martha Belle had actual notice of the delivery of the Roberts' deed prior to delivery of Ezra's deed to her the latter instrument was ineffectual as a conveyance of the property. Civ.Code, sec. 1217. She could not by a gift deed obtain estate in the lots as against Roberts who had already acquired title thereto by the deed from Ezra and wife. It is statutory that a grant of real property is conclusive against the grantor and those subsequently claiming under him "except a purchaser or encumbrancer who in good

faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded." Civ.Code, sec. 1107.

[10] Therefore, since appellant did not establish that Martha Belle Cubley was a purchaser for value and in good faith, he cannot prevail. *Clark v. Sawyer*, 48 Cal. 133, 142; *Mahoney v. Middleton*, 41 Cal. 41, 50; 45 Am.Jur. 479, sec. 104.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



101 Cal.App.2d 300

HANSEN v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N.

Civ. 4146.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1950.

O. A. Hansen brought an action against the Bank of America National Trust and Savings Association to recover money which plaintiff allegedly kept with defendant and which defendant allegedly agreed to repay to plaintiff upon plaintiff's order. The Superior Court of San Bernardino County, Carl B. Hilliard, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that defendant bank did not violate any duty to plaintiff by not charging to account of plaintiff's wife a check in favor of plaintiff drawn by plaintiff's wife, before bank paid a check previously drawn by plaintiff's wife, payment on which plaintiff's wife had desired stopped.

Judgment affirmed.

1. Banks and banking ⇨140(1)

A drawee bank owes no duty to payee of a check to honor or pay check.

2. Assignments ⇨49

A check does not itself operate as an assignment of the funds.

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3. Banks and banking ⇨124, 126

A bank accepting check for deposit gives a provisional credit only, subject to check being paid and proceeds placed in deposit representing the credit, and where check is drawn on same bank it must either be found good, by making proper charge or book entry, or notice of dishonor given at or before end of succeeding business day. Gen.Laws, Act 652, § 16c.

4. Banks and banking ⇨124

Where bank employee was told that plaintiff's wife wanted to close her checking account and open one for plaintiff, but was not told that she thereby desired to stop payment on check previously drawn by plaintiff to third party, and plaintiff's wife, at suggestion of such employee, took check rather than cash, and another bank employee, who did not know plaintiff's wife was closing account prepared deposit ticket in plaintiff's name and gave pass book to plaintiff, bank had, until end of next succeeding business day to dishonor such check or find it good, and bank did not violate duty to plaintiff by paying previously issued check on next succeeding business day before plaintiff's check was processed and amount charged to account of plaintiff's wife. Civ.Code, § 3265g; Gen.Laws, Act 652, § 16c.

E. John Eriksson, Homer M. Bail, San Bernardino, for appellant.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, Geo. L. Beckwith, Los Angeles, for respondent.

BARNARD, Presiding Justice.

In this action the plaintiff alleged that on April 28, 1947, he left with the Fontana Branch of the defendant bank the sum of \$2500 in cash; that the defendant received this sum and agreed to repay the same to him on his order; that the defendant misappropriated the whole sum on April 29, 1947; and that his demands for payment of said sum have been refused. A second cause of action, for money had and received, was included. The court found against the plaintiff on all of his allegations, except as to a demand, and found

that the defendant was not indebted to him in any amount, for money had and received, or otherwise. The plaintiff has appealed from the judgment.

Most of the facts are undisputed. On April 25, 1947, the appellant's wife had \$4561.64 in a checking account in the Fontana Branch of this bank. On that day, she signed and left with someone at the Matthews Real Estate office a check for \$2000 with the name of the payee left in blank. About noon on April 26, 1947, she gave to this bank a stop-payment order describing a check drawn by her "Dated 4-25-47 For \$2000 Favor of Matthews Real Estate."

On April 28, 1947, she and the appellant went to this bank and to an employee whose duty it was to sell bonds and who had nothing to do with receiving deposits. She purchased \$2061.64 worth of bonds, giving her check for that amount, which was on that day charged to her account, leaving a balance of \$2500. Mrs. Hansen told this employee that she wanted to close her account and open another for her husband. He told her there was no reason to take the cash when she wanted to open another account, and suggested that she give the appellant a check. She gave the appellant a check for \$2500 and they went together to another employee for the purpose of opening an account in his name. The appellant endorsed this check and gave it to this teller, who prepared a deposit ticket for \$2500 in the name of the appellant and gave him a pass book. Both the deposit ticket and pass book disclosed that the deposit consisted of a check, and not cash. This \$2500 check was never charged against the account of Mrs. Hansen. It clearly appears that the teller who received this deposit was not told that Mrs. Hansen desired to thereby close her account. And there is no evidence that she told the employee from whom she bought the bonds that her purpose in closing her account was to prevent the payment of an outstanding check.

On April 29, 1947, the check for \$2000 first above described, in which the name of Fred L. Crank had been inserted as payee, was presented to the bank and paid, and the amount charged to Mrs. Hansen's ac-

count leaving a balance of \$500. On the same day, the check for \$2500 deposited by the appellant was dishonored, the provisional credit in appellant's account was cancelled, and notice thereof was duly given.

It thus appears that Mrs. Hansen issued two checks against her account; that she failed to give a valid stop payment order on the first, Sec. 3265g, Civ.Code; that the second was deposited by the appellant; that before it was processed and the amount charged to Mrs. Hansen's account, the first check was presented, paid and charged; and that her account was then insufficient to cover the second check. The question presented is whether it must be held, as a matter of law, that the bank violated its duty to the appellant by not charging the \$2500 check to Mrs. Hansen's account before the \$2000 check was presented and paid.

The appellant contends that the evidence does not support the findings and judgment. It is argued that the evidence shows that he actually deposited \$2500 with the bank on April 28; that an employee of the bank advised Mrs. Hansen to handle the matter this way instead of withdrawing that sum in cash; that the employees of the bank knew that she wanted to close her account to prevent payment of the \$2000 check; that the \$2500 check, being presented first, was entitled to priority; and that the bank is estopped to deny that this was a cash deposit. It is further argued that section 16c of the Bank Act, Deering's General Laws, Act 652, does not give the bank another day in which to determine whether a check is good, but merely gives it that time for giving notice when a check is found not good. Cases are cited stating that a bank has until the close of banking hours of the day of the deposit in which to act, but these cases were decided prior to the amendment of section 16c in 1943.

[1, 2] It appears conclusively and without conflict that appellant's deposit was made by check and not in cash. From the preponderant evidence, which must be accepted in support of the judgment, it appears that the teller who entered this de-

posit was not told of any desire on the part of Mrs. Hansen to close her account. Not only was no estoppel pleaded, but there is nothing in the evidence which establishes an estoppel in favor of the appellant, or which requires that the deposit of the \$2500 check be treated as a cash deposit. It seems to be settled in this state that a drawee bank owes no duty to the payee of a check to honor or pay the check. *Sneider v. Bank of Italy*, 184 Cal. 595, 194 P. 1021, 12 A.L.R. 993; *Marble Co. v. Merchants' Nat. Bank*, 15 Cal.App. 347, 115 P. 59. A check does not of itself operate as an assignment of the funds. Civ.Code, Sec. 3265e; *Arnold v. San Ramon Valley Bank*, 184 Cal. 632, 194 P. 1012, 13 A.L.R. 320. Any liability of the respondent to the appellant must be based upon their depositor relationship; upon whether the check was received provisionally for collection or as an immediate creation of a debt owed to the appellant. The deposit being a check, and not cash, it seems clear that it was a credit transaction and governed by section 16c of the Bank Act. That section, so far as material here, provides that any credit allowed by a bank for any check drawn on that bank, or on another bank or another branch of the same bank, shall be provisional only, subject to final payment and to receipt by the bank allowing such credit of the actual money; provided further, "that any check * * * drawn on * * * the same bank * * * shall either be found good * * * or notice of dishonor duly sent, at or before the end of the next succeeding business day".

[3] As we read this section, it provides that a bank accepting such a check for deposit gives a provisional credit only, subject to the check being paid (or charged against the account on which it is drawn) and the proceeds placed in the deposit representing

the credit, with the further proviso that where the check is drawn on the same bank it must either be found good (by making the proper charge or book entry) or notice of dishonor given at or before the end of the succeeding business day. This gives the bank that time in which to determine whether to accept or reject the check so deposited and in which to make the necessary charge on the account on which the check was drawn, thus making collection of the check and removing the condition from the credit. Logically and practically, a bank must have a reasonable time to act in such a matter. Otherwise, another teller might pay another check before the receiving teller could complete the transaction and make the proper charge, even though both tellers had gone to look at the drawer's account before they acted. Section 16c seems to recognize this and to fix a reasonable time within which the bank must act on the provisionally deposited check. If a bank acts within the time thus allowed and rejects the check which was accepted provisionally it cannot, under the statute, be held liable to the payee of the check merely because another check on the drawer's account happened to have been cashed in the meantime. In the absence of fraud or intentional wrongdoing, and there is no evidence of any such thing here, we think the provisions of section 16c are controlling. The result of which the appellant complains was made possible by the careless acts of Mrs. Hansen, and the blame should not be placed on the bank, in disregard of the statute. On the record before us the respondent bank is not chargeable with the loss, if it be assumed that a loss was suffered.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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GOUGH v. GOUGH (three cases).

Civ. 17901.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1950.

Hearing Denied Feb. 15, 1951.

Mildred M. Gough brought action against Lloyd Gough, sometimes known as Lloyd Goff, to recover unpaid amounts that had accrued on a decree of separate maintenance which plaintiff had obtained in New York, and the action was consolidated with an action by Lloyd Gough against Mildred Munson Gough for divorce, wherein the defendant filed a cross complaint. A judgment awarding Lloyd Gough a divorce and denying Mildred Munson Gough recovery of unpaid installments of support money under the New York decree was entered by the Superior Court, Los Angeles County, Ranse R. Sischo, Judge of the Superior Court of Merced County, State of California, presiding under designation of Chief Justice as chairman of the judicial council, and Mildred M. Gough appealed. The District Court of Appeal, Moore, P. J., held that the New York decree of separate maintenance was entitled to full faith and credit.

Judgment reversed with directions.

McComb, J., dissented.

4. Divorce ⇨331, 332

In absence of power of modification, an order for payment of alimony or support money, rendered by court of competent jurisdiction, must be recognized by all states under the full faith and credit clause of the federal constitution as to all accrued installments. U.S.C.A.Const. art. 4, § 1.

2. Statutes ⇨263

Statutes will be applied only prospectively in absence of a clear expression of legislative intent to contrary.

3. Divorce ⇨332

New York law giving courts power to modify alimony and support decrees was not applicable to sum already accrued and past due, and, hence, New York judgment as to accrued and unpaid support payments was entitled to full faith and credit. Civil Practice Act, N.Y. § 1170; U.S.C.A.Const. art. 4, § 1.

4. Divorce ⇨331, 332

Even if New York decree of separate maintenance obtained by wife was not entitled to full faith and credit, a judgment for wife for sums already accrued and past due on the decree should have been given as a matter of comity.

5. Divorce ⇨330

In husband's action for divorce on ground of extreme cruelty, wherein wife filed a cross complaint on grounds of willful neglect and desertion, decree of separate maintenance obtained by wife in New York was res judicata of issue of wife's innocence and husband's guilt as of that date.

6. Judgment ⇨948(1)

If matter alleged in second action was within scope of first and so relevant to issues that it could have been presented in former action, the judgment in the prior bars the maintenance of the second action even though it is not specially pleaded.

7. Divorce ⇨326

In husband's action for divorce on ground of extreme cruelty, wherein wife filed a cross complaint on grounds of willful neglect and desertion, wife was not precluded from asserting decree of separate maintenance, which she had obtained in New York, was res judicata as to conduct of parties prior to entry of New York decree on ground that New York action was tried as default except as to issue of alimony, where New York decree recited on its face that husband appeared by his attorney, that proofs were presented and that husband admitted in open court the allegations of abandonment and nonsupport.

8. Divorce ⇨326

In husband's action for divorce on ground of extreme cruelty, wherein wife filed cross complaint on ground of willful neglect and desertion, wife did not waive benefit of doctrine of res judicata as to conduct of parties prior to entry of decree of separate maintenance which she had obtained in New York, by failing to plead New York decree in either her answer or cross complaint, since New York decree

was not a complete bar to husband's suit for divorce because he was still free to prove acts of cruelty after New York decree.

husband's desertion and willful neglect was alone sufficient evidence to entitle wife to divorce on such grounds.

9. Judgment ⇨948(1)

Where a prior adjudication is relied upon merely as conclusive evidence as to some fact constituting either matter of defense or an element of a cause of action and is not a complete bar to the action, the former judgment need not be pleaded.

William P. Gray, of Gray, Binkley & Pfaelzer and Sidney H. Wall of O'Melveny & Myers, Los Angeles, for appellant.

Margolis & McTernan, John W. Porter, Los Angeles, for respondent.

10. Divorce ⇨326

In husband's action for divorce on ground of extreme cruelty, wherein wife filed a cross complaint on grounds of willful neglect and desertion, wife did not waive right to assert decree of separate maintenance which she had obtained in New York was res judicata as to conduct of the parties prior to entry of the New York decree because she pleaded that husband had treated her cruelly and had deserted her prior to entry of New York decree, since such allegations were necessary in order to state a cause of action, and the New York decree was admissible as proof of such allegations.

MOORE, Presiding Justice.

The parties to this action were married in New York in 1929 but have lived separate and apart since 1934. Six years after they parted the wife obtained a decree of separate maintenance in New York by reason of respondent's desertion and wilful neglect. By the judgment the husband was ordered to pay \$40 per week for the wife's support. After years had elapsed during which the husband did not make the payments required of him by the New York judgment, the wife instituted this action to recover the unpaid amounts that had accrued. The husband countered with an action for divorce on the ground of extreme cruelty. The wife entered her cross-complaint to the husband's action demanding a divorce on the grounds of wilful neglect and desertion by the husband. The judgment awarded the husband a divorce and denied the wife recovery of the unpaid installments of support money under the New York judgment.

11. Divorce ⇨326

In husband's action for divorce on ground of extreme cruelty, wherein wife filed a cross complaint on ground of willful neglect and desertion, introduction by wife of evidence of parties' conduct prior to her obtaining a decree of separate maintenance in New York was not a waiver of her right to assert that New York decree was res judicata as to conduct of parties prior to entry of the decree, where wife was forced to present such proof to rebut husband's testimony previously introduced over objections.

[1] In refusing to enforce the New York judgment as to the unpaid installments of support money the trial court adopted the theory that the New York decree was not final and therefore not entitled to full faith and credit. The determinative question then is whether the New York decree was subject to modification by the courts of that state, since it is well settled that in the absence of a power of modification such an order for the payment of alimony or support money, rendered by a court of competent jurisdiction, must be recognized by all states under the full faith and credit clause of the Federal Constitution, art. 4, § 1, as to all

12. Divorce ⇨130, 131, 133(1)

Evidence established that wife was entitled to divorce on grounds of willful neglect and desertion and that husband was not entitled to divorce on ground of extreme cruelty.

13. Divorce ⇨326

Decree of separate maintenance obtained by wife in New York on grounds of

accrued installments. *Sistare v. Sistare*, 218 U.S. 1, 16, 30 S.Ct. 682, 54 L.Ed. 905; *Biewend v. Biewend*, 17 Cal.2d 108, 110, 109 P.2d 701, 132 A.L.R. 1264; *Beard v. Beard*, 57 Cal.App.2d 579, 581, 135 P.2d 9.

Power to modify alimony and support decrees is given the courts of New York by section 1170¹ of the Civil Practice Act of that state. This statute as it appeared at the time appellant secured her decree had been uniformly interpreted as not being retroactive in operation and any installments of alimony which had accrued prior to an application for modification were held to be vested and not subject to variance. *Sistare v. Sistare*, supra; *Harris v. Harris*, 259 N.Y. 334, 182 N.E. 7; *Krauss v. Krauss*, 127 App.Div. 740, 111 N.Y.S. 788; *Brice v. Brice*, 225 App.Div. 453, 233 N.Y.S. 366; *Smith v. Smith*, 255 App.Div. 652, 9 N.Y.S.2d 188. As late as 1939 the California courts construed the New York law to be in accord with our own and held that a judgment for alimony is not subject to modification as to sums already accrued and past due. *Parnham v. Parnham*, 32 Cal.App.2d 93, 98, 89 P.2d 189; *Barns v. Barns*, 9 Cal.App.2d 427, 430, 50 P.2d 463; *Bruton v. Tearle*, 117 Cal.App. 696, 698, 4 P.2d 623; *Cummings v. Cummings*, 97 Cal.App. 144, 147, 275 P. 245.

However, there is also now a line of decisions in New York apparently permitting retroactive modification of an alimony decree. The Court of Appeals in *Kirkbride v. Van Note*, 1937, 275 N.Y. 244, 9 N.E.2d 852, 112 A.L.R. 243 and *Karlin v. Karlin*, 1939, 280 N.Y. 32, 19 N.E.2d 669, laid the foundation from which the lower New York courts inferred such a discretionary power. In the cited decisions the court annulled unpaid accrued alimony payments where a divorced wife had remarried without her former husband's knowledge. Such

cancellation was permitted as of the date of the remarriage. But the source of the court's power to annul such accrued payments was section 1159 of the Civil Practice Act which specifically provided that upon such a remarriage the court "must modify such final judgment * * * by annulling the provisions * * * directing payments of money for the support of the plaintiff."

In the *Karlin* case the court cited the *Kirkbride* decision and affirmed an order modifying a support decree *nunc pro tunc* as of the date it became final in order to conform the judgment with an agreement that had been entered into by the parties for the wife's support. The court found that she was wrongfully seeking to ignore such agreement by applying for enforcement of the decree.

In reliance upon the two cited decisions some of the lower courts of New York expressed the view that they did have the power to make retroactive reductions in alimony. See *McCanliss v. McCanliss*, 268 App.Div. 138, 49 N.Y.S.2d 289; *Bregoff v. Bregoff*, 269 App.Div. 902, 56 N.Y.S.2d 268; *Cunningham v. Cunningham*, 261 App.Div. 973, 25 N.Y.S.2d 933; *Probst v. Probst*, 259 App.Div. 1090, 21 N.Y.S.2d 294. In 1946 the United States Supreme Court in *Griffin v. Griffin*, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635, indicated that the New York courts could reduce or modify accrued installments of alimony. The court distinguished its former opinion in the *Sistare* case on the ground that the New York statutes had significantly changed since that decision. This assumption appears erroneous, as in *Waddey v. Waddey*, 1943, 290 N.Y. 251, 49 N.E.2d 8, 10, it was pointed out that the provisions of section 1170 of the Civil Practice Act had been "in effect under one or another Code of Civil Procedure or Civil Practice Act * * * since 1895." Moreover, the

4. "Where an action for divorce or separation is brought by either husband or wife, the court * * * must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires * * * for the support of the

plaintiff [if she be the wife]. The Court, by order, upon the application of either party to the action, * * * after due notice to the other * * * at any time after final judgment, may annul, vary or modify such directions * * *."

Law Revision Commission of the State of New York in its report of this problem stated, "Despite the opinion of the U. S. Supreme Court in the Griffin case it is difficult to find any substantial change, since the amendment of 1895, on the part of these statutes which grants discretion to modify alimony." (State of New York Law Revision Commission, Legislative Document (1948), No. 65(E), page 29, footnote 23-a.)

It is thus apparent that there is a definite confusion among the New York authorities. Apparently, however, *Waddey v. Waddey* is the latest expression of the Court of Appeals on the retroactive effect of section 1170 although this section was not directly concerned therein. The court reaffirmed the theory that accrued alimony is a "vested property right" and stated that the provisions of a statute will not be applied retroactively where they are capable of any other construction, unless the intent of the legislature clearly appeared to the contrary. It is true that section 1170 was amended in 1948 to make the statute retroactive but as pointed out in the *Waddey* decision that amendment can have no effect upon the right to support money awarded by a decree that antedates the amendment. The Law Revision Commission commented that this decision indicates a trend of reasoning that accrued installments of alimony are irreducible and that the construction of section 1170 by the Court of Appeals does not lean toward the view adopted by the Supreme Court of the United States in the *Griffin* decision. Also, in *Treherne-Thomas v. Treherne-Thomas*, 1944, 267 App.Div. 509, 46 N.Y.S.2d 679, the view of the early *Harris* case was followed with the declaration that installments of alimony created vested rights which the court has no power to modify.

[2,3] In view of the unsettled state of the New York law on the subject we have no recourse but to follow the holdings of the California courts and of the New York Commission and rely on the settled rule of construction that statutes will be applied only prospectively in the absence of a clear expression of legislative

intent to the contrary. From such authorities it is inescapable that the trial court erred in refusing to give full faith and credit to the New York judgment as to the accrued and unpaid support payments found to be in the amount of \$11,-989.25.

Furthermore, the fact that Civil Practice Act 1170 was amended in 1948 thereby extending the authority of the New York courts under that section to unpaid accrued installments cannot alter this decision. The *Waddey* case squarely held that a statute authorizing a reduction in support money could have no effect on alimony rights granted under a decree obtained before the enactment of such provision. The opinion stated, "Even though the Legislature had indicated by express declaration its intent that the act should have retrospective application, it would not be effective as to decrees entered prior to the date it went into effect since the right of appellant to alimony became a vested property right upon the entry of the judgment and could not be affected by subsequent legislation."

[4] Also it appears that, assuming for the purposes of argument that the New York decree was not entitled to full faith and credit, the trial court should have given judgment for the appellant as a matter of comity. Under the New York decisions which have recognized a power of modification such has only been exercised when a substantial change in the circumstances of the parties has been disclosed. See *Cunningham v. Cunningham*, 261 App. Div. 973, 25 N.Y.S.2d 933, where children had reached majority and the husband's income had been reduced from \$7,000 to \$5,000; *Probst v. Probst*, 259 App.Div. 1090, 21 N.Y.S.2d 294; where child had been supported by others; *Frost v. Frost*, 189 Misc. 133, 71 N.Y.S.2d 438, and *Kahler v. Searl*, 259 App.Div. 729, 18 N.Y.S.2d 246, wherein children had attained majority. No such showing has been made herein and as the New York law is not in conflict with the policy of this forum the judgment should be enforced on principles of comity. *Biewend v. Biewend*, 17 Cal.2d 108, 113, 109 P.2d 701, 132 A.L.R. 1264;

Barns v. Barns, 9 Cal.App.2d 427, 430, 50 P. 2d 463.

[5, 6] The trial court's admission over objection of evidence of the conduct of the parties prior to the 1940 decree was in effect to rule that such judgment is not *res judicata* of the issue of appellant's innocence and respondent's guilt as of that date. The doctrine of *res judicata* is clearly applicable to the situation presented by the pleadings and the proof herein. The parties here are the identical litigants who were before the New York court in 1940. The husband's desertion and wilful neglect were established then and the decree entered is a bar to a second suit thereon as to issues actually determined or necessarily involved. *Krier v. Krier*, 28 Cal. 2d 841, 843, 172 P.2d 681; *Lynn v. Cable*, 95 Cal.App.2d 696, 699, 213 P.2d 521; *Steiner v. Thomas*, 94 Cal.App.2d 655, 660, 211 P.2d 321; *Quagelli v. Quagelli*, 99 Cal. App. 172, 175, 277 P. 1089. Therefore, the finding that the husband did not at any time either desert appellant or fail to provide for her is contrary to law.

While it is true that the husband could not have pleaded a cause of action for divorce in New York on the ground of extreme cruelty, he could have properly alleged it as a defense to the wife's suit for separate maintenance. Therefore, the finding that the wife treated respondent with extreme cruelty cannot be supported in so far as it is based on her alleged conduct prior to 1940 for the reason that it is implicit in the New York decree granting appellant permanent separation and support that she was there found not to be guilty of extreme cruelty. See *Davis v. Davis*, 56 Wyo. 524, 111 P.2d 124, 138 A.L.R. 336. "If the matter alleged in the second action is within the scope of the first and is so relevant to the issues that it could have been presented in the former action the judgment in the prior bars the maintenance of the second action even though it is not specially pleaded. Were the rule otherwise, a party might designedly withhold issues and litigate them in consecutive lawsuits." *Steiner v. Thomas*, supra [94 Cal.App.2d 655, 211 P.2d 324].

[7] Respondent contends that the New York action was tried as a default except as to the issue of alimony. However, the New York decree recites on its face that the husband appeared by his attorney, that proofs were presented and that he admitted in open court the allegations of abandonment and nonsupport.

[8, 9] It is also argued that appellant waived any benefit of the doctrine of *res judicata* by failing to plead the New York decree in either her answer or cross-complaint in the divorce action. The answer to such contention is that the New York judgment was not a complete bar to respondent's suit for divorce as he was still free to prove acts of cruelty occurring after 1940. *Comfort v. Comfort*, 17 Cal. 2d 736, 744, 112 P.2d 259. When a prior adjudication is relied upon merely as conclusive evidence as to some fact constituting either matter of defense or an element of a cause of action and is not a complete bar to the action, the former judgment need not be pleaded. (15 Cal. Jur., Judgments, sec. 230; *Higuera v. Corea*, 168 Cal. 788, 145 P. 529; *Stockton v. Knock*, 73 Cal. 425, 15 P. 51; 30 Am.Jur., Judgments, sec. 256; 2 Freeman, Judgments, 5th Ed. sec. 798.)

[10, 11] Moreover, no waiver resulted by appellant's pleading that respondent treated her cruelly and deserted her prior to 1940. Such allegations were necessary in order to state a cause of action, and the New York decree was admissible as proof of such allegations. Also, when appellant herself introduced evidence of the parties' conduct prior to 1940 no waiver resulted inasmuch as she was forced to present such proof to rebut the testimony of respondent previously introduced over her objection.

[12, 13] The finding of appellant's extreme cruelty is thus stripped of support except as to evidence of her conduct subsequent to the 1940 judgment. But respondent contends that this evidence still supports the judgment awarding the husband a divorce. Mr. Gough testified that after the entry of the New York decree ap-

pellant continually harassed him for money although, admittedly, he was always in arrears on the support payments notwithstanding his income was \$350 per week while appellant's was \$25. Specifically, he testified that appellant kept calling him by telephone at the theatre where he worked in regard to her support payments; that she became hysterical at times and threatened to denounce him publicly. The only corroboration of this testimony was given by a Mr. Fluellen who was stage manager at the time. He testified that a woman announcing herself as Mrs. Gough telephoned on several occasions, and that when Mr. Gough came to the telephone he became upset and his mental attitude after such conversation appeared to affect adversely his stage performance. Fluellen admitted that he did not know Mrs. Gough and that he could not hear any of her conversation. Can this evidence support a finding that appellant has been guilty of conduct constituting extreme mental cruelty and inflicting grievous mental suffering upon respondent? As a matter of law it cannot. It does no more than demonstrate that Mrs. Gough sought only to enforce her adjudicated rights. To make a request by telephone to a judgment debtor that he pay the judgment is the right of any creditor. He could easily have avoided her calls by paying his debt. Any "harassment" resulting to respondent was brought about by his own conduct and was provoked by his own failure to comply with the terms of that judgment when apparently he had the ability to do so.

Finally, inasmuch as the New York judgment is *res judicata* as to the matter of respondent's desertion and wilful neglect, this coupled with appellant's own testimony that respondent simply moved out of their residence without her prior knowledge or consent and the finding that he was almost \$12,000 in arrears under the New York decree all amply support the allegations of

her cross complaint for divorce. The decree in the prior action was alone sufficient evidence. *Quagelli v. Quagelli*, 99 Cal. App. 172, 175, 277 P. 1089.

The judgment is reversed with directions to strike all findings commencing with "that there is no community property" in finding III and all Conclusions of Law except number II; to strike all the judgment after the word adjudged; to make findings of fact in accordance with the allegations of Mrs. Gough; in her complaint particularly that of the total unpaid accrued installments due under the New York decree aggregating \$17,473.25, the sum of \$5,484 has been paid, leaving due \$11,989.25; that by reason of defendant's removal from New York to California it is necessary for the protection of plaintiff's rights that her New York decree be established in this court; that plaintiff is without funds to defray the expenses of this action; that defendant is financially able to pay a reasonable fee for plaintiff's attorney in representing her in both actions involved herein; that \$1000 is a reasonable fee. That Conclusions of Law declare that the New York decree should be established as a foreign judgment; that plaintiff have judgment for the sum of \$11,989.25 accrued and unpaid at the time of trial plus \$40 per week to the date of entry of the new judgment and that Mr. Gough should be ordered to pay thereafter to Mrs. Gough \$40 per week as support money. That such findings further recite that the allegations of Mrs. Gough's cross complaint for divorce are true and conclude that a decree of divorce should be entered in her favor. Let judgment be entered as authorized by such findings and conclusions.

WILSON, J., concurs.

McCOMB, J., dissents.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

ALLEN v. HUSSEY et al.

LOS ANGELES COUNTY v. HUSSEY et al.
(two cases).
Civ. 17512.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1950.

Rehearing Denied Jan. 23, 1951.

Hearing Denied Feb. 19, 1951.

Merle M. Allen brought action against J. Gordon Hussey and wife, to void a lease of an airport by the Palmdale Irrigation District to the named defendant, and the county of Los Angeles, a body corporate and politic, intervened, and the county of Los Angeles, a body corporate and politic, substituted for Ruth M. Jones, brought action against J. Gordon Hussey and wife, to cancel a lease given by Ruth M. Jones to the named defendant for realty adjacent to airport, and the County of Los Angeles, a body corporate and politic, brought action against J. Gordon Hussey and wife to cancel a lease of other realty adjoining airport, and the actions were consolidated and tried together. The Superior Court of Los Angeles County, William J. Palmer, J., rendered a judgment adverse to the defendants, and they appealed. The District Court of Appeal, Wilson, J., held that lease of airport was invalid as violation of a public trust and as a gift to the named defendant in violation of the state constitution.

Affirmed.

1. Waters and water courses ⇨224

An irrigation district is an agency of the state, and its functions are exclusively governmental.

2. Waters and water courses ⇨228½

An irrigation district owns no lands in a proprietary sense, and its property is owned by the state and is held only for governmental purposes.

3. Waters and water courses ⇨224

Owners of property within irrigation district are beneficiaries of trust for public uses, and their interests are to be protected along with those of bondholders and general creditors. Water Code, § 22437.

4. Trusts ⇨357(2)

If trustee, in breach of trust, transfers trust property to one who takes with notice of breach of trust, transferee does not hold the property free of the trust, though

he paid value therefor, and such rule is applicable whether breach of trust is intentional or negligent or result of misrepresentation of trust instrument.

5. Waters and water courses ⇨228½

Where United States government agencies expended about \$1,500,000 for development of airport on land of irrigation district, and district expended about \$25,000, lease by district of airport for 34 or 69 years to individual who was to pay rental of \$1 a year and receive profits from operation of airport was a breach of trust, and airport could be recovered at suit of district or of property owner therein, though board acted in good faith and on legal advice. Water Code, §§ 20500, 20560, 22140, 22142, 22437, 24253; Civil Aeronautics Act of 1938, § 303, 49 U.S.C.A. § 453.

6. Waters and water courses ⇨228½

The United States, as condition of furnishing financial aid, was at liberty to impose on irrigation district such terms as it deemed necessary and proper as conditions precedent to undertaking construction of airport on land of irrigation district. Civil Aeronautics Act of 1938, § 303, 49 U.S.C.A. § 453; Water Code, § 22144.

7. Waters and water courses ⇨228½

Where lease by irrigation district of airport to individual was void because in violation of district's agreement with and guaranty to Works Progress Administration, subsequent redrafting of lease at request of Civil Aeronautics Authority could not validate transaction. Civil Aeronautics Act of 1938, § 303, 49 U.S.C.A. § 453.

8. United States ⇨85

The Emergency Relief Appropriation Act, pursuant to which the Works Progress Administration operated and made its expenditures, was intended to provide public works for use and benefit of the public and not of private individuals. Emergency Relief Appropriation Act of 1941, 54 Stat. 611.

9. Waters and water courses ⇨228½

Lease by irrigation district to individual of airport which had been developed in part with funds of Works Progress Administration was void as against the policy

of the Emergency Relief Appropriation Act. Emergency Relief Appropriation Act of 1941, 54 Stat. 611.

10. Waters and water courses ⇨224

An irrigation district is a public corporation or agency and has only such powers as are given to it by the Legislature.

11. Waters and water courses ⇨228½

Board of directors of an irrigation district has no power to dispose of district's property other than in manner provided by law, and all contracts or purported contracts by district beyond scope of power given by statute are void.

12. Waters and water courses ⇨231

Assessments collected by an irrigation district are public funds and not private property of the district, and therefore such funds cannot be expended for construction work without previous authorization by voters of district.

13. Waters and water courses ⇨228½

Irrigation district had no power to incur an indebtedness with respect to airport on irrigation district's land that could not be paid out of revenue derived from the airport. Water Code, § 22143.

14. States ⇨119

Where United States government agencies expended about \$1,500,000 for development of airport on land of irrigation district, and district expended about \$25,000, lease by district of airport to individual who was to pay rental of \$1 a year and receive profits from operation of airport was a "gift" to individual in violation of the Constitution. Const. art. 4, §§ 22, 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Gift".

15. Waters and water courses ⇨228½

Alleged benefit to irrigation district from airport on land of district did not furnish consideration for lease of airport by district to individual for \$1 a year, especially where airport was to be operated for private profit of individual.

16. Waters and water courses ⇨228½

Previous services of individual in assisting in procurement of government funds for construction of airport on land of irrigation district was not a legal consideration for lease by district of airport to individual for \$1 a year rental, where district had not contracted to pay for individual's services.

17. Waters and water courses ⇨228½

Assumption by individual of responsibility for operation of airport on land of irrigation district was not consideration for lease of airport by district to individual for rental of \$1 a year.

18. Counties ⇨110

When county acquired title to airport from irrigation district, county had right to obtain cancellation of invalid lease of airport by district to individual for rental of \$1 a year.

19. Waters and water courses ⇨228½, 247
(1)

Where lease of airport by irrigation district to individual for rental of \$1 a year was void ab initio, passage of time did not validate the lease, and hence statute of limitation was not available as defense to action to cancel lease.

Bouchard & Brown, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

I. Henry Harris, Jr., and Robert J. Magdlen, Los Angeles, for respondent Merle M. Allen.

WILSON, Justice.

The question presented in this action concerns the validity of leases made by Palm-dale Irrigation District and two individuals to defendant J. Gordon Hussey covering the airport and adjacent property located within the District. Three actions involving the validity of such leases were consolidated and tried together: (1) An action by Merle

M. Allen as a property owner within Palmdale Irrigation District against Hussey, the District and its board of directors to void a lease made by the District to Hussey; (Shortly after the action was filed the County of Los Angeles acquired title to the property covered by the lease and the District's interest in the lease and intervened in the action.) (2) an action by Ruth M. Jones to cancel a lease given by her to Hussey covering property adjacent to the airport; (The County of Los Angeles subsequently acquired the plaintiff's title and was substituted in the action.) (3) an action by the County of Los Angeles to cancel a lease of other property adjacent to the airport from one Van Buskirk to Hussey.

At the outset it should be said that the court found that in all transactions relating to the airport and the leases thereof the board of directors of the District and Hussey acted in good faith and were not guilty of fraud or concealment.

The court declared that the lease from the District to Hussey was void as constituting a gift of public funds to him, that Hussey had previously disclaimed any interest in the Jones and Van Buskirk properties, that he had become a party to the latter leases merely as an accommodation to the District and that the District was the real party in interest under both.

A consolidated judgment was entered adjudging that all the leases are null, void and ineffective for any purpose and decreeing that they be cancelled. Hussey and wife have appealed on an agreed statement and the judgment roll.

The board of directors of the District requested Hussey to assist them in securing the development of the airport and he, in 1941, began negotiations with the federal government to have the emergency landing field enlarged as a Works Progress Administration project with Palmdale Irrigation District as the sponsor.

In March, 1941, the board of directors instructed the secretary of the District to file an application with WPA¹ to construct an airport as proposed by plans prepared by the District. Hussey met with the board

and made certain representations with regard to working on that project and other projects connected with it. In 1941, upon application of the District as sponsor, the federal government made available funds for the construction of the airport. In July of that year the board approved leases and resolutions pertaining to the proposed airport, the leases to the District having been for a period of 35 years as follows: (a) Goodhue lease covering 140 acres at a rental of \$275 a year; (b) Van Buskirk lease covering 87.7 acres at \$3 an acre; (c) Jones lease, 57.8 acres at \$3 an acre; (d) Hinkley lease, 60 acres at \$5 an acre, with a one year's option to purchase for \$4,190.21. In January, 1942, the District purchased the Hinkley property for the price named in the option.

On the date the above mentioned leases were approved by the board of directors they were informed that Van Buskirk and Jones had also executed and placed in escrow leases to Hussey covering additional property adjacent to the airport.

At the same time an agreement was accepted by the District whereby Walberg-Dozier Company agreed to sell the District certain lands adjacent to the airport on condition that the District acquire "sufficient title" to the property owned by Jones, Van Buskirk and Goodhue, and that the development of the property be approved by a government agency. The consideration for the Walberg-Dozier property, which consisted of 300 acres, was the issuance of tax receipts amounting to \$864.25 and the exchange of other District lands valued at approximately \$10,000. In January, 1942, the District acquired the Walberg-Dozier lands.

The board of directors then accepted a proposed agreement between the District and Hussey whereby the District agreed to sublease to Hussey two parcels of land containing 28.05 and 7.89 acres, respectively, which were included in the Goodhue lease but outside the boundaries of the airport as laid out at that time; the agreement also provided that within ten days after Hussey had acquired by lease from Hink-

1. The initials WPA will be used hereinafter to refer to Works Progress Administration.

ley certain other properties Hussey would assign the property to the District. All the Hinkley property was subsequently purchased by the District.

At the same time a lease of the airport dated July 11, 1941, was executed by the District to Hussey providing that in the event the District held the property comprising the airport, or any of it, under lease Hussey would pay directly to the lessor the amount the District was required to pay under such lease, and if the District bought the property Hussey would pay as rent 4 percent of the amount expended by the District. This agreement was cancelled in November, 1941, at the request of the United States Government.

The board next executed an agreement with Hussey providing that since Hussey had expended much time, energy and money to facilitate the development of the airport, and would continue to do so, and the District would benefit thereby, the latter made Hussey its sole and exclusive agent for the sale of property in the District; and for all lands sold with certain exceptions, whether by Hussey or by the District, the District would receive \$150 an acre and the balance would go to Hussey.

Next the directors leased to Hussey five parcels of property acquired from Walberg-Dozier Company, such lease being for a period of 35 years and becoming effective when the District acquired the land, the consideration for the lease being \$10 and services rendered. Subsequently Hussey acquired one of the five parcels consisting of 41 acres for \$10 an acre.

All the foregoing leases and agreements were authorized by the board to be placed in escrow and to be released when WPA announced its readiness to proceed with the improvement.

The District then authorized Hussey to go to Washington and represent it in negotiating with public or private agencies for the development of the airport. Hussey carried on the negotiations with the federal government and was largely instrumental in securing federal aid for that purpose. In August, 1941, pursuant to the plan for

the airport, the board of directors filed a master proposal for federal aid.

In December, 1941, the directors authorized the secretary of the District to send, and he did send, a notice to the bondholders of the District concerning a plan to purchase approximately 340 acres upon which the District had secured the options at the meeting of July 10, 1941. In order to provide land for the airport the notice proposed that the bondholders surrender certain interest-bearing coupons maturing July 1, 1939, to and including January 1, 1942, for noninterest-bearing registered warrants in an amount of 50 percent of the face value of such coupons surrendered, payable January 1, 1947. Such plan was accepted by bondholders who surrendered their interest-bearing coupons of a total face value of \$28,925 in exchange for registered warrants. The sum of \$10,444.14 of bond interest-fund money was deposited in January, 1942, in a special airport account and subsequently was spent by the District in improvement and acquisition of land for the airport site.

The land for the airport was acquired partly by purchase by the District, partly by leases in the name of the District, and, for the purpose of providing adequate clearances outside the airport, Hussey took some leases directly from the property owners. Included in such purchases was the property described in the Hinkley lease for which the District paid the above mentioned sum of \$4,190.21 from the bond interest-fund money deposited in the special airport account. The balance of the lands acquired by the District were obtained by lease, one of them being the Jones lease. The remainder of the Jones property necessary to allow clear approaches was leased by Jones to Hussey. On June 28, 1941, and as a part of one transaction for the purpose of acquiring the entire Jones property for the District as a part of the airport site, Jones simultaneously entered into separate agreements with the District and Hussey whereby approximately 57.8 acres were leased to the District and 98.8 acres to Hussey. The terms of the leases are identical, being for a period of 35 years

at an annual rental of \$3 an acre. On the same date and as a part of one transaction and for the same purpose, the Van Buskirk property was acquired through separate agreements whereby 87.7 acres were leased to the District and 72.3 acres to Hussey. Each lease was for the period of 35 years with an annual rental of \$3 an acre. The Jones and Van Buskirk leases to Hussey were cancelled by the consolidated judgment in these actions.

The leases from Jones and Van Buskirk were executed by Hussey only as nominal lessee for the purpose of protecting for the District the aerial approach clearances and were taken in the name of Hussey rather than in the name of the District because of the provisions of section 24253 of the Water Code, which requires the approval of the California District Securities Commission of leases that are within the terms of that section.

On January 19, 1942, Hussey entered into a management contract with the District which was approved by WPA under the terms of which Hussey was to receive 75 percent of the gross profits and Palmdale Irrigation District 25 percent thereof.

In March, 1942, a proposal and application to WPA was executed on behalf of the District and filed with the federal agency. This proposal was supplemental to the master proposal of 1941, and by its terms provided that if the proposed work should be undertaken by WPA the District would take over the project when completed and operate and maintain the field as aviation facilities in the interest of the public, that the work would constitute a useful public project and the facilities constructed or improvement thereunder would be operated and maintained by the sponsor in the public interest.

Pursuant to the applications above mentioned WPA expended approximately \$500,000 for the development of the Palmdale airport prior to December 30, 1943, the date of the lease from the District to Hussey, which is in question in these actions. After that date the United States War Department and Civil Aeronautics

Authority expended an additional sum of approximately \$1,000,000 for the development of the airport.

On June 1, 1942, the War Department demanded and received possession of the entire airport, including the properties leased to Hussey. All the leases to the government ran for the duration of the war and six months thereafter, for which an annual rental of \$1 was paid to each lessee. The leases to the United States covering the Jones and Van Buskirk properties were approved by the respective owners. The leases to the United States have never been terminated, but the government has released to the Irrigation District the operation and management of the airport.

In April, 1943, pursuant to request of CAA,² the directors of the District passed a resolution decreeing that public convenience and necessity required the District to acquire fee title to the Jones, Van Buskirk and Goodhue properties. In conformity with that resolution a condemnation action was filed in May, 1943, and carried through but within the time provided by law the District filed a written notice of abandonment. In that action Hussey and his wife, who were named as defendants, signed and acknowledged a disclaimer in which they disclaimed "any right, title, or interest in or to the land sought to be acquired by plaintiff in the above entitled action, and waive any award of damages in said action."

During the trial of the condemnation action the attorney for the District testified that he asked Hussey if he would be willing to waive his right to any award in the condemnation proceeding and Hussey agreed; that thereafter the attorney prepared a document for Hussey's signature which was the disclaimer above mentioned. Hussey testified that he signed the document prepared by the attorney and delivered it to him for the sole purpose of waiving the right of defendants Hussey to any part of the award made in the condemnation proceedings.

Subsequently judgments totaling \$5600 were entered against the District in the condemnation action for costs and attor-

2. Civil Aeronautics Authority will be hereinafter referred to as CAA.

neys' fees incurred therein. Hussey deposited in such action \$2,680 as a deposit to allow the District to take immediate possession. Upon the abandonment of the action those funds were paid to defendants other than Hussey and none of such funds have been repaid to him.

On June 22, 1943, the directors of the District adopted a resolution entitled "Resolution Constituting Agreement with the United States Relative to Operation and Maintenance of Palmdale Airport," which is referred to in the record and will be hereafter referred to as the AP-4 Resolution. Thereafter, at the suggestion of CAA, the Palmdale Irrigation District cancelled the management contract previously executed with Hussey and submitted to CAA, in October, 1943, a proposed lease from the District to Hussey providing for a rental of 4 percent of the gross receipts from the operation of the airport. This document was not executed by either party and was disapproved by CAA for the reason that it was not subordinated to the AP-4 Resolution relative to the operation and maintenance of the airport. The proposed lease was redrafted, approved by CAA, and executed by the District and Hussey. This instrument is the principal subject of this litigation and is one of the leases held void and cancelled by the judgment in the consolidated actions from which the present appeal comes. The lease was for a term of 34 years at a rental of \$1 a year during its term or any extension thereof. Hussey was given the option to renew or extend the lease for an additional term of 35 years.

In December, 1945, the United States returned the control, operation and management of the airport to Palmdale Irrigation District under an interim permit requiring the property to be operated as a public airport without unjust discrimination and without granting exclusive right for the use of the property within the meaning of section 303 of the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 453.

Also in December, 1945, under his lease and the above mentioned interim permit from the United States, Hussey went into possession of the airport and occupied it

until November, 1947, when possession and operation were taken over by the County of Los Angeles.

Prior to November 5, 1947, Ruth M. Jones, plaintiff in one of the actions now on appeal in which County of Los Angeles was substituted in her stead, and Van Buskirk, grantor and assignor of the County of Los Angeles, and Palmdale Irrigation District divested themselves of all interest in the lands and improvements of the airport and of their interest in the leases by conveying the same to the County of Los Angeles, since which date no other person or entity has had any interest in such lands or leases except County of Los Angeles and Hussey, who claims an interest under his lease from the District.

In November, 1947, the County of Los Angeles filed an action in eminent domain to condemn the land and leases of the Palmdale Airport, in which action Hussey, who was a defendant, stipulated that the County of Los Angeles take over the operation and maintenance of the airport pending trial of the condemnation action. That action had not been brought to trial at the time of the trial of the cases before this court. From November, 1947, to October, 1948, the County had expended for maintenance, labor and improvements \$18,000 and had received from services, charges and gas sales \$6,209.56.

The agreed statement upon which the appeal is taken sets forth that the board of directors in all the foregoing transactions with Hussey acted upon the advice of their counsel and in the manner they believed to be lawful and proper; that by the transactions and agreements they undertook to accomplish a project which in their judgment would contribute to the general welfare of the District and of its residents and property owners and that they exercised their honest judgment in entering into such leases and agreements.

Defendants maintain the lease from the District to Hussey is authorized and is valid by reason of the provisions of section 22437 of the Water Code which reads "The title to all property acquired by a district is held in trust for its uses and purposes.

The district may hold, use, acquire, manage, sell, or lease the property as provided in this division."

[1-3] An irrigation district is an agency of the State and its functions are exclusively governmental. It owns no lands in a proprietary sense; its property is owned by the state and held only for governmental purposes. *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 197, 88 P.2d 685; *El Camino Irr. Dist. v. El Camino Land Corp.*, 12 Cal.2d 378, 383, 85 P.2d 123. In *Clough v. Compton-Delevan Irr. Dist.*, 12 Cal.2d 385, 388, 85 P.2d 126, it is said that by section 29 of the Irrigation District Act, now sec. 22437 of the Water Code, the property of the district is impressed with the public use and the trust is for all the purposes of the act; it is an active trust for public uses and purposes and to permit a partition of the land which constitutes the corpus of the trust would mean the destruction of the trust in violation of the statute. The same consideration of policy forbids the leasing of the property for 34 or 69 years at a rental of \$1 a year. The owners of the property within the district are beneficiaries of the trust and their interests are to be protected along with those of the bondholders and general creditors.

[4] "If the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee does not hold the property free of the trust, although he paid value for the transfer." 2 Restatement, Trusts, sec. 288, p. 878. In the comment following the text of the section it is said that the interest of the beneficiary of the trust property is not cut off by the trustee's transfer in breach of the trust to a third person who has notice that the transfer is in breach of trust, although he paid value for the transfer, and the beneficiary can in equity compel the third person to restore the property to the trust.

[5] The foregoing rule is applicable whether the breach of trust is intentional or negligent or results from misinterpretation of the trust instrument. Hence although in the instant case the court found

that the board of directors of the District acted in good faith and on legal advice, the transaction was a breach of the trust and the property may be recovered at the suit of the District or of a property owner therein. Hussey had notice of the trust since he is presumed to have known the law as expressed in the statute and as construed by the courts.

"If the trustee in breach of trust transfers trust property and no value is given for the transfer, the transferee does not hold the property free of the trust, although he had no notice of the trust." 2 Idem, sec. 289, p. 879. Even though the legal advice received by the board of directors and by Hussey indicated to them that they were free to enter into the lease and such advice could be construed to mean that Hussey had no notice of the trust the transaction was nevertheless void because it was in violation of the trust created by the statute.

Section 181, 1 Restatement, Trusts, p. 466, is to the effect that it is the duty of the trustee to use reasonable care to make the trust property productive. Sec. 189, p. 494, states that the trustee can properly lease trust property for such periods, and with such provisions as are reasonable. The WPA had expended \$500,000 in the improvement of the airport; the district paid approximately \$25,000 for the acquisition of land and cancelled a contract whereby it was to receive 25 percent of the gross income from the operation of the airfield; it was to receive under the lease \$1 a year for 34 and possibly 69 years. Expenditures of the district consisted of \$10,000 from the bond interest-fund, \$10,000 in the land exchange with Walberg-Dozier Company, \$5600 for costs and attorneys' fees in the abandoned condemnation suit. The authorization for such a lease by the board of directors was in violation of their duties as trustees of a public trust even though they acted in good faith and on legal advice, hence such purported lease did not vest in defendant Hussey any right or interest whatsoever in the airport.

The purported lease was made in violation of the WPA Sponsor's Agreement which contains the following provisions:

(a) "It is certified that the work set forth in this proposal will constitute a useful public project, that the facilities constructed or improved thereunder will be maintained and operated by the Sponsor in the public interest, and that no agreement, express or implied, has been or will be entered into whereby any land, building, structure, facility, or any part of the proposed work will be transferred, sold, leased, or otherwise disposed of to a nonpublic agency or private individual, with the following exceptions: (If not so state.) No Exceptions.

* * * * *

"(b) Disposal or Leasing of Property: It is not contemplated that public property to be improved by this project will be leased, sold, donated or otherwise disposed of to a private individual or corporation, or quasi-public organization during the useful life of the improvements to be placed thereon under this project."

On the faith of the express promises made by the board of directors of the District, WPA expended \$500,000 in constructing runways and other improvements on the airport. The purported lease to Hussey was directly contrary to the quoted portions of the agreement which induced WPA to make its large expenditures. At the date of the execution of the supplementary agreement with WPA, March 6, 1942, the original lease to Hussey of July 11, 1941, had been cancelled at the request of the government and the operating agreement was in force—but no lease. As indicated by the above quotations it was the manifest purpose and intent of WPA that the airport should not be leased and its expenditure of its funds was on the warranty of the District that it would not be leased.

Section 22142 of the Water Code authorizes an irrigation district to "sponsor any project undertaken by the United States for the improvement of land for airport or aviation school purposes or both." That section and section 22140 are in the article of the code entitled "Airports and Aviation Schools." Section 22140 provides that "This article applies only if all of the following are true: * * * (b) The United

States agrees to improve or contribute money for the improvement for airport or aviation school purposes or both of the land proposed to be used." The District was without power to sponsor the project unless the government improved the airport or contributed funds for the improvement.

[6] Section 22144 reads: "A district may accept the appropriation of any funds by the United States for the improvement of the land for an airport or aviation school on any conditions imposed by the United States if the use of the airport for commercial purposes is not thereby precluded." The United States was at liberty to impose on the District such terms as it deemed necessary and proper as conditions precedent to undertaking the construction of the airport and by reason of the provisions of the Water Code the District was without authority to accept funds from the government or to sponsor an expenditure unless it accepted the government's terms and requirements. Among them was the District's guaranty that no part of the facility had been or would be leased "to a non-public agency or private individual, * * * No exceptions." The District accepted the conditions required by WPA and was without power to execute the lease in contravention of such conditions.

[7] Defendants' contention that the re-drafting of the lease at the request of CAA and its approval by that governmental agency validated the transaction is not tenable. The lease was void because it was in violation of the District's agreement with and guaranty to WPA which was in full force and effect. The latter agency had expended funds that were within its exclusive control upon the warranty of the District that there would be no lease. WPA did not consent to the lease. It would be an anomalous situation if one governmental agency could determine the conditions under which it would expend funds under its control and for which it was responsible and refuse to allot money unless the sponsor of the project agreed to the conditions thus imposed, and upon the completion of the work another agency would have power

to annul the agreement by waiving any or all the provisions of a contract to which it was not a party. Such a paradoxical situation could result in nothing but uncertainty and chaos in government, since if one agency should overrule the act of another, still a third could annul the second and reaffirm the first, in consequence of which a contract would be in force today, void tomorrow and restored on the day after.

Manifestly CAA was interested in only one matter, to wit, the subordination of the lease to the AP-4 Resolution. This was the agreement under which CAA undertook to do additional work on the airport. The first draft of the lease was not executed by Hussey and was disapproved by CAA because of AP-4. A redraft in which the lease was subordinated to AP-4 was approved by CAA. It does not appear from the record that CAA gave any consideration to the sponsor-district's contract with WPA nor to the provisions of the Water Code which were the sole authority for the District to enter into the WPA agreement. Defendant does not contend that CAA had authority to annul the Water Code.

The lease itself recognizes the paramountcy of the WPA Sponsor's Agreement. It provides in section 15: "This lease shall be subordinate to the provisions of any existing or future agreement between the District and the United States, relative to the operation or maintenance of the airport, the execution of which has been or may be required as a condition precedent to the expenditure of Federal funds for the development of the airport." When the lease was executed the Sponsor's Agreement had already been executed which forbade such a lease.

The WPA agreement provided that "In consideration of the expenditures to be made from Federal funds on this project

* * * District will take over the work when completed and operate and maintain it as aviation facilities in the interest of the public." It cannot be reasonably contended that it is in the public interest to permit a lessee to operate the airport costing a half million dollars for his private gain, paying rental of only \$1 a year.

The lease contains an assignment to Hussey of all proceeds of a sale or other moneys that might be received for the airport from the Army or Navy or any governmental agency, including WPA, if such agency should take over or acquire the leased airport, excepting only such moneys as would be needed to refund to the District its own investment plus 4 percent interest from the date of expenditure. No reason has been made to appear as to why such donation to Hussey should have been attempted.

Defendants contend that the prohibition in the WPA agreement against leasing is a "statement of present intention rather than a warranty." There is no elaboration in the brief of such contention and no argument in its support. It is without merit. It will not be assumed that WPA would undertake the expenditure of so large a sum of money on a mere "present intention" that would be subject to change by the directors of the District as soon as the work had been completed.

[8,9] The lease was contrary to the spirit and intent of the Emergency Relief Appropriation Act, 54 Stat. 611, pursuant to which WPA operated and made its expenditures. The act was intended to provide public works for the use and benefit of the public and not of private individuals. To assure this result the provision against leasing was inserted in the agreement. Since it is against the policy of the law it is void. *McAllister v. Drapeau*, 14 Cal.2d 102, 108 ff, 92 P.2d 911, 125 A.L.R. 800. In that action an agreement to give a secret lien subordinate to the first lien of Home Owners' Loan Corporation was declared void, although the lien of the latter was not affected by the secret agreement or by the second lien. Since the lease here in question is against the policy of the law as well as contrary to the sponsor's agreement it is no defense that WPA has not raised the question by appropriate litigation.

[10-13] An irrigation district is a public corporation or agency and has only such powers as are given to it by the Legislature. Its board of directors has no

power to dispose of the district's property other than in the manner provided by law, and all contracts or purported contracts of the district which are beyond the scope of the power given by statute are void. *Bottoms v. Madera Irr. Dist.*, 74 Cal.App. 681, 694-695, 242 P. 100. Districts are subject to the provisions of Division 11 of the Water Code regardless of the date of their formation. Water Code, sec. 20560. Division 11 is the Irrigation District Law. Sec. 20500. Section 22143 provides that no district shall incur an indebtedness for the improvement of an airport or aviation school sponsored by the United States "which can not be paid out of revenue to be derived from its airport or aviation school or the leasing thereof." In order to acquire land for the sponsored project the District incurred indebtedness (a) Jones, Van Buskirk and Goodhue leases, rental of \$711.50 a year for 35 years; (b) Hinkley lease, rental at \$300 a year (land purchased subsequently for \$4,190.21); (c) judgment of \$5,600 for costs and attorneys' fees in the condemnation suit; (d) Walberg-Dozier purchase for cancellation of tax receipts amounting to \$864.25 and exchange of land valued at \$10,000; (e) registered noninterest-bearing warrants for \$14,500 resulting in the release of \$10,444.14 subsequently used for acquiring and improving land for the airport site. Such warrants constituted an indebtedness. Assessments collected by an irrigation district are public funds and not private property of the district. *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 567 ff, 60 P. 40. Such funds cannot be expended for construction work without previous authorization by the voters of the district. *Buschmann v. Turlock Irr. Dist.*, 47 Cal.App. 321, 324, 190 P. 491. The arrangement with bondholders hereinabove referred to did not transmute the funds from their public character into that of private ownership of the District. Hence by reason of the mandate of section 22143 the District was without power to incur an indebtedness that could not be paid out of revenue derived from the airport. The rental of \$1 a year to be paid by Hussey obviously was insufficient to answer this

requirement. Such sum was not just a nominal rental but was no rental at all for such a property.

[14] But little need be said in addition to our previous comments concerning the lease to show that it is a gift to Hussey in violation of sections 22 and 31 of article IV of the Constitution of this State. He received, subject to certain limitations, (1) a lease of the airport (the leasehold is property), on which the United States government had expended \$1,500,000 or more and the District had invested \$25,000, for a term of 34 years or 69 years at his option; (2) the exclusive right, during the term of the lease, to manage, operate and control the airport for his own use and profit; (3) an assignment of all proceeds of a sale or other moneys that might be received by the District for the airport from the Army or Navy or any governmental agency, if such agency should take over the leased premises and make payment therefor (except only such amount as would refund to the District its own investment plus 4 percent interest); (4) the right to assign the leases to any person for the purpose of managing and operating the airport, or to any association or corporation that might be created for such purpose; (5) the right to sublet any of the buildings or improvements, or any part thereof, on the property and to sublet the airport or any part of it. In return what did he give, or what was the consideration for all these grants and privileges? One dollar a year! Such consideration was to remain unchanged for 34 years in any event and for 69 years if Hussey should exercise his option for an extension. The requirement that he manage, operate, supervise and control the airport and maintain it in a good and serviceable condition was no more than any tenant is required by law to do. Civil Code, secs. 1928, 1929. The lease provides that if Hussey does not maintain the landing area in repair the District may do so, but there is no provision for reimbursing the District for any expense it may incur for such purpose.

This is not a case, as contended by defendants, where the court "enters the boardroom" and substitutes its judgment for that

of the board of directors of the District as to what is a proper consideration but is a situation in which there is no consideration at all for the lease and it is the duty of the court so to declare. The fact that the board acts in good faith does not change the matter into one of consideration, adequate or inadequate, where there is an entire absence of consideration. While the airport was to be operated as a public landing field the profit from its operation was to go to Hussey and not to the District or any other public agency. The benefit was to Hussey, not merely incidentally, but it was the paramount element of the transaction.

Defendants maintain that a part of the consideration for the lease was the benefit to the District in having an airport in the locality. But the airport would have been there had there been no lease. When it was executed WPA had already expended a half million dollars in the development of the airport and the operating agreement was in force whereby Hussey was to manage the airport and the District was to receive 25 percent of the profits derived therefrom. The substitution of the dollar-a-year lease for the operating agreement is a benefit—but to Hussey only and not to the District.

[15-17] Moreover, a benefit to the District, if there had been such, does not furnish a consideration for the lease, especially when the facility was to be operated for the private profit of the lessee. *Higgins v. San Diego Water Co.*, 118 Cal. 524, 547 ff, 45 P. 824, 50 P. 670. Hussey's previous services in assisting in the procurement of WPA funds for the construction of the airport are not a legal consideration for the lease since the District had not contracted to pay for such services and therefore was under no legal obligation therefor. *Conlin v. Board of Supervisors*, 99 Cal. 17, 24, 33 P. 753, 21 L.R.A. 474; *Molineux v. State*, 109 Cal. 378, 380, 42 P. 34; *Lamb v. Board etc.*, 29 Cal.App.2d 348, 350, 84 P.2d 183. Nor was Hussey's assumption of responsibility for the operation of the airport a consideration. If so any public agency would be able to circumvent the beneficial restrictions imposed

by the Constitution by the simple expedient of bestowing responsibility upon a person and in return for his acceptance thereof donating public property to him.

Land adjacent to the airport was leased by Jones and Van Buskirk to Hussey at the same time they leased other lands to the District, as hereinbefore related, and as a part of the same transaction. The leases were made to Hussey "only as nominal lessee to protect for the District the aerial approach clearances," and were taken in his name, rather than in the name of the District, by reason of section 24253 of the Water Code which requires the approval of the California Districts Securities Commission on leases that are within the terms of that section. Since Hussey was only nominal lessee and the District was the real party in interest, he had no personal, proprietary interest in the leases. If he ever had or claimed such interest he abandoned it. The first year's rental on both Jones and Van Buskirk leases was paid by the District. Hussey never paid any rent at all and the District did not pay after the end of the first year.

[18] After the County of Los Angeles had acquired title to the airport and to the interest of the District in the leases it had a right to obtain their cancellation. Furthermore, Hussey and wife disclaimed all right, title and interest in the lands covered by the leases, hence have no cause of complaint against the judgment cancelling them.

The purpose of the reference to the testimony of the attorney for the District and of Hussey that the disclaimer was for the purpose of waiving Hussey's right to an award in the condemnation proceedings does not appear since the disclaimer is in plain and unambiguous terms, disclaiming any and all interest in the land, and Hussey does not contend that he could not and did not read it or that he did not understand its purport. He contends in his brief that the delivery of the disclaimer was conditional and was to be used only as a waiver of his right to compensation. The agreed statement does not so indicate and the trial court found against this contention.

[19] Since the District's lease to Hussey is void *ab initio* for the reasons hereinbefore stated the passage of time did not validate it, hence the statute of limitations is not available as a defense. Such defense is likewise inapplicable in the action relating to the Jones and Van Buskirk leases inasmuch as Hussey never acquired any interest for himself in those leases and abandoned any nominal interest he may have had both by failing to pay rent and by disclaimer.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Rehearing denied; McCOMB, J., dissenting.

Hearing denied; SCHAUER, J., dissenting.



CRESCI v. BROCK, Director of Department of Agriculture et al.

No. 14575.

District Court of Appeal, First District,
Division 1, California.

Dec. 20, 1950.

Rehearing Denied Jan. 19, 1951.

Hearing Granted Feb. 15, 1951.*

Action by Peter J. Cresci, doing business as Peter Pan Stores, against A. A. Brock, as Director of Department of Agriculture of the State of California, and others, for preliminary injunction restraining enforcement of Business and Professions Code, § 12024.4, requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale. The Superior Court of the State of California in and for the City and County of San Francisco, Eustace Gullinan, Jr., J., entered an order and preliminary injunction restraining the enforcement of the statute, and the defendants appealed. The District Court of Appeal, Bray, J., held that preliminary injunction restraining enforcement of the statute would not be granted retail poultry dealer, where statute was not unconstitutional on its face and was not unconstitutional in its application to dealer's business.

Order and preliminary injunction reversed.

* Dismissed June 12, 1951.

1. Appeal and error ◊863

Evidence ◊20(1)

If the only contention is that unconstitutionality appears on face of statute, the sole question presented on review of temporary injunction restraining application of statute is unconstitutionality of statute, but if claimed unconstitutionality is based on allegations that a person's rights have been invaded by actual or threatened application of statute to such person, reviewing court must determine if there is reasonable basis for challenge predicated upon particular economic facts of a given trade or industry, which are outside sphere of judicial notice, and if there is such a reasonable basis the only question is whether trial court abused its discretion in holding the matter in status quo pending trial of issues.

2. Injunction ◊144

Complaint alleging that statute requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale was unconstitutional in its application to retailer's business and seeking preliminary injunction restraining enforcement of statute in that statute would change customary method of business, would force unemployment, would cause customer to pay more for poultry and would place retailer in unfair competition with meat dealers was sufficient to state cause of action. Business and Professions Code, § 12024.4.

3. Evidence ◊20(1)

Courts, not being experts in the poultry business, will not judicially notice particular economic facts of the poultry business.

4. Injunction ◊85(2)

The statute prohibiting issuance of injunction to prevent execution of public statute by officers prohibits restraining public officers from enforcing valid law, but does not prevent issuance at the instance of one specially interested to enjoin attempted execution of an unconstitutional statute. Civ.Code, § 3423; Code Civ.Proc. § 526.

5. Weights and measures ⚖️2

Change in customary way of conducting plaintiff's retail poultry business by reason of statute requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale, or necessity of establishing loss of weight caused by cleaning or dismembering poultry, or knowledge obtained by customer of exact weight of poultry purchased would not make statute unconstitutional in its application to retailer seeking preliminary injunction restraining enforcement of statute. Business and Professions Code, § 12024.4.

6. Constitutional law ⚖️38

Merely changing the customary way of doing business in itself does not make a law unconstitutional.

7. Evidence ⚖️588

Courts are not bound by statements which are obviously incorrect.

8. Evidence ⚖️48

Table of the United States Department of Agriculture giving shrinkage of poultry from dressed weight to ready-to-cook weight is official table of which judicial notice will be taken. Code Civ.Proc. § 1875, subd. 3.

9. Weights and measures ⚖️2

The statute requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale is not unconstitutional in its application to retailers seeking preliminary injunction restraining enforcement of statute in that statute discriminates between retailer and seller of other foods, including meat products, or between retailer and wholesalers selling direct to customers. Business and Professions Code, § 12024.4.

10. Weights and measures ⚖️2

The statutes regulating sale of poultry is not invalid for prohibiting sale other than by live weight, dressed weight or table dressed weight. Business and Professions Code, § 12024.4.

11. Weights and measures ⚖️2

The requirement in statute regulating sale of poultry that retailers packaging poultry and marking weight thereon must

weigh package at time of sale is valid. Business and Professions Code, § 12024.4.

12. Weights and measures ⚖️2

That statute requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale permits cleaning and dismembering of table dressed poultry in absence of customer does not invalidate the statute. Business and Professions Code, § 12024.4.

13. Statutes ⚖️40

A statute is not required to set forth the public policy reason for its adoption.

14. Statutes ⚖️47

The terms "retailer," "customer," "basis of settlement" and "delivered" in statute prohibiting "retailer" from selling poultry other than by live weight, dressed weight or table dressed weight, and stating that weight of poultry upon which "basis of settlement" is made shall be weight when prepared and "delivered" in manner specified by "customer" are not vague, uncertain and indefinite but will be given their well known meaning. Business and Professions Code, § 12024.4.

15. Statutes ⚖️47

The Legislature can create a term, unknown to a particular trade, if the term is defined so that the trade knows what it means.

16. Weights and measures ⚖️2

An Act which requires a dealer to weigh his commodity in the presence of the buyer is not an illegal assertion of the police power.

17. Constitutional law ⚖️240(1), 296(1)
Weights and measures ⚖️2

The statute requiring poultry retailers to sell table dressed poultry at weight and price to be determined at time of sale does not deny due process of law or equal protection of law to poultry retailer 90% of whose business methods will have to be changed by reason of the statute. Business and Professions Code, § 12024.4.

18. Constitutional law ⚖️240(1), 296(1)
Weights and measures ⚖️2

That the purpose of statute requiring poultry retailers to sell table dressed poultry

at weight and price to be determined at time of sale was protection of customer so that he might know exact price paid for poultry delivered to him does not deprive poultry dealer of due process of law or equal protection of law, notwithstanding that such knowledge may cause customer to buy cheaper products or may add some burden to dealer's business. Business and Professions Code, § 12024.4.

19. Constitutional law ☞240(1)
Weights and measures ☞2

That the Legislature has not seen fit to require the weight of meat and fish to be determined after removal of inedible portions does not affect validity of statute requiring such determination as to poultry and rabbits, in absence of showing that the situation as to fish and meat is comparable. Business and Professions Code, § 12024.4.

20. Constitutional law ☞38

A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.

21. Weights and measures ☞1

That other sections of Business and Professions Code deal with selling at false weights does not deprive Legislature of right to enact a section requiring the weighing of poultry to be in the presence of the customer. Business and Professions Code, §§ 12023, 12024, 12024.4, 12024.5, 12025.

22. Weights and measures ☞2

Where the detection of false weighing is almost impossible, the requirement that the commodity as delivered be weighed in the presence of the customer in order to make detection possible, is not illegal.

23. Weights and measures ☞1

The Legislature can determine the possibility of providing for protection of customer against probability of false weighing and it is not necessary that there be a showing that retailers have actually engaged in any false weighing.

24. Constitutional law ☞70(3)

Even if reasonableness of statute is debatable, courts cannot interfere with enforcement of statute.

25. Weights and measures ☞1

A statute which ensures that a person may know the exact weight of the commodity he is receiving is one which comes within the legislative power to enact laws to protect public health, safety, morals, comfort, convenience or general welfare.

26. Injunction ☞118(1), 128, 147

In action to enjoin enforcement of statute, it is not sufficient for plaintiff to allege merely that the statute is not unconstitutional in its application, but facts must appear that indicate there is at least a doubt as to the constitutionality of the statute, and where the facts which appear from the evidence fail to show that in its application to plaintiff's business the statute is illegal or unconstitutional a preliminary or other injunction will not issue.

27. Injunction ☞152

Oral testimony may be admitted on the hearing of an application for temporary injunction, and it is not required that the hearing be had exclusively on affidavits.

28. Injunction ☞85(2), 152

Preliminary injunction restraining enforcement of a statute requiring poultry retailers to sell table dressed poultry at weight and prices to be determined at time of sale would not be granted retail poultry dealer, where statute was not unconstitutional on its face and was not unconstitutional in its application to dealer's business. Business and Professions Code, § 12024.4.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson and W. R. Augustine, Deputy Attys. Gen., Dion R. Holm, City Atty., John E. Barricklo, Deputy City Atty., San Francisco, for appellants.

Jefferson E. Peyser, San Francisco, for respondents.

BRAY, Justice.

Defendants appeal from an order and preliminary injunction restraining the enforcement of section 12024.4 of the Business and Professions Code, added in 1949.

Questions Presented.

Primarily, there are three questions presented: (1) The scope of review of a preliminary injunction restraining the enforcement of a statute claimed to be unconstitutional; (2) whether the court abused its discretion; (3) may oral evidence be admitted on the hearing of an application for a preliminary injunction?

Record.

On the filing of the complaint, a temporary restraining order and order to show cause was issued. Defendants made return by demurrer, points and authorities, and affidavits of the Chief of the Division of Weights and Measures of the Department of Agriculture of the State of California and the County Sealer of Weights and Measures of the City and County of San Francisco. On the return date of the order to show cause, the matter was continued by stipulation to November 28, 1949, at which time the court denied defendants' motion for a nonsuit and to dismiss the temporary restraining order, and continued the order to show cause. It was heard on December 1 on the complaint, answer, affidavits, and on oral testimony and evidence offered by plaintiff and admitted over defendants' objections. It was then submitted and on December 20, the court granted the preliminary injunction restraining defendants from enforcing the provisions of the code section.

Complaint.

The gist of the complaint follows: Plaintiff for many years past has been and now is engaged in the business of selling fish and poultry at retail in San Francisco and brings the action on behalf of himself, other dealers similarly situated, and members of the Retail Poultry and Fish Dealers Association of San Francisco. The 1949 Legislature added section 12024.4 to the Business and Professions Code. This section requires that retailers selling poultry and fowl must sell at the "weight of the commodity when prepared and delivered in

the manner as specified by the customer." It has long been the custom of plaintiff¹ to purchase poultry² in dressed form, that is, by their weight after being killed and plucked of feathers and to resell at retail in the same form. When requested by the customer, plaintiff customarily removes the entrails or dismembers the poultry and delivers it to the customer without redetermination of weight or price. The resale price is computed upon the weight in the dressed form in which it was purchased from the wholesaler, and thereby the retailer has been able to determine the resale price "with certainty, without speculation, and with due regard to competitive prices." Defendants threaten to enforce the act and to prosecute criminally plaintiff for any violation thereof, thereby preventing plaintiff from selling in the customary manner, but requiring him when selling "table dressed" poultry, that is, poultry which the customer has requested be dismembered or that the entrails be removed, to weigh it in that form and to charge according to that weight. This would require plaintiff to change his customary method of doing business; the resale price would have to be on a speculative basis and without regard to cost, and would have to be a price which will cause a substantial loss of patronage and would seriously impair plaintiff's ability to meet the competition of other poultry sellers who are not subject to the provisions of the act and cause irreparable injury. It would result in higher prices to consumers. The act is unjust, arbitrary, oppressive, and unconstitutional for the foregoing reasons and because (1) it bears no reasonable relation to the public health, safety, morals or general welfare; (2) it discriminates between retailers of poultry and retailers of other foods, particularly of meat products. The act is void for uncertainty in certain specified particulars. These and other grounds of the alleged invalidity of the act will be discussed later, if necessary.

1. Whenever "plaintiff" is referred to in connection with the custom or manner of doing business it shall include other poultry retailers.

2. Whenever the word "poultry" is used it will include also "fowl."

Scope of Review.

Plaintiff contends that on this appeal, our duty is merely to determine whether the trial court abused its discretion in temporarily restraining enforcement of "a new and oppressive statute" and retaining the status quo until the issue of its validity can be tried on the merits, much as in any other application for injunction. Defendants contend that only if we hold the statute invalid can we uphold the action of the trial court, and therefore we must determine now the statute's constitutionality.

[1] Neither contention is correct. Where the only contention is that the unconstitutionality appears on the face of the statute, then, upon review of a temporary injunction restraining its application, the sole question presented to the reviewing court would be whether or not the statute is unconstitutional. But where the claimed unconstitutionality is based upon allegations indicating that a person's "rights have been invaded by the actual or threatened application of the challenged law to him",³ then the duty of the reviewing court is to determine if it appears that there is a rational basis for the challenge " * * * predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice * * *."⁴ If there is such rational basis, then the only question left for determination is whether the trial court abused its discretion in holding the matter in status quo until the true facts are determined at a trial of the issues. " * * * With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support." Brock v. Superior Court, supra, 12 Cal.2d 605, at page 614, 86 P.2d 805, at page 809, quoting from

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281. "The court points out that in a suit to enjoin the enforcement of legislation where the complaint tenders issues of fact touching the question of constitutionality 'The plaintiffs are entitled to the findings of a trial court upon those issues.'" French Art Cleaners v. State Board etc. Cleaners, 91 Cal.App.2d 890, 899, 206 P.2d 25, 30. As also said in the case last cited, 91 Cal.App.2d at page 896, 206 P.2d at page 28. "It does not necessarily follow, simply because the injunction issued, that the court entertained the conviction that the legislation was unconstitutional. It is to be assumed, in the absence of any record of the court's reasons, that it was issued, as preliminary injunctions usually are, merely to maintain the status quo until the final determination of the case." In this case plaintiff's main contention is that the act is unconstitutional in its proposed application as to him.

Application of Act.

[2,3] In determining whether there is a rational basis for the claimed unconstitutional application of the act to plaintiff's business, it is necessary to consider whether the complaint states a cause of action in this behalf. It does so state. The complaint sets forth that to force plaintiff to deliver table dressed poultry at a weight and price to be determined at time of sale, would change without good reason the customary method of the business, would force unemployment, cause the customer to pay more for the commodity, place the plaintiff in unfair competition with meat products dealers as to whom no similar requirement exists. It is alleged that certain customers desire their poultry table dressed in their presence. The act would also cause unfair competition between plaintiff and the retailer who table dresses the poultry in the absence of the customer, selling to the customer the poultry already packaged. It also would result in covering up defects that would be discovered by the customer buying in the customary manner. The courts are not experts in the poultry

3. Brock v. Superior Court, 12 Cal.2d 605, 614, 86 P.2d 805.

4. Id., 12 Cal.2d at page 614, 86 P.2d at page 809.

business, and cannot take judicial notice of whether or not these are the facts.

[4] Defendants contend that injunction cannot issue in this type of case as being one prohibited by section 526 of the Code of Civil Procedure which provides that an injunction cannot be granted "to prevent the execution of a public statute by officers of the law for the public benefit." Subd. 4. Section 3423 of the Civil Code is identical. Defendants also cite cases like *Asiatic Club v. Biggy*, 160 Cal. 713, 117 P. 912, and *Sullivan v. San Francisco Gas etc. Co.*, 148 Cal. 368, 83 P. 156, 3 L.R.A., N.S., 401, to the effect that equity will not interfere to prevent officials from enforcing the law. This very contention was made in *Brock v. Superior Court*, supra, 12 Cal.2d 605, at pages 609-610, 86 P.2d 805, at page 807, and was answered by the court: "The petitioners place their principal reliance upon section 3423 of the Civil Code which provides that 'an injunction cannot be granted * * * to prevent the execution of a public statute, by officers of the law, for the public benefit'. This section has been construed as a limitation upon the power of a court to restrain public officers from enforcing a valid law (*Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845), but it has uniformly been held that one specially interested may enjoin the attempted execution of an unconstitutional statute. *Bueneman v. City of Santa Barbara*, 8 Cal. 2d 405, 407, 65 P.2d 884, 109 A.L.R. 895; *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14; *Wheeler v. Herbert*, 152 Cal. 224, 92 P. 353; *Schofield v. City of Los Angeles*, 120 Cal.App. 240, 7 P.2d 1076. And although certain provisions of the law under which the petitioners in the present proceeding assumed to act have been upheld (*Brock v. Superior Court*, supra [9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127]), a statute valid upon its face may be constitutionally applied. *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220. Therefore, if the complaint in the action brought by Forbes and his co-plaintiffs shows that the petitioners threatened to enforce an unconstitutional law

against them, or that their acts in the attempted application of a valid law violated rights guaranteed to all citizens by either the federal or state Constitution, the superior court had jurisdiction to issue an injunction pending a hearing and decision upon the issues presented, and the petition for a writ of prohibition must be denied."

The Statute.

Section 12024.4 provides: "It shall be unlawful for any retailer to sell or advertise for sale to the consumer any poultry, fowl, or rabbits in any manner other than live weight, dressed weight, or table dressed weight; provided, however, that this does not prevent the sale of baby chicks, turkey poults, started chicks, started poults, laying hens, or breeding stock by the head count.

" 'Live weight' shall mean the weight of poultry, fowl, or rabbits alive.

" 'Dressed weight' shall mean the weight of the poultry or fowl, after being killed, and plucked of feathers.

" 'Table dressed weight' shall mean the weight of poultry or fowl when completely dressed or dismembered for cooking.

" 'Dressed weight' and 'table dressed weight' of rabbit shall be synonymous, and shall mean the weight of the rabbit, after being killed, and skinned, and the head, feet, and entrails removed.

"In each separate transaction the weight of the poultry, fowl, or rabbit, upon which the basis of settlement is made, shall be the weight of the commodity when prepared and delivered in the manner as specified by the customer.

"Provided, however, that any commodity specified in this section need not be weighed at time of sale when the commodity is sold in the wrapper or container in which it was received, or into which it was packed, and on which appears the net weight of the commodity therein, as marked by the processor, packer, wholesaler, or jobber, and further providing that the name and address of the processor, packer, wholesaler, or jobber, shall be clearly and

conspicuously stated in connection with the statement of net weight."

Evidence at Hearing.

At the hearing, plaintiff relied upon the complaint as an affidavit and introduced the oral testimony of himself, one Nannizzi, a San Francisco retail poultry dealer, and one Vermillion, assistant field manager of the Retail Meat Dealers Association. It was stipulated that another, one Sicca, a retail poultry dealer and secretary of the San Francisco Retail Fish and Poultry Dealers Association, if called, would testify substantially as had Nannizzi.

Defendants filed affidavits of defendant Brenton, Chief of the Division of Weights and Measures of the Department of Agriculture of the State of California, and defendant Skinner, County Sealer of Weights and Measures of the City and County of San Francisco, which denied the material allegations of the complaint, and then set up that in their experience and that of the various officials of the several county sealers of weights and measures, there was great difficulty in obtaining conclusive legal evidence of violation of section 12024 of the Business and Professions Code (which makes it a misdemeanor to sell any commodity in less quantity than the dealer represents it to be) in connection with the sale of poultry and rabbits by weight, because when delivered to the purchaser by the vendor, they were in a different physical form than when selected by the purchaser and weighed by the vendor and that the enactment of section 12024.4 was absolutely necessary to cover the various situations involved in the sale of these commodities by weight.

[5-7] Taking the complaint as an affidavit and the testimony of plaintiff's witnesses at face value, the evidence fails to show that the application of the act to plaintiff and his business is an invalid or unconstitutional one. True, the act will prevent plaintiff from conducting his business in the customary way. When his customers desire poultry cleaned or dismembered he will be able no longer to

charge by the weight prior to such cleaning or dismembering, but the weight thereafter. Merely changing the customary way of doing business in itself does not make a law unconstitutional. If so, acts which require packaging of certain foods which were once sold in bulk would be illegal. Plaintiff and his witnesses testified that it would be impossible for them in advance to estimate the loss of weight caused by cleaning or dismembering poultry and hence they could not figure out the price to be charged on the finished product. While such statements were made, it is obvious they are not true. At the same time they were saying this, they testified that they bought fish "in the round," and after cleaning it and filleting it, had no difficulty in fixing a price at which to retail the finished product. True, they attempted to differentiate the poultry situation by pointing out that the fish were cleaned before being placed on sale, while poultry, in many instances, were cleaned and dismembered in the presence of the customer. Courts are not bound by statements which are obviously incorrect. To expect a court to believe that dealers cannot estimate the average loss of weight in cleaning or dismembering poultry, is to expect the court to blind itself to the facts of everyday business life.

[8] Plaintiff's testimony to the effect that it would be impossible to estimate the shrinkage of poultry in changing it from "dressed weight" to "table dressed weight" as defined in the act, is patently incorrect. Moreover, the United States Department of Agriculture has prepared and distributed a table⁵ headed "Poultry: Approximate Shrinkages in Dressing and Eviscerating," which, among other things, gives the shrinkage of poultry from "dressed weight" to "Ready-to-Cook" (approximately the same as "table dressed"). Any variation in the particular fowl because of the type of dismemberment required by a customer from that in "ready to cook" mentioned in the table would not offer much of an estimation problem. The loss of weight will, of course, vary with each fowl, but, as the tes-

5. This court takes judicial notice of such an official table. Code Civ.Proc. § 1875, subd. 3.

timony shows, this loss varies with each fish, and yet the dealers have no difficulty in averaging this loss and in making a price that will bring them a profit on the transaction. Actually, a study of the evidence shows that plaintiff's real objection to the act is that it requires the dealer to let the customer know the exact weight of the poultry he is getting. Under plaintiff's method, a customer is told that he is buying, for example, a three pound chicken, and that the price is 50 cents per pound. Then, at the customer's request, it is cleaned and dismembered. Assuming a 20 per cent loss of weight, the customer actually receives one-fifth less than three pounds, and is paying, not 50 cents per pound of chicken delivered, but 62-½ cents. In fact, one of the contentions of plaintiff that the act has an unconstitutional application is that if the customer learns that he is actually paying 62-½ cents per pound for the amount of fowl he actually receives, when heretofore he has believed that he was paying only 50 cents, he will no longer buy fowl but will buy meat. In other words, to require that a customer know the truth, makes the act unconstitutional.

[9] The evidence fails to show any discrimination between poultry sellers and sellers of other foods, including meat products.

Other Contentions.

1. The act discriminates between retailers and wholesalers selling direct to consumers. There is no basis for this contention, for under the terms of the act, wholesalers selling to consumers would be retailing, and hence bound to comply with the act.

[10] 2. The act prohibits the sale of poultry which is neither "live," "dressed," nor "table dressed." If there is any other kind sold, there is no evidence given why the sale of poultry should not be so restricted.

[11] 3. It prohibits retailers from packaging poultry, marking the weight thereon and selling it without again weighing the package. No good reason is given why it should not be so weighed.

[12] 4. Broad general statements that enforcement of the act will result in fraud practiced on the consumer without facts to support it are of no value. The evidence fails to disclose how poultry cleaned and dismembered in the absence of the customer will result in the sale of unwholesome poultry. As a matter of fact, it appears that most of the table dressed poultry that is sold today is cleaned and dismembered in the absence of the customer.

[13] 5. The contention that the act itself must set forth the public policy reason for its adoption is not supported by any authority.

Alleged Uncertainty.

[14, 15] Plaintiff contends that the act is vague, uncertain and indefinite because of the use of certain terms. Such terms as "retailer," "consumer," "basis of settlement," "delivered," have such well known meaning that a claim that they are indefinite, vague or uncertain is completely without basis. While the evidence shows that the words "table dressed weight" constitute a term not known to the trade, it is clearly defined in the act and there is cited no authority for the proposition that a Legislature may not create a term, unknown to a particular trade, provided, of course, it is defined so that the trade may what it means.

Policy of Legislature.

[16] Practically all of the contentions made by plaintiff go to the question of policy in the adoption of the act. We cannot say that an act which requires a dealer to weigh his commodity in the presence of the buyer is an illegal assertion of the police power. As to the policy, "In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the Legislature. * * * it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's pow-

er, and, if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained." *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 454, 455, 456, 55 P.2d 177, 181, affirmed, see *Pep Boys, Manny, Moe & Jack, of California v. Pyroil Sales Co.*, 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122.

[17] Plaintiff contends that his right of due process of law has been violated by the act. He does not, however, point out any respect in which it has been so violated nor cite any cases in support of his contention. He further contends that his right of equal protection of the law has been violated. The evidence fails to show that this is so in any respect. The fact that his method of doing 90 per cent of his poultry business (he testified that 10 per cent of this business concerned the sale of "dressed" poultry as to which the law makes no change; and he also has quite a fish business) will have to be changed, does not make the act illegal. Plaintiff's contentions in this respect are answered in *People v. Hoshor*, 92 Cal.App.2d 250, 256, 206 P.2d 882, 886: "The contention that the right of due process of law and of equal protection of the law are violated by the act as applied has been completely answered by *People v. Eiseman*, 78 Cal.App. 223, 249, 248 P. 716, 727. The court there held that while it is true that the act burdens honest business, such burden is for the very good and only reason that 'under its forms dishonest business may not be done.' * * * Conditions must be imposed and their performance enforced notwithstanding inconveniences caused to honest men. For sovereignty to abandon its watch care of society and to confess its inability to guard honest men against the plunderers because, forsooth, an occasional good citizen might be inconvenienced, would be to signify its utter helplessness to protect the very men who constitute the state."

[18] The act in our case obviously was enacted for the protection of the consumer, so that he might know the exact price he is paying for the price of the commodity delivered. We can find nothing in this re-

quirement that is either illegal or unconstitutional. The fact that the consumer who might have thought that heretofore he was getting his poultry cheaper than was the fact is now going to be made aware of the true price, and that such knowledge might cause him to buy cheaper products or might add some burden to plaintiff's business, deprives plaintiff neither of due process or the equal protection of the law. Applicable here is the language from *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498, quoted in *People v. Eiseman*, 78 Cal.App. 223, 249, 248 P. 716, 727: "We think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declarations; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its functions.' In conformity with the law as announced in the cases cited it must be held here that the act in question is not unconstitutional."

A somewhat analogous situation appears in *Willapoint Oysters v. Ewing*, 9 Cir., 174 F.2d 676. There the Federal Security Agency had prescribed standards of identity and a standard of fill of containers for canned oysters. The standard of fill required that the "drained weight of all species of oysters packed in a can should be not less than 59 per cent of the can's water capacity. Petitioner there contended that it was impossible, because of the particular "blanching" process used by it in preparing oysters, to place in the can the required weight, without "twisting, tearing, breaking, and browning" the product, thereby destroying the good will and consumer acceptance it had built up over the years, and that the consumer could well be protected by a statement on the label of the correct weight. In upholding the regulation the court said, 174 F.2d at page 688: "The justification for the Administrator's order is his belief that any oyster canning method which ultimately results

in a container but one-half full of oysters is unfair to the consumer, and that a mere statement on the label of the ounce content of drained oysters is not sufficiently curative. In short he feels that the consumer is entitled to receive more oyster meat and less liquid."

[19, 20] While it is true that the Legislature has seen fit not to require the weight of meat and fish to be determined after the removal of the inedible portions, such fact does not affect the validity of an act requiring such determination as to poultry and rabbits. There is no evidence that fish is ever sold to the customer as a whole and thereafter the innards are removed. The universal custom is to sell the fish cleaned. To some extent fat and bones are removed from meat after it is weighed for the customer. Nevertheless, there is no showing that the situation as to fish and meat is comparable. Assuming, however, that the situation is comparable, it is not absolutely necessary that the state attack all abuses at one time. "A State may 'direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.' * * * Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid 'cautious advance, step by step, and the distrust of generalities.'" *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 723.

[21, 22] The fact that other sections of the Business and Professions Code §§ 12023, 12024, 12024.5 and 12025 deal with selling at false weights, etc., makes section 12024.4 no less "an honest weight statute" nor does it deprive the Legislature of the right to require the weighing to be in the presence of the customer. The evidence of defendants shows that such a requirement is necessary, not only to enable enforcement officers to be better able to check on violations, but to protect the customers. It is not, as claimed by plaintiff, an act whose sole purpose is for the

convenience of the officials in obtaining conclusive evidence of violations. But even if it were, such fact would not make it illegal. In cases where, as was testified here, detection of false weighing is almost impossible, the requirement that the commodity as delivered be weighed in the presence of the customer in order to make detection possible, is not illegal. *Skaggs v. City of Oakland*, 6 Cal.2d 222, 57 P.2d 478, and *Justesen's Food Stores, Inc., v. City of Tulare*, 12 Cal.2d 324, 84 P.2d 140, and similar cases, are not in point. There it was held that the regulations under consideration were enacted merely for the convenience of inspecting officials. In the *Skaggs* case, deliveries of bakery products were prohibited at night, on Sundays and certain holidays. In the *Justesen's* case stores selling food were prohibited from being open during hours when the municipal meat and food inspector was not on duty. Both regulations were attempted to be supported on the grounds that it was inconvenient for officials to inspect after hours. In our case, it is not a matter of the convenience of officials, but the difficulty of enforcing the honest weight statutes, not merely at the convenience of the officials, but at all.

[23-25] It is not necessary that defendants show that plaintiff and other retailers have been actually engaged in false weighing. If it appears, and it does here, that there is an opportunity for fraud, it is for the Legislature to determine the policy of providing for the protection of the customer against that probability. Even if the reasonableness of the statute is debatable, the courts may not interfere. *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 202 P.2d 38, 7 A.L.R.2d 990. It should require no discussion to show that a statute which ensures that a person may know the exact weight of the commodity he is receiving is one which comes within the power of the Legislature to enact laws to protect the public health, safety, morals, comfort, convenience or general welfare.

[26] Our case is distinguishable from *French Art Cleaners v. State Board etc. Cleaners*, supra, 91 Cal.App.2d 890, 206

P.2d 25. There the preliminary injunction was issued on the complaint as an affidavit, which showed that the constitutionality of a minimum price statute applicable to the dry cleaning business was at least debatable. Here, while the complaint alleges certain conclusions which might cause a question to arise concerning the constitutionality of the act, when it is taken together with the testimony at the hearing, the question of constitutionality, so far as application of the act to plaintiff's business is concerned, completely disappears. It is not sufficient in an action to enjoin the enforcement of a statute, for a plaintiff to allege merely that it is unconstitutional in its application. Facts must appear that indicate there is at least a doubt as to the constitutionality, and where, as here, the facts which appear from the evidence fail to show that in its application to plaintiff's business the act is illegal or unconstitutional, no injunction, preliminary or otherwise, may issue.

In *McKay Jewelers, Inc., v. Bowron*, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188, the court held unconstitutional an ordinance which prohibited a person from soliciting trade in front of his own place of business. The situation in that case is not

analogous to the situation here, where all that is required is that the seller weigh in the presence of the buyer the commodity about to be delivered.

[27] In view of our decision, we do not deem it necessary to consider the procedural questions raised, other than to say that we consider defendants' claim that oral testimony may not be admitted on the hearing of an application for injunction and that the hearing must be had exclusively on affidavits, as super-technical and unsupported by the authorities.

Conclusion.

[28] As the act is not unconstitutional on its face, and, as the evidence shows that likewise it is not unconstitutional in its application to plaintiff's business, no occasion arose for the court to balance the equities or to exercise a discretion concerning the granting of a preliminary injunction. It should have denied the application.

The order and preliminary injunction are reversed.

PETERS, P. J., and FRED B. WOOD, J. concur.

FRANCHISE TAX BOARD v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Sac. 6078-6080.

Supreme Court of California, in Bank.

Dec. 22, 1950.

Rehearing Denied Jan. 18, 1951.

Original application by the Franchise Tax Board for a writ of prohibition against the Superior Court in and for the County of Sacramento to prevent enforcement of a court order that the tax commissioner make available tax returns of individual non-financial taxpayers for inspection and copying. The Supreme Court, Edmonds, J., held that the section of the franchise tax act which protected tax returns from disclosure, prevented banks, who were complaining taxpayers, from determining identity of non-financial corporate taxpayers and prevented commissioner from making returns of those taxpayers available for inspection and copying.

Writ of prohibition granted, and petition to produce additional evidence denied.

I. Prohibition $\S$ 3(1)

Where franchise tax commissioner was forbidden by statute from disclosing tax returns of corporations, and superior court ordered commissioner to make available for inspection and copying tax returns and related data filed by approximately 25,000 corporations, so that franchise tax board, as statutory successor of commissioner, was threatened with judicial action either by citations for contempt or criminal prosecution, and there was no available remedy by way of appeal, if superior court acted without or in excess of jurisdiction, prohibition was only plain, speedy and adequate remedy available to the board. Code Civ.Proc. $\S$ 1000; Gen.Laws, Act 8488, $\S\S$ 1 et seq., 35.

2. Taxation $\S$ 443

Banks claiming refund under Franchise Tax Act were not entitled to inspect and copy tax returns of non-financial corporations on theory that by asserting claims for refund they sought to "enforce" the act within meaning of exception provision that tax returns are exempt from disclosure except "in cases or actions instituted for the enforcement of this act", since

a tax statute is enforced by the state or its representatives.

See publication Words and Phrases, for other judicial constructions and definitions of "Enforce".

3. Taxation $\S$ 443, 1079

The phrase "except as otherwise herein provided" contained in section of corporation franchise tax act, that disclosure by commissioner of amount of income of any bank or corporation is unlawful, was borrowed from personal income tax act and was used to give returns of all taxpayers a privileged status by uniform provisions in all statutes administered by the commissioner, and did not make previous exception which provided for "public hearing and opportunity to examine the data on which his determination is based" an exception to the prohibition, and permit banks to examine tax returns of non-financial taxpayers. Gen.Laws, Act 8488, $\S\S$ 4a, 35; Revenue and Taxation Code, $\S$ 19282 et seq.

4. Statutes $\S$ 228

Where enumerated exceptions immediately follow an excepting clause, such exceptions are the only ones intended.

5. Taxation $\S$ 443

Provision in corporation franchise tax act for public hearing and opportunity given to examine the data on which Commissioner's determination is based does not necessarily include tax returns and related documents of other taxpayers, and such papers would be excluded from data which commissioner could make available for inspection. Gen.Laws, Act 8488, $\S\S$ 4a, 35; Revenue and Taxation Code, $\S$ 19282 et seq.

6. Administrative law and procedure $\S$ 209

A legislative body may delegate to a board or officer the discretion of carrying out a declared policy according to a prescribed test or standard.

7. Administrative law and procedure $\S$ 311

Where proceedings are quasi-legislative in character, a hearing of a judicial type is not required, and a hearing allowed by legislative grace is not circumscribed by restrictions applicable to judicial or quasi-judicial adversary proceedings.

8. Administrative law and procedure Ⓒ470

There is no constitutional requirement for any hearing in a quasi-legislative proceeding.

9. Taxation Ⓒ486

Under corporation franchise act, where banks did not have an opportunity to produce whatever evidence and be heard to whatever extent they desired, but were permitted a hearing within prescribed limits, among which was the confidential status accorded returns of non-financial corporate taxpayers, and banks were given opportunity to question witnesses, produce evidence, and consider all data relied upon by commissioner, excepting identity of non-financial corporate taxpayers, restriction upon banks did not render statutory hearing a nullity or deprive banks of their constitutional rights. Gen.Laws, Act 8488, § 1 et seq.

10. Taxation Ⓒ443

Where tax returns of non-financial corporations were utilized by franchise tax board to compile data which that quasi-legislative agency considered in determining tax rate according to formula prescribed by legislature, proceedings were in no sense adverse to financial institutions and evidence was not required to be made available to those institutions. Gen.Laws, Act 8488, § 1 et seq.

11. Taxation Ⓒ10

State taxation of a national bank at an approximate equivalent rate to that applied through all taxes on non-financial corporations is a valid and constitutional procedure.

12. Prohibition Ⓒ29

Where so much of evidence as was relevant to question of effect and validity of provision of corporation franchise tax act forbidding disclosure by tax commissioner of amount of income of any bank or corporation was available in record before Supreme Court, petition to produce additional evidence in the Supreme Court in prohibition proceeding would be denied.

ner and Ernest P. Goodman, Deputy Attys. Gen., for petitioner.

Sigvald Nielson, Albert J. Shults and Pillsbury, Madison & Sutro, all of San Francisco, Mitchell, Silberberg & Knupp, Los Angeles, as amicus curiae on behalf of petitioner.

O'Melveny & Myers, Louis W. Myers, Sidney H. Wall, Howard J. Deards, Pierce Works, Lawler, Felix & Hall and Brenton L. Metzler, all of Los Angeles, for respondent and real parties in interest.

EDMONDS, Justice.

The Bank and Corporation Franchise Tax Act, Stats. 1929, ch. 13, p. 19, as amended; Deering's Gen.Laws, Act 8488, provides that, with certain exceptions, it shall be unlawful for the Franchise Tax Commissioner to divulge any information concerning a tax return filed in accordance with the statute. In litigation challenging the validity of certain assessments made by the commissioner, the superior court ordered him to make available for inspection and copying the returns and related data filed by approximately 25,000 corporations. By this proceeding in prohibition, the Franchise Tax Board, as the statutory successor of the commissioner, is endeavoring to prevent the enforcement of those orders.

The Security-First National Bank of Los Angeles, Bank of America National Trust and Savings Association, and The Farmers and Merchants National Bank of Los Angeles brought separate actions for the refund of taxes paid by each of them under the Franchise Tax Act for the taxable year of 1943. The general theory upon which these actions are based is that the California plan of taxing banks and other financial corporations either is unconstitutional as enacted by the Legislature, or as applied to their respective operations by the Franchise Tax Board.

Under the authority of § 5219 of the Revised Statutes, 12 U.S.C.A. § 548, a state may tax a national bank according to, or measured by, its income from all sources, including that from tax exempt securities. California adopted this method of taxation in 1928. Cal.Const. Art. XIII, § 16.

Fred N. Howser, Atty. Gen., James E. Sabine, Irving H. Perluss, Edward Sum-

The Franchise Tax Act, *supra*, lays upon nonfinancial corporations a tax at a flat rate of 4 per cent of their respective net incomes. § 4, subd. 3. National banks and other financial corporations are taxed at the same flat rate of 4 per cent of net income plus an additional percentage (not to exceed 8 per cent in all) derived from a ratio between the totaled personal property taxes paid by all nonfinancial corporations and their totaled net income for a given tax year. § 4a.

Under this formula, although its personal property is not taxed, a bank may be required to pay a franchise tax at a rate proportionate to the personal property tax assessed against a nonfinancial corporation. The tax upon the bank's franchise, however, is in lieu of all other taxes and licenses, whether state, county or municipal, except taxes assessed upon its real property. There is no such provision for nonfinancial corporations; they may be required to pay personal property, sales and use taxes, and motor vehicle transportation and local licenses in addition to franchise and real property taxes.

In 1943, for the purpose of fixing the rate at which banks and financial corporations should be assessed for the taxable year of 1943, the commissioner conducted a hearing, and considered as evidence certain data compiled from the tax returns filed by nonfinancial corporations for the purpose of showing the amount of taxes paid by them upon their personal property. Thereafter, he determined that the banks and financial corporations should be taxed at the rate of 6.9 per cent of net income, which was an increase of .18 per cent over the rate fixed for the previous year.

The banks attack the evidence upon which the commissioner fixed the 1943 tax rate. By affidavits filed in support of their motions for leave to inspect, Code Civ. Proc. § 1000, they assert that substantially all of the evidence and information utilized by the commissioner as the basis for his determination consisted of franchise tax returns, claims for abatement and refund of taxes, unverified replies to demands for supplementary data and affidavits and evidence of diminution in net income through war

contract renegotiations. More specifically, the banks charge that the returns of the nonfinancial corporations include haphazard approximations in reporting allocations of net income, amounts accounted for as taxes upon real property which in fact were taxes upon personalty, payments to satisfy assessments upon personal property which later were held by the courts to be subject to refund, and other erroneous data.

In the actions for refund, the banks' attack upon the evidence received by the commissioner is essentially the same as that pressed at the hearing held for the purpose of fixing the tax rate. The banks then asserted that they had a right to examine and copy the reports and data of all nonfinancial corporations for the purpose of proving their contentions of inaccuracy. The commissioner refused the demand upon the ground that the Franchise Tax Act prohibits the disclosure of the information included in the tax returns. However, he agreed to receive any evidence which the banks might offer tending to prove that nonfinancial corporations had reported as taxes upon personal property amounts which had not been paid for that purpose. He permitted the banks to examine the various compilations upon which the rate was computed, and submitted data prepared by his office which purported to show for each of the 25,000 nonfinancial corporations the net income allocated to California, the amount of franchise tax, and the amount of taxes on personal property assessed against each corporation. In this list the corporations were identified only by serial number, not by name. Tabulations showing similar information regarding industries were made available to the banks. The commissioner also brought returns and other related documents into the hearing room and, when requested to do so by the banks, verified each item by reading it aloud from the returns and other documents. However, the identity of the particular taxpayer from whose return the commissioner read was uniformly withheld.

The orders of the superior court here under attack require the Franchise Tax Board to make the tax returns and related

documents available to the banks for inspection and copying, subject only to the limitation that the board shall not be required to " * * * disclose or permit inspection of or the taking of copies of any figures or amounts expressed in terms of money and representing income gross or net (but not including deductions claimed from gross income) and returned or reported by individual and identifiable * *" nonfinancial corporations. The position of the board is that the superior court has exceeded its jurisdiction by issuing inspection orders contrary to the mandate of the Franchise Tax Act, which makes the disclosure of information included in a tax return a misdemeanor. As justifying the procedure invoked, it is argued that a writ of prohibition is the proper remedy because judicial action is threatened by the banks, and § 1000 of the Code of Civil Procedure specifies that one who refuses to comply with an order for the inspection of documents may be cited for contempt. There is no other plain, speedy and adequate remedy, says the board, because it must risk prosecution for contempt of court if it does not comply or be charged with having committed a misdemeanor if it complies with the orders. These orders, it declares, are nonappealable and the disclosure of confidential information cannot be rectified by subsequent judicial action.

Upon the question of the banks' right to inspect the tax returns, the board insists that the orders issued by the superior court are invalid under both the tax statute and § 1881(5) of the Code of Civil Procedure, which forbids the examination of a public officer as to communications made to him in official confidence, when the public interest would suffer by the disclosure. The function of the commissioner in determining the tax rate is quasi-legislative and need not meet all of the requirements of procedural due process. In the case of a hearing afforded by legislative grace, procedural due process does not require an examination of all the evidence, particularly where, as here, disclosure of tax returns is expressly forbidden. In any event, an adequate hearing was granted in that the banks were supplied with every item of in-

formation requested by them at the hearing, with the exception of the individual taxpayers' identity. No question of discrimination against national banks is involved because the tax levied upon them need only approximate the overall tax upon nonfinancial corporations. Finally, it is argued, the practical aspects of compliance with the orders are overwhelming. It would require the services of the entire auditing and clerical staff of the board for a period of 50 or more days merely to furnish the material ordered produced by the superior court. According to the board, many returns are in field offices, and the file for each corporation contains returns for many years. It is claimed that all other work of the board would have to cease pending the production of the approximately 25,000 returns.

The briefs of *amici curiae* in support of the board reiterate and further develop many of these contentions. The element of reliance by taxpayers upon the confidential treatment of their returns is stressed, and it is said that failure to recognize the full effect of the statutory requirement of nondisclosure would prompt taxpayers to withhold information which they believed readily could be obtained by their competitors in the event of a judicial proceeding. One *amicus curiae* insists that the general law concerning the right of privacy precludes disclosure of the contents of the returns.

In support of the challenged orders, the banks assert that at no stage of the tax proceedings have they had an opportunity to examine the returns which are the basis of the formula under which they have been assessed. It is contended that due process of law requires a full and fair hearing at some stage of the tax proceeding, which they were not afforded at the rate-making hearing. As the banks present the situation, the various compilations used by the commissioner and the portions of the tax returns, identified only by serial numbers, which were read to counsel, could not be challenged effectively because it was impossible to determine the relevancy of the individual tax returns upon which the rate was fixed. An examination of the

tax returns will demonstrate, the banks insist, that they have been assessed upon the basis of data which includes inaccuracies, omissions and misrepresentations.

The right to see the returns is placed upon still another ground. Since the rate fixing hearing denied the banks an opportunity to examine the tax returns, they argue that due process of law requires that such opportunity be afforded during the refund litigation, which is the final stage of tax proceedings. It is asserted that due process requirements are offended by failure to permit examination of all the data upon which a tax rate is predicated, particularly where the determination of the exact rate is delegated by the Legislature. Furthermore, say the banks, the board's failure to deny the banks' allegations concerning the relevancy and materiality of the returns, as stated in the moving affidavits, supports the orders of inspection made under § 1000 of the Code of Civil Procedure.

As refuting the board's argument that § 35 of the Franchise Tax Act validly renders the tax returns privileged, the banks insist that such privilege is inconsistent with the requirements of due process and, under the express provisions of the statute, have no application to financial corporations. It is insisted that, unlike the conventional privilege situation in which use of evidence is available to neither litigant or both, under the theory of the board the returns are available only to the taxing authorities. The banks contend that the returns lost whatever privileged character they may have possessed as to financial corporations when they were used "against" such taxpayers in determining their tax rate. Reliance is placed upon decisions holding that equal protection and due process of law are denied when secret and undisclosed evidence is used against a litigant or defendant.

The banks also stress their assertion that 98 per cent of the returns used in determining the tax rate had not been audited or checked in any way and contained much unreliable and inaccurate information. In support of their contention that the decision as to the tax rate was based upon

inadequate evidence, they particularly refer to that part of the proceedings relating to renegotiations of government contracts. According to the record, prior to the hearing the commissioner had concluded that approximately 27 million dollars in income of certain nonfinancial corporations would be renegotiated and, by their returns or otherwise, other nonfinancial corporations had "indicated" that anticipated renegotiations would reduce their incomes by approximately 54 million dollars. The identity of the corporations was not disclosed to the banks. Such renegotiations, it is claimed, have reduced the income denominator as to nonfinancial corporations and thereby substantially increased the tax rate of the banks. The banks insist that they still do not know by what amount, if any, the income of the nonfinancial corporations was so reduced, and until such information is made available to them, there has been a denial of due process.

[1] Under the circumstances shown in this case, it is clear that the board is threatened with judicial action in the enforcement of the inspection orders either by citations for contempt or criminal prosecution. Moreover, there is no available remedy by way of appeal. *Collins v. Corse*, 8 Cal.2d 123, 64 P.2d 137; cf. *Estate of Brady*, 32 Cal.2d 478, 196 P.2d 881. If the superior court acted without or in excess of jurisdiction, prohibition is the only plain, speedy and adequate remedy available to the board.

The provisions of the Franchise Tax Act protecting tax returns against disclosure read as follows:

"Except in accordance with proper judicial order in cases or actions instituted for the enforcement of the provisions of this act or for the prosecution of violations of this act and except as otherwise herein provided, it shall be unlawful for the commissioner, any deputy, agent, clerk or other officer or employee, to divulge or make known in any manner the amount of income for any particulars relating to the business affairs of the bank or corporation set forth or disclosed in any report or return required under this act; provided, however, that such information may upon

request of a committee appointed by either the Assembly or the Senate be furnished to such committee, but it shall be unlawful for such committee or any member, clerk or other officer or employee thereof to divulge or make known in any manner any particulars * * *. Nothing herein shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns and the items thereof * * *. (b) *Any offense against this section shall be a misdemeanor.* (c) Notwithstanding the provisions of subsection (a), the commissioner may permit the Commissioner of Internal Revenue of the United States * * * to inspect the returns * * *." (Italics added.) § 35.

[2] The banks rely upon the language which excepts "* * * cases or actions instituted for the enforcement of the provisions of this act * * *" as the basis for their claim that they are entitled to examine the tax returns. They say that they are seeking to enforce the refund provisions of the act. But a taxpayer does not "enforce" a statute which levies a tax upon him. He may assert a claim for refund, as permitted by law, but in doing so he does not "enforce" the statute. A tax statute is enforced by the State or its representatives, see generally §§ 7051, 8251, 9251, 11651, 14740 and 16506 of the Revenue and Taxation Code, and the "cases or actions" mentioned in § 35 are those brought by the State. Cf. *Bowman v. Montcalm Circuit Judge*, 129 Mich. 608, 89 N.W. 334.

[3] The banks also claim that the phrase "* * * except as otherwise herein provided * * *", contained in § 35, refers to the provisions of the Franchise Tax Act generally. Therefore, it is contended, § 4a is an exception to the prohibition of § 35, because the former provides for "* * * public hearing and opportunity given to examine the data on which his determination is based * * *." An examination of "data" requires, the banks argue, the inspection of the tax returns because it is upon them and related documents that the commissioner based the tax rate.

The language "* * * except as otherwise herein provided * * *", now found in § 35, was borrowed from § 33 of the Personal Income Tax Act (now § 19282 et seq. of the Revenue and Taxation Code) where this language was added in 1937. Stats. 1937, ch. 668. No doubt, § 35 of the Franchise Tax Act was amended in 1939 to include this language in order to give the returns of all taxpayers a privileged status by uniform provisions in all the statutes administered by the commissioner.

When the Personal Income Tax Act was codified in 1943, the words "* * * except as otherwise herein provided * * *" were used by the Legislature as a reference to the exceptions expressed in § 33 of that act. This fact is illustrated by the language of § 19282 of the Revenue and Taxation Code which reads: "Except as otherwise provided in this article * * *" certain conditions shall prevail. The article referred to contains the exceptions formerly included in § 33 of the Personal Income Tax Act.

As further evidence that the Legislature treated the language in question as a reference to the exceptions found in § 35 alone, it should be noted that § 26451 of the Revenue and Taxation Code, to become effective July 1, 1951, reads: "Except as otherwise provided in this article * * *" Stats., 1949, ch. 557. "This article", Article 2 of Chapter 15, contains only the exceptions formerly enumerated in § 35 of the Franchise Tax Act.

[4] Also, the construction of § 35 itself indicates the legislative intent that the exceptions referred to in the first sentence be those enumerated in the same section. The very next sentence, which is separated only by a semicolon, introduces the exceptions with the common term "provided, however". It seems logical to conclude that, where enumerated exceptions immediately follow the excepting clause, they are the only ones intended. Clearly, § 35 may not be read in conjunction with § 4a, because the former is complete within itself.

[5] However, even if it be assumed that the excepting clause of § 35 applies to the entire statute, § 4a does not require di-

vulgence of the nonfinancial taxpayer's identity. The term "data" does not necessarily include the tax returns and related documents. The phrase "examine the data" has been in § 4a since 1933; the excepting clause of § 35 was not added until 1939. As § 35, prior to 1939, expressly required the confidential treatment of returns and reports and did not include the phrase "except as otherwise herein provided", it is obvious that the "data" which the banks were permitted to examine under the authority of § 4a did not embrace the tax returns and reports made confidential by § 35. The commissioner, since 1933, and without legislative action changing the rule, has excluded tax returns from the "data" which he has made available for inspection. *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 156 P.2d 1. Moreover, the general term "data" found in § 4a is controlled by the specific provisions against disclosure of tax returns stated in § 35.

[6] The banks' contention that the board's refusal to permit them to examine and take copies of some 25,000 tax returns, identified as to the corporations filing them, amounts to a denial of procedural due process of law is based upon the erroneous assumption that the commissioner was acting quasi-judicially. It is well established that a legislative body may delegate to a board or officer the discretion of carrying out a declared policy according to a prescribed test or standard. It is not necessary that the Legislature " * * * find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances * * *. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct * * *. These essentials are preserved when [the legislative body] has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."

Yakus v. United States, 321 U.S. 414, 424-425, 64 S.Ct. 660, 667, 88 L.Ed. 834; accord *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372; *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294. Of interest in this connection is a part of the argument presented to this court. When asked whether the commissioner was exercising judicial or legislative functions, counsel for the banks replied " * * * I suppose that he has no quasi-judicial functions whatsoever * * * I would say, yes, under the holdings of this Court, that he is not acting judicially or quasi-judicially."

[7] Where the proceedings are quasi-legislative in character, a hearing of a judicial type is not required; a hearing allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi-judicial adversary proceedings. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796; *Bi-Metallic Investment Co. v. State Board of Equalization*, supra; *Assigned Car Cases*, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204; *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525; *Brown v. Winter, D.C.*, 50 F.Supp. 804; *Ray v. Parker*, 15 Cal.2d 275, 101 P.2d 665. The Legislature might have adopted a flat tax rate of 6.9 per cent. Instead of doing so, in § 4a of the Franchise Tax Act it specified the procedure to be followed by the commissioner in ascertaining the facts and computing the percentage which would be applicable in comparing the tax burdens upon banks and other corporations. Following the prescribed method of computation, the commissioner determined that the equalizing tax rate should be 6.9 per cent.

[8] There is no constitutional requirement for any hearing in a quasi-legislative proceeding. "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the

point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power." *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U. S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372.

However, despite the lack of necessity therefor, the Legislature, as a matter of grace, provided for a hearing and one was accorded the banks in compliance with the statutory provisions. The banks were given the opportunity to question witnesses, produce evidence, and consider all data relied upon by the commissioner excepting the identity of the nonfinancial corporate taxpayers which is prohibited by § 35. Through the compilation of some 1,000 data sheets and by bringing individual returns into the hearing room and reading from them as requested, the commissioner adequately met the requirements of a permissive statutory hearing upon a legislative question.

[9] The banks contend that because they were not permitted to examine the tax returns and learn the identity of the individual taxpayer, they had no hearing at all. A similar complaint was made in *Norwegian Nitrogen Products Co. v. United States*, *supra* [288 U.S. 294, 53 S.Ct. 354], quoted with approval in *Ray v. Parker*, *supra*, in which the court said: "The decision of this case hinges upon our answer to the question whether the petitioner has been 'heard' in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the Commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitors upon the data thus laid bare?" This rhetorical question

was answered in the negative. So in the present case, the statute does not declare that the banks shall have an opportunity to produce whatever evidence and be heard to whatever extent they may desire. It permits a hearing within the prescribed limits, among which is the confidential status accorded the returns of nonfinancial corporate taxpayers.

It cannot be said that such restriction renders the statutory hearing a nullity. In substance, it is the argument of the banks that were it not for the privileged nature of the returns, they would be able to prove their case. To some degree, a litigant faces the same problems as to all privileged communications, and the necessity for secrecy regarding tax returns, which underlies the legislative action giving that protection to the taxpayer, is fully recognized in such cases as *In re Chatham Phoenix National Bank & Trust Co.*, 269 App.Div. 108, 53 N.Y.S.2d 923, *In re Valecia Condensed Milk Co.*, 7 Cir., 240 F. 310, and *In re Reid*, D.C., 155 F. 933.

The banks argue that the tax returns lost whatever privileged status they may have had through their use by the commissioner "against" the banks. At the outset, it must be remembered that the determination of the tax rate for financial corporations generally was quasi-legislative in nature. An agency performing such a function does not legislate "against" the taxpayer. The returns were utilized to compile the data which the quasi-legislative agency considered in determining the tax rate according to the formula prescribed by the Legislature. The proceedings were in no sense adverse. Under the act, the taxpayers were entitled to a hearing, which they received; the proceedings were subject to legislative control, if desired, through examination of the tax returns by one of its committees.

[10] For this reason, decisions holding that the evidence must be available to both litigants or neither are inapplicable. *Olive Proration Program Committee v. Agricultural Prorate Comm.*, 17 Cal.2d 204, 109 P.2d 918, 922, relied upon by the banks, is further distinguishable by the fact that it involved evidence which " * * *

was secretly received by the commission after it had determined the issues presented by the petition to terminate." There was no privilege bar to the evidence in that case; the evil lay in the fact that a finding was based upon evidence of which the opposite party was not apprised. Here, the evidence upon which the rate was determined was the amount of taxes paid by nonfinancial corporations. The banks were fully informed as to those figures. They were permitted to examine the compilations upon which the rate was computed. Material was prepared showing for each of the 25,000 nonfinancial corporations the net income, the amount of franchise tax, and the amount of taxes on personal property assessed against each of them. Returns and other documents were used to verify the compilations in which individual taxpayers were identified by serial numbers. The tax rate was determined from those figures, which were available to the banks although the identity of various taxpayers was not disclosed. The commissioner agreed to receive any admissible evidence offered by the banks in proof of their contention that the returns were inaccurate, but he properly refused to disclose the identity of the individual nonfinancial taxpayers or make their returns available for inspection and copying. By his action, the banks are confronted with the common situation wherein proof of alleged facts is rendered more difficult because of the existence of certain privileged communications, protected as such because underlying public interests and policies outweigh the convenience of a particular litigant.

[11] Much of the banks' argument has been directed to the unconstitutionality of the method of taxation prescribed by the Franchise Tax Act. It is firmly established that state taxation of national banks at an approximate equivalent rate to that applied through all taxes on nonfinancial corporations is a valid and constitutional procedure. *International Harvester Co. v. Evatt*, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; *Tradersmens National Bank v. Oklahoma Tax Commission*, 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947. The question is of doubtful relevance in this proceeding. It

concerns the narrow question of the validity of § 35 of the act; not the constitutionality of the entire plan of taxation.

[12] The banks have requested that they be permitted to introduce a transcript of the hearing and a letter concerning the computation of the tax rate. The asserted relevance of this additional evidence is that it will prove the use by the commissioner of incorrect data in determining the rate, his reliance upon hearsay information, and the consideration of secret evidence as conclusive. So much of that evidence as is relevant to the question as to the effect of § 35 and its validity, is available in the present record.

For the foregoing reasons, the writs of prohibition are granted, and the petition to produce additional evidence is denied.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., and BRAY, J. pro tem., concur.

SCHAUER, J., concurs in the judgment.

Rehearing denied; TRAYNOR, J., not participating.



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PEOPLE v. Antonio Richard ROCHIN.

Cr. 4452.

Supreme Court of California.

Jan. 11, 1951.

Hearing denied.

CARTER and SCHAUER, JJ., dissenting.

Prior opinion 225 P.2d 1.

CARTER, Justice (dissenting).

I dissent from the order denying a hearing in this case, and because of the flagrant violation of the fundamental constitutional right of privacy depicted in the opinion of the District Court of Appeal, I cannot refrain from giving expression to the strong

feeling which I have against the holding of this court, *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; *People v. Gonzales*, 20 Cal.2d 165, 124 P.2d 44; *People v. Kelley*, 22 Cal.2d 169, 137 P.2d 1, which gives aid and comfort to so-called officers of the law who are so lacking in respect for the constitutional provisions here involved that they ruthlessly violate them with impunity. I commend the justices of the District Court of Appeal for their forthright declarations in this case against the abuses which are permitted and sanctioned by the holding of this court in the cases cited above, and I have little doubt that if the justices of the District Court of Appeal who participated in the decision of this case were members of this court, such holding would be promptly and unmistakably changed, and the above cited decisions of this court supporting such holding would be squarely overruled.

In view of the disinclination of the members of this court to change this obviously erroneous rule—established by its own decisions, and in direct conflict with the decisions of the Supreme Court of the United States and the highest court of many of the other states in the union—see dissenting opinion in *People v. Gonzales*, supra, 20 Cal.2d 165, 176, 124 P.2d 44. I am asking the Legislature of California to enact legislation which will force the courts of this state to uphold the constitutional provisions, 4th Amendment to the Constitution of the United States, Section 19 of Article I of the Constitution of California, guaranteeing the right of privacy to residents of this state.

We are told by our national leaders that a state of emergency now exists throughout the world—that our liberties are in jeopardy—that to preserve those liberties we must unite with other free nations of the world in establishing the most potent military force of all time to resist totalitarian aggression. What are these liberties which are threatened? Is not the right of privacy, guaranteed by the above mentioned constitutional provisions, one of those liberties? There can be no question that the right of privacy is one of these fundamental rights, guaranteed by the

Bill of Rights—the charter of our civil liberties. Could anyone imagine such right being any more ruthlessly violated under a totalitarian regime than it was in the case at bar? It makes little difference whether the minion of the law who perpetrates such outrages has the official title of commissar, gestapo, sheriff, policeman, constable, game warden, or what-not, the violation of ones right of privacy is just as deplorable. Merely to say that what the officers did in this case, was wrong, is not enough—they will do it again and again if the courts continue to hold that the evidence they obtain by such unlawful means may be used in criminal prosecutions. The Legislature must therefore declare by statute that evidence obtained in violation of the constitutional provisions here involved shall be inadmissible in any judicial proceeding in order to protect the right of privacy guaranteed by our Constitution so long as this court persists in perpetuating the error it committed in its decision in the *Mayen* case.

The forefathers of this country and the framers of the Constitution of the United States were of the firm conviction that the maxim of Lord Coke was not only true, but that it would be true in the years to come, and that a provision to insure its protection should be placed in the Bill of Rights. Lord Coke said that "The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."

This great right is expressed in the Fourth Amendment to the Constitution of the United States, and it reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This exact provision is found in the Constitution of our State in Section 19, Article I.

The United States Supreme Court, speaking through many great judges and in a great number of cases, has staunchly re-

fused to allow this right to be violated. In the highest court of our country, the protection extends even farther than the literal words of the Amendment. No evidence obtained in violation thereof may be used against a defendant in the federal courts. This is the result I desire to achieve by the proposed legislation. Such a statute should provide: "*No evidence obtained in violation of Section 19, Article I of the Constitution or any law of the State of California shall ever be introduced or admitted or used for any purpose whatsoever in any Court of this State.*"

Mr. Justice Holmes, in his great dissent in *Olmstead v. United States*, 277 U.S. 438, 469, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944 had this to say: "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act. * * * we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

The problem to be solved is a serious one. Under the law of this state any police officer may break into any home, seize anything he may desire and this may be used against a defendant despite the fact that no warrant had been issued, and that the breaking and entering may have been done on mere suspicion or conjecture. The constitutional provision was adopted to prevent this very evil. Mr. Justice Douglas, in a recent decision handed down by the Su-

preme Court of the United States, *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 193, 93 L.Ed. 153, stated the proposition well when he said: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. *We cannot be true to that constitutional requirement* and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." The same statement is no less true when it is said of our Constitution. Power is a heady thing whether it is exercised by federal police or by state police, and history does show that the police, no matter whether of our government or of the federal government, when acting on their own cannot be trusted.

The contention is frequently made, in support of the law as it now stands, that the officers found what they expected to find and that therefore the evidence must be admissible. Mr. Justice Jackson in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 228, 92 L.Ed. 210 answers it in this way: "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when

it starts and does not change character from its success.

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

The right of the people to be secure in their persons, houses, papers and effects must be protected. In the understandable zeal of police officers to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement. This should also be true of our constitutional provision, but it has not been so construed to prevent evidence so obtained from being used against the accused person.

The Elder Pitt, in his speech on the Excise Tax, gave expression to what later became the Fourth Amendment. What he said then is just as important today. He said that "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the winds may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter. All his forces cannot cross the threshold of the ruined tenement." Yet the police and other so-called law enforcement officers in California may now ruthlessly force their way into the home of a private citizen, and *without a search warrant*, seize whatever they may find and use it as evidence in our courts notwithstanding they violated the constitutional right—the right of privacy—of the citizen in obtaining

it. Cases such as this make it crystal clear that a rigid application of the federal rule is necessary to prevent this abuse of police power. It has been truly said that: "Power is a bell which prevents those who start it ringing from hearing any other sound."

Every student of history recognizes that the abuse of official power has been the source of the major ills inflicted upon mankind since the existence of organized governments. This is true notwithstanding the effort of those who believe in a democratic form of government to establish a system of checks and balances so that boundless power is not reposed in any single official or branch of government. Hence the provision of both the Fourth Amendment to the Constitution of the United States and Section 19 of Article I of the Constitution of California, that before a search may be made or evidence seized, proof under oath must be submitted to a magistrate—a judicial official—that probable cause exists for such search or seizure, and a warrant issued by such magistrate "particularly describing the place to be searched and the person or thing to be seized." Those constitutional mandates were designed to place a curb or restriction upon the power of the law enforcing branch of the government, requiring it to obtain judicial sanction, in cases where a search is necessary to obtain such evidence. It is sheer nonsense to say that those who drafted those constitutional provisions ever had any other thought in mind than that evidence obtained in violation thereof would not be accepted by any court or accorded judicial sanction. As Mr. Justice Douglas so aptly stated in the McDonald case, *supra*, "*We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*"

I agree with Mr. Justice Douglas, and it must follow, that every law enforcing officer, every prosecuting attorney, every judge and justice of any court of this state who has taken a solemn oath to sup-

port the Constitution of the United States and the Constitution of the State of California, and gives his sanction to the use of evidence obtained in violation of the constitutional provisions here involved, makes of that oath, insofar as it applies to these constitutional provisions—which he has solemnly sworn to support—an empty hollow mockery.

I would grant the petition for hearing in this case, and reverse the judgment with direction to the trial court to dismiss the charge against the defendant.

SCHAUER, J., concurs.

SCHAUER, Justice.

I dissent from the order denying the petition for hearing. In my opinion a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse.

"To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extrajudicial confession which is used as evidence in the courtroom.

"A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.

"If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.

"The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his con-

fession is given in evidence." (*Lisenba v. People of State of California* (1941), 314 U.S. 219, 237, 62 S.Ct. 280, 86 L.Ed. 166)

In *People v. One 1941 Mercury Sedan* (1946), 74 Cal.App.2d 199, 213, 168 P.2d 443, where law enforcement officials assaulted and battered accused, compelling him to vomit an incriminatory substance, the court said that the privilege against self-incrimination "protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that when statements are extorted from an accused there is a strong likelihood that the extorted evidence would be unreliable. But the reason for the rule no longer exists when physical evidence is considered." This reasoning appears to ignore a problem more basic and more important in legal concept than the question of the actual guilt or innocence of the accused. We are not concerned here merely with a rule designed to exclude untrustworthy evidence; we are, or should be, as in the situations described in the above quotation from the *Lisenba* case, concerned with the fundamental concept of due process. The requirements of due process are just as applicable to the guilty as to the innocent.

The privilege against self-incrimination protects a guilty person from being required, by orderly process, to answer questions on the ground that such answers might furnish "a link in the chain of evidence needed in a prosecution." (*Blau v. United States* (1950), 340 U.S. 159, 71 S.Ct. 223.) The person who claims this privilege before a grand jury or a court has the opportunity to establish his right to remain silent by litigation. The defendant here had no such opportunity. Without a warrant the officers broke into his room; they assaulted and battered defendant and took him away by force; by further force he was compelled to vomit and thus to produce evidence against himself. Had

the evidence forced from defendant's lips consisted of an oral confession that he illegally possessed a drug, then, even though the sheriffs by physical violence had deprived him of his privilege against self-incrimination, he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. I find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse.

CARTER, J., concurs.



101 Cal.App.2d 618

DAVIS v. WOODCOCK.

Civ. 7779.

District Court of Appeal
Third District, California.

Jan. 8, 1951.

Corena L. Davis brought action against C. C. Woodcock for injuries sustained in automobile accident. A judgment for plaintiff was entered in the Superior Court, Humboldt County, Delos A. Mace, J., and the defendant appealed. The District Court of Appeal, Peek, J., held that where automobile occupant and automobile driver were employed by same employer, and driver was reimbursed by employer for his gas and oil upon his agreeing to transport occupant to work, occupant was a passenger and not a guest, within automobile guest statute, and could recover from driver for injuries sustained in automobile accident while on way to work upon showing that driver was guilty of simple negligence.

Judgment affirmed.

1. Automobiles ⇨181(2)

Where relationship between parties is one of business and transportation is supplied in pursuit thereof for their mutual benefit, and compensation has been given, occupant of automobile is a "passenger" and not a "guest", within automobile guest statute. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest" and "Passenger".

2. Automobiles ⇨181(2)

An automobile occupant may be a passenger and not a guest, within automobile guest statute, even though compensation given to driver has been supplied by a third person and not the occupant. Vehicle Code, § 403.

3. Automobiles ⇨181(2)

Where automobile occupant and automobile driver were employed by same employer, and driver was reimbursed by employer for his gas and oil upon his agreeing to transport occupant to work, occupant was a "passenger", and not a "guest", within automobile guest statute, and could recover from driver for injuries sustained in automobile accident while on way to work upon showing that driver was guilty of simple negligence. Vehicle Code, § 403.

4. Appeal and error ⇨1011(1)

Findings predicated upon substantial, although conflicting evidence, would not be disputed on appeal.

Falk & Falk, Eureka, for appellant.

Robt. G. Partridge and Wallace O'Connell, San Francisco, for respondent.

PEEK, Justice.

The defendant has appealed from a judgment in favor of the plaintiff in an action for personal injuries.

By her complaint plaintiff alleged that through the negligence of defendant, while riding with him as a passenger for consideration, she was caused to suffer certain personal injuries. The demurrer of defendant was overruled and he answered denying generally the allegations of said

complaint. At the conclusion of the hearing the court found that plaintiff was a passenger for consideration; that the purpose of the carriage of plaintiff by defendant was business and not social; that defendant was negligent in the operation of the care and that his negligence was the principal cause of plaintiff's injuries. From the findings the trial court concluded that plaintiff was entitled to damages in the sum of \$4480.13 and judgment was entered accordingly. Although the record shows that a motion for new trial was filed, the record contains no mention of the disposition thereof and we assume the same denied after sixty days in accordance with § 660 of the Code of Civil Procedure. Defendant now raises two contentions (1) that as a matter of law plaintiff must be held to be a guest under the provisions of § 403 of the Vehicle Code, and (2) that the evidence does not establish that defendant was negligent or that any negligence was the proximate cause of the accident. We are convinced that both of said contentions must be answered in the negative.

Section 403 reads as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

The evidence relative to the first contention of appellant shows without dispute that plaintiff and defendant were employed by the same concern, which was located in Arcata, a distance of approximately eight miles from her home in Eureka. At the time of the accident plaintiff was riding with defendant for the sole purpose of going to work in Arcata. The record further shows the admission by defendant that he agreed to the proposition of his employer that if he would take plaintiff from Eureka to Arcata and return the employer would pro-

vide defendant with gas and oil. Defendant further testified that he regularly carried other employees for a cash compensation. Furthermore defendant admitted in a written statement to his insurance agent that he was transporting plaintiff under such an arrangement. Plaintiff testified to a conversation with defendant wherein she asked him if she should pay for her transportation and he said "no" that Mr. Giffin (their employer) was reimbursing him. She also testified that defendant told her he was under obligation to transport her even on days when he was not working. She additionally testified that her remuneration was a specified salary plus transportation and that she could not have accepted the job without the provision for transportation. The evidence further shows that the trip was for the mutual benefit of the parties.

[1-3] It is the well established rule that "where the relationship between the parties is one of business and the transportation is supplied in the pursuit thereof for their mutual benefit, compensation has been given and the plaintiff is a passenger and not a guest." *McCann v. Hoffman*, 9 Cal.2d 279-286, 70 P.2d 909, 913. Also it is the rule that the compensation referred to in § 403 of the Vehicle Code need not flow from the passenger but may be supplied by a third person. *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 66 P.2d 651. It necessarily follows, under the facts as shown by the record, the finding of the trial court that plaintiff was a passenger for consideration and not a guest must be sustained.

[4] If then plaintiff was a passenger it necessarily follows that defendant owed her the duty of ordinary care. This conclusion poses defendant's second contention that the evidence does not establish that he was negligent or if so that such negligence was the proximate cause of the accident. No extended summary of the testimony appears to be necessary. Suffice it to say that the evidence as shown by the record in regard to this contention is typical of such cases—conflicting in every material aspect. Under such circumstances citation of authority would seem unnecessary to support the oft repeated statement of the rule that

findings predicated upon substantial, although conflicting evidence, will not be disputed on appeal.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



101 Cal.App.2d 438

ROY v. MISSION TAXI CO., Inc., et al.
(two cases).

Civ. 14034, 14207.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1950.

Hearing Denied Feb. 19, 1951.

Action by Elsie I. Roy against the Mission Taxi Company, Inc. and the Pacific Gas and Electric Company, Inc., and others, for injuries suffered by plaintiff in a collision between a taxi in which plaintiff was a passenger, and a truck. The Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., entered judgment against defendants in total amount of \$25,000, and each defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained the finding that both defendants were negligent.

Judgment affirmed.

Prior opinion, 219 P.2d 840.

1. Automobiles ⇨245(14, 61)
Carriers ⇨320(21, 30)

In action for injuries sustained by taxicab passenger in intersectional collision when taxicab struck truck which was turning left into arterial street, evidence of negligence of cab driver and truck driver and whether the negligence, if any, of either of them, was sole proximate cause of collision, was for jury.

2. Automobiles ⇨245(1)
Carriers ⇨320(21)
Evidence ⇨588

In action for injuries sustained by taxicab passenger in intersectional collision

when taxicab struck truck which was turning left into arterial street, it was function of jury to determine credibility of witnesses and to weigh the physical evidence at the place of collision, the force of impact, and other attendant circumstances.

3. Automobiles ⇨244(11, 36)
Carriers ⇨318(7)

In action for injuries sustained by taxicab passenger in intersectional collision between taxicab and truck which was turning left into arterial street, evidence sustained finding that drivers of both vehicles were negligent, and that their negligence concurred in proximately causing injury to passenger.

4. Trial ⇨234(4), 240

In action for injury sustained by taxicab passenger in intersectional collision between taxicab and truck which was turning left into arterial street, where instruction on imminent peril requested by truck driver's employer was clearly calculated to inform jury that imminent peril was created by taxicab driver, refusal to give instruction as argumentative and a formula instruction, was proper.

5. Trial ⇨240

It is not the province of the court to make an argument to the jury, and though the giving of an instruction argumentative in form may not always be cause for reversal, the court is not bound to give such an instruction even if the argument be a legitimate one, and a refusal to give the instruction is not error.

6. Trial ⇨234(4)

Formula instructions should not be given.

7. Trial ⇨228(3)

A jury should be instructed in concise and understandable language as to principles of law applicable under evidence to case on trial.

8. Trial ⇨261

In action for injuries sustained by taxicab passenger in intersectional collision between taxicab and truck which was turning left into arterial street, where instruction on imminent peril requested by employer of truck driver was properly refused

as argumentative and as a formula instruction, failure of trial court to modify or rephrase proposed instruction and give it, was not reversible error.

9. Trial ⇨261

Where instructions are offered which cannot properly be given without modification, court may refuse to give them.

10. Automobiles ⇨246(9)

Carriers ⇨321(12)

In action for injuries sustained by taxicab passenger in intersectional collision between taxicab and truck which was turning left into arterial street, giving of instruction on right of way of vehicles entering intersection at approximately same time was proper. Vehicle Code, §§ 550, 552, 577.

Hoge, Pelton & Gunther, San Francisco, Leo V. Killion, Reginald M. Watt, San Francisco, of counsel, for appellant Mission Taxi Co.

Robert H. Gerdes, John J. Briare, and Frederick T. Searls, all of San Francisco, Campbell, Hayes & Custer, San Jose, Edward J. Niland, Santa Clara, of counsel, for appellant Pacific Gas & Electric Co.

James F. Boccardo, San Jose, Jean M. Blum, San Jose, of counsel, for respondent.

FRED B. WOOD, Justice.

Defendants Mission Taxi Company, Inc. (hereinafter referred to as the Taxi Company), and Pacific Gas and Electric Company (hereinafter referred to as the P. G. & E.) appeal from a judgment entered upon a verdict against them for damages for personal injuries sustained by plaintiff while riding as a pay passenger in a cab of the Taxi Company at the time of a collision between it and a panel truck of the P. G. & E.

The Taxi Company's appeal was taken upon the entire record, including a reporter's transcript. That of the P. G. & E. was taken upon a settled statement. Each defendant briefed and at the former hearing orally argued its appeal upon its own record. At that hearing this court indicated that if it should appear necessary to

augment the P. G. & E. record, the court would set the submission aside and give counsel the opportunity to object to any augmentation or to argue the case in view of the augmentation. Subsequently, in writing our former opinion, we overlooked this point and decided both appeals upon the basis of the reporter's transcript. Upon P. G. & E. bringing this to our attention, we granted a rehearing of both appeals, ordered the record in the P. G. & E. appeal augmented by the reporter's transcript, already filed in the other appeal, gave the parties opportunity to present supplemental briefs and oral argument and the P. G. & E. an opportunity to object to such augmentation. Subsequently, further briefs were filed and oral argument had, and both appeals submitted, upon the basis of the entire record.

The Taxi Company claims: (1) That the evidence is insufficient to support the verdict against the Taxi Company, in that it shows that the negligence of the P. G. & E. was the sole proximate cause of the accident, and (2) that the giving of an instruction in the language of section 550 of the Vehicle Code was prejudicial error in a case which involves a collision at a through highway intersection.

The P. G. & E. claims: (1) That the evidence is not sufficient to show (a) negligence on the part of its employee or (b) any causal connection between assumed negligence on his part and the accident in question, and (2) that the refusal of its proffered instruction on imminent peril was prejudicial error.

We will consider first the sufficiency of the evidence to support the verdict, as to each appellant.

The collision occurred about 4:30 p. m. on March 26, 1947, at the intersection of Santa Clara and Montgomery Streets in San Jose. Santa Clara runs east and west; Montgomery, north and south. Santa Clara is a through street with arterial stop signs on Montgomery at the intersection, was signposted for a prima facie speed limit of 25 miles per hour, and had a wide white line along its center and a narrower white line (hereinafter mentioned as the single

white line) between the center line and the south curb, 10 feet from the center and 31 feet from the curb.

The P. G. & E. panel truck was going north along Montgomery, to turn left on Santa Clara. The driver testified that he stopped for two minutes with the front end of the truck just north of the south curb line of Santa Clara, the better to observe the traffic (cars were parked along the south curb of Santa Clara); that one car was approaching from the west on Santa Clara and he waited for it to clear and then started out in low gear, giving a left turn signal, holding his hand out while traveling a distance of 12 to 15 feet; that he was getting up to the single white line, was traveling 4 to 6 miles an hour and could stop in 2 to 4 feet, when he first saw the cab, then about 200 feet to the west, traveling toward him, in the lane just south of the single white line, at 45 to 50 miles per hour; he then glanced to his right, just a second, to see if he had clearance on that side, during which interval the cab traveled 50 or 60 feet, without diminution of speed until the cab driver put his brakes on when about 75 or 80 feet away; that when he saw the cab he speeded up, straight ahead, to move out of the way, picked up speed to 8 or 10 miles an hour; that a car approaching from the west, between the cab and the south curb of Santa Clara, prevented his stopping and waiting for the cab; if he stopped he would be in the path of that car; that when he saw this other car he had enough clearance to get out of its way at the speed it was going; that he saw this other car before he saw the cab, did not then see the cab because of this other car. Upon the taking of his deposition he said he was passing the single white line when he first saw the cab, which would place him directly in the path of the cab at that moment. He testified that at the time of the collision he was starting to make his turn, the truck was at an angle, its front part had already gotten west of the center line of Montgomery in making his turn, and the rear part was 2 or 3 feet south of the center line of Santa Clara. Then, later, he said the truck was not at an angle over the

center of Montgomery at the time he was struck; it was still going straight, that he was just starting to make a turn, was not at an angle at the time of the impact, and indicated on a map, Exhibit M, that his truck was then going straight north, just east of the center line of Montgomery, extending across the inner lane of Santa Clara, its front end just north of the center line of that street. According to a police officer, on the scene a few minutes after the collision, the truck driver then said that he came to a complete stop at the sign, did not see the cab until he had pulled out a little bit, there was a car coming in the extreme outside lane and as he cleared it he saw the cab coming; the cab was then 70 or 75 feet away and the truck was going 5 to 10 miles an hour; and that he tried to increase his speed but could not very well, the truck had a governor on it. The inconsistencies in the truck driver's account of the transaction take on added significance when we consider the fact that during the testimony of the police officer (who made observations and took measurements shortly after the collision), the parties stipulated that the collision occurred at a break in the cab's tire marks on the pavement, and that placed the collision at a point about 4 or 5 feet south of the single white line of Santa Clara and 1 foot 10 inches west of the center line of Montgomery, giving rise to an inference that the driver of the truck started making his left turn before reaching the white line and while in the path of the cab, appreciably more than 10 feet before reaching the center of Santa Clara.

The driver of the Taxi Company's cab testified he was driving easterly on Santa Clara in the lane just south of the single white line, approaching Montgomery Street; that he was about 100 to 150 feet west of Montgomery when he first saw the truck, saw the top of the truck which was cruising across the imaginary pedestrian lane (which crosses Montgomery just south of the south curb line, extended, of Santa Clara); the truck was in motion, traveling 1 to 2 miles an hour (this witness never saw the truck stop at any time, could not say that it had stopped but he did

not think it had; according to the police officer, he said shortly after the collision that the truck had stopped); the cab was traveling 25 to 30 miles an hour at the time and slowed down to 20 as it approached the intersection; when the truck had gotten to about halfway between the south curb line and the single white line of Santa Clara it came almost to a stop, not to a dead stop but the cab driver thought it was going to stop; until then he intended to let the truck pass if it came out, and he was going at 25 to 30 miles an hour, but when he thought the truck was going to stop he stepped on it, figuring he could go through; then the truck driver stepped on it, increased his speed from that point to the point of collision to 8 or 10 miles an hour, moved right out in front of the cab and turned left right into the cab; when the witness saw that, he made a determined effort to stop, his brakes took hold; he was about 30 feet from the intersection (center of the intersection, apparently) when he applied his brakes and went 28 feet after he applied them; he saw no signal of the truck driver's intention to turn left; he continuously watched the truck until the collision occurred. He said that between the point he was at when he first saw the truck, and the street intersection, he could stop the cab; that during the period he was watching the truck there was a car traveling east on Santa Clara, in the lane next to his right, about 30 feet behind him, going at the same speed he was going; that he knew Santa Clara was signposted for a speed limit of 25 miles per hour. According to the police officer, the cab driver, a few minutes after the collision, estimated he was four car lengths away and going 31 miles an hour when he first saw the truck (a statement which upon the trial the cab driver did not recall making; could not say he did not make it; said he could have made it, but did not recall it), and said the truck driver stopped at the stopsign and then shot across in front of the cab. Upon the taking of his deposition, he said he was about 25 feet from the intersection, from the pedestrian lane closest to you as you approach, when he first saw the truck (which would put the cab at that time about 55 feet from the

point of the collision). The truck driver testified that right after the collision he asked the cab driver why he did not stop and he said he slammed on his brakes but they did not seem to hold, a statement which the driver of the cab denied ever having made.

A bystander testified that he saw the truck stopped in Montgomery at about the south line of Santa Clara, did not see it in motion; also, that he heard the cab's brakes squealing, looked up and observed the cab in the lane just south of the single white line on Santa Clara, about 30 feet west of the west line of Montgomery. Asked as to the speed of the cab when he first saw it, he said he did not observe its speed in that position; then, that judging its speed while skidding, knowing the distance skidded and the impact, he did not know if he could answer; finally, that at the very moment he saw it he judged the cab was going at least 50 miles an hour. Counsel for the Taxi Company moved that this testimony as to speed go out because based on conclusions. The court ruled that counsel might argue that point to the jury.

The left front of the cab struck the left rear portion of the truck, damaging the left rear side of the truck and the left front of the cab, turning the truck, which carried a load of one-half to three-quarters of a ton, almost completely around to face in a southwesterly direction. The front of the cab when it stopped was 8 feet 9 inches, and the truck 9 feet 10 inches, from the point of collision. The skid marks of the cab (which apparently had four-wheel brakes) measured 48 feet 3 inches. The force applied through the brakes of the cab and by the impact of the cars hurled the plaintiff forward from the back seat, over the front seat, and through the windshield, to her serious injury.

[1,2] From this evidence an appellate court cannot say, as a matter of law, that the cab driver was not negligent or that the truck driver was not negligent, or that the negligence, if any, of either of them was the sole proximate cause of the collision. There are significant inconsistencies in the testimony of each of these two wit-

nesses and conflicts between their respective accounts of what happened, which it was the function of the triers of fact to appraise and resolve. In that process, it was their function to determine the credibility of these and other witnesses and weigh in the physical evidence of the place of collision, the force of the impact, and other attendant circumstances. If the jury found, as it might, that the truck was moving into the first lane of Santa Clara Street when the cab was but 70, 75, 100, or even 150 feet from the intersection (whether the cab was traveling 25, 30, 45, or 50 miles an hour), it might well conclude that the driver of the truck did not exercise due care in entering the intersection, knowing it was a through highway, knowing he had 40 feet to go before completing his left turn, knowing his view was partially obscured by parked cars, and knowing the truck had a slow pickup. The jury might then conclude that he failed to yield the right of way to the cab as a vehicle which was "approaching so closely on the through highway as to constitute an immediate hazard", in violation of a duty imposed by section 552 of the Vehicle Code, and that such failure to yield was a proximate, though perhaps not the sole, cause of the collision. Also, if the jury found, as they might, that he came to almost a dead stop as he reached the lane the cab was in, then went ahead and into his left turn, crossing the center line of Montgomery without signaling or without maintaining the signal until the turn (he said he held his hand out for 12 or 15 feet into Santa Clara), in violation of duties imposed by section 544 and paragraph (2) of subdivision (a) of section 525 of the Vehicle Code, they might conclude these acts also were contributing causes of the collision.

As to the driver of the cab, if the jury found, as they might, that he failed to exercise due care, by traveling at such an excessive rate of speed that he could not control his car in meeting a situation reasonably to be anticipated or (if he could stop the cab, as he said he could) by not yielding to the truck, barging on through regardless of consequences, they then might conclude that his conduct was a proximate cause of the collision. The fact that

the driver of the truck may not have entered the intersection in such a manner as to give him the right of way under section 552 of the Vehicle Code, would not of itself absolve the cab driver from exercising that degree of care which the law imposes upon every person when driving a vehicle upon a public highway.

[3] It is apparent, therefore, that there is substantial evidence which supports the conclusion reached by the jury and that an appellate court cannot disturb the verdict. See *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183; *Mason v. San Diego Elec. Ry. Co.*, 57 Cal.App.2d 17, 133 P.2d 841; *Breland v. Traylor Engineering & Mfg. Co.*, 52 Cal.App.2d 415, 419-420, 126 P.2d 455; and *Almanerz v. San Diego Electric Ry. Co.*, 15 Cal.App.2d 423, 59 P.2d 513.

As to the remaining points presented by these appeals, we adopt that portion of our former opinion which dealt with them, an opinion written by Justice Schottky, sitting as Justice pro tempore. It follows, without substantial change.

Appellant P. G. & E. contends that the court committed reversible error in refusing to give instruction No. 67 offered by it, which reads as follows: "You are instructed that a person, who in driving on a roadway with ordinary care, suddenly and unexpectedly is confronted with imminent peril brought about by the negligence of another, is not bound to use that degree of care which a person of ordinary prudence in calmer moments would use; and under such circumstances if Mr. Liles, the driver of the P. G. & E. truck, attempted to speed up and get out of the way of the Mission Cab, or took the wrong course solely by reason of the imminent peril created by the driver of the Mission Cab, the P. G. & E. could not be held responsible in so doing, if a person of ordinary prudence, under the pressure of the same emergency, might have done the same thing. In other words, the law in this respect is simply plain common sense. You must judge the driver of the P. G. & E. truck in the light of what would be reasonable and proper under the particular circumstances of this case. Any person can determine how an accident

might have been avoided after it has happened. The law does not require the driver of the P. G. & E. truck to anticipate that there is going to be an accident or to act with the utmost wisdom upon being confronted with an imminent peril. He is charged with his foresight rather than his hindsight and he cannot be held responsible for failure to take precautions against the unexpected negligence of Butler, the driver of the Mission Cab, nor is he required to act in an emergency, or in the excitement of an imminent peril created by the driver of the cab, with the same judgment that would be expected of him in the absence of such peril so created."

[4-7] No other instruction was given on the subject and we agree with the appellant that a party is entitled to proper instructions as to the law applicable to every material issue of fact when there is some evidence to support his theory of the case. Under the evidence in the case, appellant P. G. & E. was entitled to a proper instruction on the subject of imminent peril, and had a proper instruction been offered we would be inclined to hold that it would be error to refuse to give it. However, the offered instruction is objectionable for many reasons and was properly refused by the court. In at least two places it is clearly calculated to inform the jury that imminent peril was created by the driver of the taxicab and thus invades the province of the jury. It is a type of argumentative and formula instruction which often has been criticized by our appellate courts. A jury should be instructed in concise and understandable language as to the principles of law applicable under the evidence to the case on trial. Argumentative and formula instructions are objectionable because they emphasize certain portions of the testimony, and coming from the court may serve to confuse and mislead the jury. As was said in *Estate of Clark*, 180 Cal. 395, at pages 398-399, 181 P. 639, 641: "But it is not the province of the court to make an argument to the jury, and though the giving of an instruction argumentative in form may not always be cause for reversal, it is also true that the court is not bound to give such an instruction even if the argument be

a legitimate one, and the refusal thereof is not error. [Citing cases.]" And as this court said in *Taha v. Finegold*, 81 Cal.App. 2d 536, at page 543, 184 P.2d 533, 536: "Formula instructions should not be given. As said in *Tice v. Pacific Elec. Ry. Co.*, 36 Cal. App.2d 66, 71, 96 P.2d 1022, 1024, 97 P.2d 844, formula instructions 'are not calculated best to serve most successfully administration of justice. Their final disappearance will improve the conduct of court trials.' While the giving of formula instruction is not in itself prejudicial error, the giving of them here added to the other circumstances of the case, combined to deny the plaintiff a fair trial." The prevalent practice of seeking to argue a case in instructions should be discouraged and we have no doubt that if the appellant had offered an instruction giving the law as to imminent peril, as approved by the decisions of our courts, it would have been given by the trial court.

[8,9] Nor was it reversible error for the trial court to fail to modify or reframe the proposed instruction, for the reason as stated by our Supreme Court in *Nelson v. Southern Pac. Co.*, 8 Cal.2d 648, at page 653, 67 P.2d 682, 685: "It is next complained that the court did not instruct the jury at all upon the duty of the defendant company to give warning as the train approached the crossing. It is conceded that the instruction offered by the plaintiff was incorrect, but it is insisted that this did not relieve the court of the duty to give a proper instruction upon a relevant issue thus called to its attention. Undoubtedly it would have been proper for the court to instruct the jury on the duty of the defendant to give warning as it approached the intersection (*Bruce v. Western Pipe & Steel Co.*, 177 Cal. 25, 169 P. 660; *People v. Frey*, 165 Cal. 140, 131 P. 127), but it has been frequently held that where instructions are offered which cannot properly be given without modification the court may refuse to give them (*Wiley v. Young*, 178 Cal. 681, 174 P. 316; *Dover v. Archambeault*, 57 Cal.App. 659, 664, 208 P. 178, and cases cited)."

[10] Appellant Mission Taxi Company contends that the court erred in giving in-

struction No. 58 proposed by appellant P. G. & E. That instruction reads as follows: "You are instructed that Section 550 of the Vehicle Code provides as follows: '550. Vehicle Approaching or Entering Intersection. (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway. (b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.'" Instructions were given as to what constituted an "intersection," what was a "right of way" and that vehicles must stop at through highways, Veh. Code, § 577, and in addition section 552 of the Vehicle Code was given as an instruction, as follows: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." Since it is an undisputed fact that the accident here involved occurred at an intersection with a through highway, the Taxi Company claims that the giving of the instruction on section 550 of the Vehicle Code was prejudicial error and this in spite of the fact that the court also gave the law under section 552, appellant citing and quoting from *Elmore v. County of Lassen*, 10 Cal.App.2d 229, 232-233, 51 P.2d 481. That case, however, was overruled on the point for which it is here cited, by *Pattisson v. Cavanagh*, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945, decided by this court in 1936. The Supreme Court in denying a hearing in the latter case said, "The application is based in part on a conflict between this decision and the decision rendered by the Second Division of the First District Court of Appeal in the case of *Elmore v. County of Lassen*, 10 Cal.App.2d

229, 51 P.2d 481. In so far as that case is inconsistent with the decision in the above-entitled case, we disapprove of the decision in the case of *Elmore v. County of Lassen*, supra." 18 Cal.App.2d at page 130, 64 P.2d at page 945.

The facts of the *Pattisson* case were similar to those in this case, except that the car proceeding down the arterial highway and driven by the plaintiff ran off the left-hand side of the road to plaintiff's damage when the defendant came in from the right. The same two instructions were given there as here, and the plaintiff argued on appeal from a decision for the defendant that they were conflicting and that the one dealing with the right of way at intersections in general took from the jury the question as to whether the presence of plaintiff's car constituted an immediate hazard. The court, in the *Pattisson* case, saying that the question of the negligence of each party was one for the jury, stated: "We are of the opinion that when all instructions upon the subject of right of way are read and considered together it cannot be said that they are conflicting or that the jury was misled thereby. The plain import thereof was that ordinarily the driver of an automobile entering an intersection first is entitled to the right of way thereover, but that before entering an arterial intersection he must stop and yield the right of way to any approaching vehicle thereon which constitutes an immediate hazard." 18 Cal.App.2d at page 127, 63 P.2d at page 870.

Appellant Taxi Company has cited numerous cases from this and other jurisdictions which appear to support its contention that it was error to give said instruction No. 58, but the latest expression of our Supreme Court upon the subject was its above-quoted language in denying a hearing in *Pattisson v. Cavanagh*, supra, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945. Therefore, as an intermediate appellate court we feel that we are bound by that decision and must hold that the giving of said instruction was not error.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

101 Cal.App.2d 544

REIF v. KARP et al.

Civ. 17551.

District Court of Appeal, Second District,
Division 3, California.

Dec. 29, 1950.

Fred Reif, doing business under the fictitious name and style of Emmarosa Studios, brought action against Paul Karp, also known as Pasach Karp, individually, and Paul Karp, doing business under the firm name and style of Karp's Mens Wear and Tie Kraft, Ltd., a corporation, and others to recover for money allegedly agreed to be paid for services rendered, and the named defendant filed counterclaims alleging that plaintiff and defendant contracted to buy silk parachutes from government to be used in manufacture of neckties, and that parachutes were to be equally divided between parties, but that plaintiff retained more than his share of parachutes and owed defendant certain sum for excess number of parachutes retained. The Superior Court of Los Angeles County, J. A. Smith, Judge assigned, rendered judgment for plaintiff, and the named defendant appealed. The District Court of Appeal, Wood, J., held that evidence sustained finding that plaintiff did not retain more parachutes than he was entitled to.

Judgment affirmed.

Tenancy in common $\Rightarrow$ 38(8)

In action for money allegedly agreed to be paid for services rendered, wherein defendant filed counterclaims alleging that plaintiff and defendant contracted to buy silk parachutes from government to be used in manufacture of neckties, and that parachutes were to be equally divided between parties, but that plaintiff retained more than his share of parachutes and owed defendant certain sum for excess number of parachutes retained, evidence sustained finding that plaintiff did not retain more parachutes than he was entitled to retain.

Henry O. Wackerbarth, Los Angeles, for appellant.

Sylvan Y. Allen, Los Angeles, for respondent.

PARKER WOOD, Justice.

In the complaint there are ten causes of action for money allegedly agreed to be paid for services rendered. In his answer defendant set forth three alleged counterclaims. It appears from respondent's (plaintiff's) brief that the parties stipulated that the third alleged counterclaim should be deemed a cross-complaint. The court found, among other things, that plaintiff had rendered services for defendant of the values alleged in the various causes of action in the complaint; and that defendant was entitled to a set-off as alleged in the counterclaims. Judgment was for plaintiff for \$722. Defendant appeals from the judgment.

Appellant's contentions relate only to the issues presented by the cross-complaint. In the cross-complaint it was alleged as follows: That each of the parties is engaged in the business of manufacturing and selling handpainted silk neckties; on March 5, 1946, the parties entered into an agreement to purchase from the United States certain commodities consisting of used silk parachutes packed in wooden crates, upon a bid theretofore made by plaintiff (cross-defendant); plaintiff would have said parachutes delivered in said crates to such warehouse as may be mutually agreed upon by the parties; the parties would meet at said warehouse at a time mutually agreed upon and open the crates and divide equally said parachutes between them; the \$3000 which plaintiff had theretofore deposited with the government in connection with the bid should apply on the purchase price and defendant would advance the balance of the purchase price; each of the parties would pay one-half of the expense incident to said purchase price and also one-half of the expense of hauling the crates to said warehouse; thereafter the parties purchased from the United States 8458 pounds of silk parachutes packed in wooden crates; in order to pay the balance of the purchase price, defendant advanced to plaintiff \$11,632.34 and plaintiff thereupon paid to the United States the purchase price of all of said parachutes in the sum of \$14,632.34; plain

tiff failed to have said parachutes delivered to such warehouse as the parties may have mutually agreed upon, but caused the parachutes, contained in approximate 40 crates, to be delivered to his own place of business; plaintiff opened certain of said crates immediately upon their arrival at his place of business and in the absence of, and without the knowledge of, defendant, plaintiff removed the parachutes from the crates he had opened and caused certain of said parachutes to be removed from plaintiff's place of business, and plaintiff thereupon set aside the remaining crates for defendant; plaintiff failed to divide the parachutes equally between the parties, but on the contrary plaintiff set aside for delivery to defendant 20 crates containing 2539 pounds of the parachutes and retaining for his own use 5919 pounds of said parachutes; on March 11, 1946, defendant caused the 20 crates set aside for him by the plaintiff to be delivered to his place of business, believing that they contained one-half of the silk parachutes; on March 14, 1946, the plaintiff remitted to defendant the sum of \$4561.34 out of the sum defendant had advanced to plaintiff on the purchase price of the parachutes; the 2539 pounds of silk parachutes delivered to defendant are of the agreed value of \$4392.47, and the expenses incident to the purchase of the parachutes chargeable to plaintiff are \$42.88; the defendant paid plaintiff \$2,635.75 on the purchase price of one-half of said parachutes and expenses in excess of the amount due plaintiff therefor; and the defendant is indebted to plaintiff in the sum of \$570.67, leaving a net amount due to defendant from plaintiff in the sum of \$2065.08.

Plaintiff and defendant had made separate bids on the parachutes. On March 5, 1946, they entered into a written agreement as follows:

"March 5, 1946.

Mr. Paul Karp and Tycraft.

On Bid B-32-46 Silk scraps only in San Diego was made by bid by Paul Karp, Emmarosa Studio and later on by Tycraft. On my request no award was given until now. To speed up delivery of merchandise we all agree to the following:

Regardless of who of us will get the award of this merchandise we will equally divide in two parts and notify the Commanding Officer of the U. S. Air Station of our decision personally. If none of us will get the award, and a resale authorized, then in this case the above called person will make a unit bid. That means that none of us will be entitled directly or indirectly to contact any one else to make a bid for him, and part with him or buy the merchandise from anybody who will get it but us.

Each of us who will do anything against this agreement will pay to the other party a contribution of \$5000.

It is further agreed that Paul Karp or Tycraft is to pay the difference between the deposit of \$3000 and the total amount of the bid.

Signed Maurice Rosenberg,
with Power of Attorney for Paul Karp
whose signature will be substituted.
Fred Reif

Emmarosa Studio."

Plaintiff's bid was accepted, and the purchase price was paid in the manner alleged in the cross-complaint—plaintiff and defendant each paid one-half of the purchase price and one-half of the incidental expenses.

The trial court found that it was not true that plaintiff agreed to have the parachutes delivered to a warehouse to be mutually agreed upon; that it was not true that plaintiff failed to carry out certain terms of the agreement between the parties; that it was not true that plaintiff retained for his own use and benefit 5919 pounds of parachute material; and that it was not true that the defendant paid plaintiff the sum of \$2,635.75 in excess of the amount due plaintiff on account of the purchase price of one-half of the parachutes.

Appellant (defendant) contends, in effect, that the findings are not supported by the evidence. He argues that plaintiff received the major portion of the valuable parachutes and a minor portion of the valueless cords or shrouds. In support of that argument, he refers to his testimony as follows:

that he (defendant) received a total of 205 parachutes, and the plaintiff had sold 400 or 500 parachutes; that the total weight of the merchandise received by defendant was 4062½ pounds, and he should have received 4205 pounds; that only 2779 pounds of the merchandise received by him were silk parachutes and the remainder of the merchandise was cords and flares; that on March 13, 1946, he received a call from plaintiff, regarding the arrival of the parachutes, and he picked the parachutes up that same day; that when he arrived at plaintiff's shop on that day he asked plaintiff why he had the parachutes delivered to plaintiff's place instead of having them delivered to the warehouse; that plaintiff replied, "They delivered it; that's all there is to it"; he (defendant) observed that about five of the boxes were partially opened, and he said, "These boxes seem to be open"; plaintiff replied, "I didn't open them. If you want them you can take them; if you don't want them you don't have to take them. That's the way they came from the warehouse"; then the boxes, which plaintiff had set aside for defendant, were taken to defendant's home and the small boxes were piled on top of the big boxes; he opened the top boxes first and used the silk in his business; about one month later he opened the five big boxes which contained cords and rayon flares.

Plaintiff testified (regarding defendant's assertion that plaintiff had sold 400 or 500 parachutes) that he had made purchases of parachutes other than the purchase here involved, and that he had purchased thousands of parachutes. He also testified that when the boxes involved herein arrived, he separated them by putting one "on the right side" and then one "on the left side" according to the net weight shown on the outside of the box; the boxes were in his back yard which is an open space; the boxes were not on his premises overnight; he did not remove any material of any kind from the boxes which were subsequently received by defendant; and he notified the defendant by telephone to come and get his boxes.

Plaintiff's son testified that the boxes of parachutes were delivered by Pacific

Freight Lines in the morning of March 12, 1946; the truck came to the back of the store, and he and "some fellows" took the boxes off the truck and put them in the yard; each box was marked with stencil lettering indicating net weight, gross weight and weight of the box; two of the men had cardboards on which they kept a tally of what we had; the net weight of a box was called off and the box was put on one side of the yard, and then the net weight of the next box taken off the truck was called and that box was put in another pile in order to make the weight division as even as possible; they kept records of the weight as they went along; no one opened and removed anything from the 20 boxes which defendant received—"those 20 boxes were not touched."

Whether or not there was an equal division of the parachutes was a question of fact for the determination of the trial court. The evidence was legally sufficient to support the findings.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



101 Cal.App.2d 375

ODDO et al. v. HEDDE et al.

Civ. No. 17780.

District Court of Appeal, Second District,
Division 2, California.

Dec. 22, 1950.

As Modified Jan. 4, 1951.

Hearing Denied Feb. 19, 1951.

Nicholas V. Oddo and Katherine E. Oddo, his wife, sued H. W. Hedde, Berah A. Hedde, his wife, and others for declaratory relief and for cancellation of two notes and two trust deeds securing the notes, which plaintiffs had executed in partial fulfillment of a contract they had executed with named defendants. A judgment for plaintiffs was entered by the Superior Court, Los Angeles County, Percy Hight, Judge of the Municipal Court of the City of Long Beach, County of Los Angeles, presiding as judge of the Su-

perior Court under designation of the Chief Justice as chairman of the judicial council, and the named defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence that contractor when he constructed building held a license to do general contracting business under statute and had no actual knowledge of registrar's rule requiring a supplemental classification established that contractor was acting in substantial compliance with the law, so that contractor would not be denied recovery of contract price for building.

Judgment reversed with directions.

1. Licenses ⇨39.44

Evidence that contractor when he constructed building held a license to do general contracting business under statute and had no actual knowledge of registrar's rule requiring a supplemental classification established that contractor was acting in substantial compliance with the law, so that contractor would not be denied recovery of contract price for building. Business and Professions Code, §§ 7028, 7030, 7031, 7055-7060.

2. Licenses ⇨39.43.

Statute relating to licensing of contractors insofar as it permits registrar to adopt rules to effect the classification of contractors and makes contractors subject to "disciplinary action" for ignoring a classification could not be construed as authorizing divestment of a contractor from his total profits and his total outlay in material and labor under contract for construction of building because of failure to comply with registrar's rule. Business and Professions Code, §§ 7030, 7059.

See publication Words and Phrases, for other judicial constructions and definitions of "Disciplinary Action".

3. Statutes ⇨240, 241(1)

Penal statutes that encroach upon private rights of citizens must be strictly construed, and statutes which provide for a forfeiture must be strictly construed.

4. Licenses ⇨39.43

A judgment refusing contractor recovery of contract price for building on theory that contractor was not licensed as required by statute would be denied as inequitable, where contractor substantially complied

with all the statutory law enacted for his governance and only failed to secure a supplemental classification as required by registrar's rule because of ignorance thereof. Business and Professions Code, §§ 7028, 7030, 7031, 7055-7059.

5. Administrative law and procedure ⇨800 Statutes ⇨219

The contemporaneous construction of a statute by the administrative agencies must be given effect in determining meaning of statute and legislative intent.

6. Administrative law and procedure ⇨386, 390

The rule-making power of an administrative officer or board arises only from statute that authorizes it, and a rule which conflicts with it is void.

7. Licenses ⇨39.44

Evidence failed to establish that principal contracting business of one holding license as a general engineering contractor was such as to violate rule prohibiting registrar from extending the "field and scope" of operations of a licensed contractor to those areas in which he was not classified. Business and Professions Code, §§ 7056, 7059.

8. Licenses ⇨21

If rule adopted pursuant to Business and Professions Code prohibiting registrar from extending the "field and scope" of operations of a licensed contractor to those areas in which he was not classified should be interpreted to mean that a general engineering contractor could no longer engage in any kind of construction business outside of "fixed works" without an opportunity to qualify, the rule would be void as being in excess of scope of statute. Business and Professions Code, §§ 7056, 7059

Kenneth Sperry, Long Beach, for appellants.

Roland G. Swaffield, Long Beach, for respondents.

MOORE, Presiding Justice.

Respondents sued for declaratory relief. Also they demanded cancellation of two

notes and two trust deeds securing same, which they had executed in partial fulfillment of a contract they had executed with appellants. The notes were given as payment for labor and materials used in the construction of a building to be used by Dr. Oddo as a clinic. The basis for such demand was that at the time of executing the four instruments, appellants had no building contractor's license. Judgment was entered as demanded, except that in addition to the cancellation of the second trust deed and note for \$6,530 respondents were awarded judgment against appellants for the sum of \$11,220 as the amount which appellants had received for the first trust deed from the defendant bank which had purchased the paper in due course. Other terms of the judgment left respondents with the title of their property clear and with the completed building clear of debt. A reversal is demanded on the grounds that (1) the findings are without substantial evidentiary support; (2) errors in rulings on evidence; and (3) error in entering the money judgment.

Respondent Nicholas Oddo is a physician. He engaged Mr. Hedde to erect a building in Long Beach. On November 6, 1947, they executed a written agreement to effectuate that purpose, obligating Hedde to furnish all materials and labor. It was signed by only the doctor and the contractor. At the same time the physician executed one note for \$17,750 and a trust deed securing same in favor of Hedde in which he was joined by Mrs. Oddo. Such note was for the full amount of the contract price and the trust deed conveyed the land on which the clinic was afterwards constructed. About 60 days later the second note for \$6,530 and a second trust deed securing it on the same prop-

erty were executed by Dr. Oddo and a credit for the latter sum was endorsed on the original note.

At the time of executing the "Standard Form of Agreement Between Contractor and Owner" and the first note and trust deed and during the course of constructing the building, Mr. Hedde held a "Contractor's License * * * to engage in the business or act in the capacity of Contractor." But about the time the structure was completed respondents discovered that Mr. Hedde had not complied with a rule that had been adopted earlier requiring contractors to be classified by the Registrar. Such classification designated the holder of a General Engineering license—the kind held by Hedde—as of "A" classification and designated the General Building Contractor as of "SB-1" classification. Having ascertained that their contractor had not obtained a supplemental classification, respondents instituted this action to cancel all evidences of their debt to appellants.

The issue on this appeal is whether the court below was warranted in adjudging the invalidity of the instruments executed by respondents. For three reasons it was not.

There was substantial compliance
with the law.

In procuring the "General Contractor's License" in February, 1946, Mr. Hedde was evidently attempting to comply with sections 7028, 7030, and 7031¹, Business and Professions Code. Section 7028 makes it unlawful for a person to act as a contractor without having a license therefor; section 7030 makes it a misdemeanor to do so; section 7031 requires a contractor to allege

1. Section 7028: "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter."

Section 7030: "Any person who acts in the capacity of a contractor without a license, and any person who conspires with another person to violate any of the provisions of this chapter, is guilty of a misdemeanor."

Section 7031: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

and prove that he was licensed in order to maintain an action to recover compensation for the performance of his contract. At that time Mr. Hedde had no knowledge of the Registrar's rules. Indeed, they had not yet been adopted.

Knowledge of the rules classifying contractors first came to Mr. Hedde in the spring of 1948 by means of a bulletin mailed by the Registrar to all licensees directing their attention for the first time to Rule 760.² It requires a general engineering contractor to "operate only within the scope as defined in section 7056, and that one so

classified may not extend the scope of his operation to the fields defined by sections 7057 and 7058.³ By his notice the Registrar explained the meaning of the rule and advised that to avoid disciplinary proceedings it was necessary to obtain a supplemental classification; that if a contractor in one classification seeks to perform work of a type which falls under another classification he could not do so "unless such work is merely incidental to other work being done by him." Rule 760 had evidently been adopted in July, 1947, pursuant to section 7059⁴ which was added by Statutes of 1945,

2. Rule 760. (Effective July 17, 1947.)

"A licensee classified as a general engineering contractor, shall operate only within the scope as defined in Section 7056 of Chapter 9 of Division 3 of the Business and Professions Code.

"A licensee classified as a general building contractor, as defined in Section 7057, shall not take a prime contract unless the same requires more than two unrelated building trades or crafts, or unless he has qualified for the particular specialty classifications as established by the Board.

"A licensee classified as a specialty contractor, as defined in section 7058, shall not act in the capacity of a contractor in any classification other than the one in which he is classified. Nothing contained in this Rule shall prohibit the performance of work incidental or supplemental to the performance of a contract in a classification in which any contractor is licensed by the Board.

"Nothing in this rule shall be construed to extend the field and scope of the operations of a licensed contractor to those in which he is not classified and qualified to engage as defined in Sections 7055, 7056, 7057, and 7058. Failure on the part of a licensee to observe this rule shall constitute grounds for disciplinary action."

3. Unless otherwise indicated, all sections cited are from the Business and Professions Code—to which the word "code" applies.

Section 7055: "For the purpose of classification, the contracting business includes any or all of the following branches:

- (a) General engineering contracting.
- (b) General building contracting.
- (c) Specialty contracting."

Section 7056: "A general engineering contractor is a contractor whose principal contracting business is in connec-

tion with fixed works for any or all of the following divisions or subjects: Irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, railroads, highways, tunnels, airports and airways, sewerage and bridges."

Section 7057: "A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof. "This does not include anyone who merely furnishes materials or supplies under Section 7045 without fabricating them into, or consuming them in the performance of the work of the general building contractor."

Section 7058: "A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts."

4. Section 7059:

"The registrar, with the approval of the board, may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage, as defined by Sections 7055, 7056, 7057, and 7058. A licensee may make application for classification and be classified in more than one classification if the licensee meets the qualifications prescribed by the board

chapter 1159. That section provides that the "registrar, with the approval of the board" is authorized to "adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage," as defined by the four preceding sections. Section 7055 divides the contracting business into general engineering, general building, and specialty. Section 7056 defines a general engineering contractor as one whose *principal* contracting business is in connection with fixed works for irrigation, drainage, water power, etc. Section 7057 defines a general building contractor as one whose *principal* contracting business is in connection with any structure built for the shelter and enclosure of humans and animals etc. "requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof."

Under Rule 730 the Contractors State License Board declared its policy to be that all licensed contractors be classified, prescribing the scope and extent of each classification to be according to and consistent with the established usage and procedure and that those persons to whom have been issued valid licenses be classified into the classification in which the *majority of their contracting is embraced* and that they shall be given the opportunity to qualify for and be classified and licensed in other supplemental classifications in which they contract. By Rule 731 it was provided that all persons licensed under chapter 9, Division 3 of the Code, sections 7055 through 7059, shall be classified into one or more classifications or subclassifications.

On receipt of the published notice Mr. Hedde on February 3, 1948, requested that

the supplemental classification of SB-1 be added to his general contractor's license. In March he took the examination following which the SB-1 supplemental classification was added to his "Contractor's License" on March 31, 1948. The examination consisted of one question, to wit, "compute the material required for the construction of a building ten feet square." By virtue of his liberal and technical education in three universities, his vast experience in various kinds of construction for the navy and other building and the freedom of his record from disciplinary proceeding, an SB-1 classification would have been issued to Mr. Hedde at any time in 1946 or 1947 at his request. There is not the slightest evidence of his disrespect or disregard for the statutes or rules governing the licensing of contractors, but on the contrary, it is shown that he was zealous to comply. In 1945 he applied for a "Contractor's License" for his firm. Such license was then given classification "A" which included "General Heavy Construction." In 1946 he applied for a license for himself with the same classification which was renewed in 1947 and 1948.

No admonition or suggestion appears on any of the blank forms provided for making the application except to return the filing fee with the application. At the times he filed his application in 1946 and for its renewal in 1947, if rules 730 and 731 and 760 had been adopted by the board, it was incumbent upon the Registrar to advise licensees who might be affected thereby. In the modern state with all the regulations of man's activities, from the cradle to the grave, it is unthinkable that every individual of a group governed by an administrative board can have knowledge of every rule adopted for the regulation of members. The Contractors' State License Board recognized the futility of attempting to apply their rules before advising the trade of

for such additional classification or classifications. No additional application or license fee shall be charged for qualifying or classifying a licensee in additional classifications.

"Nothing contained in this section shall prohibit a specialty contractor from taking and executing a contract involving

the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he is licensed, is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed."

their adoption. This they did by publishing a notice of their new rules in a bulletin in February, 1948. That document discloses that the board had registered on December 31, 1947, 47,252 licensed contractors and notified them of the classifications and the letter designations thereof. If the board had entertained the theory that moves respondents herein they would have proceeded to administer the discipline prescribed for those who disobey its rules. On the contrary rule 730 provided that licensees "shall be given the opportunity to qualify for and be classified and licensed in other supplemental classifications in which they intend to or do contract." Thus, if Mr. Hedde's "Contractor's License" was deficient when he made the contract with Dr. Oddo, by reason of his ignorance of the board's rules, he repaired his status by complying with the rules as soon as he had knowledge thereof. At that time the clinic had not been completed.

[1] It was not the purpose of the legislature in adopting the original "Contractor's License Law" in 1929 or in making additions or amendments thereto during the intervening years to work a hardship upon honest men engaged in a contracting business. The legislative intent was to protect the public against incompetent and dishonest operators. It could not have been reasonably intended that a person holding a general contractor's license must obtain the classification of a building contractor. Surely, it could not have been the purpose of the legislature to forbid a contractor who has been duly licensed to recover payment for work done. If it had been, they would have said so. In 1929 they made it unlawful for a person to act in the capacity of a contractor without having a license. Stats. 1929, ch. 791, p. 1591. In enacting the Code in 1939 they made the same provision in section 7030. Although sections 7056, 7057, and 7058 enacted first in 1937 provided for three classes of contractors, it continued to be "unlawful for any person to * * * act in the capacity of a contractor * * * without having a license therefor". Section 7028. Thus, Mr. Hedde was trained in the language of the statute to get a "contractor's license" before engaging in a con-

tractor's business. It was reasonable and fair that inasmuch as he held a license to do general contracting business and had no actual knowledge of the registrar's rules at the time of contracting with Dr. Oddo, he was acting in substantial compliance with the law.

Confusion in the law

[2, 3] While section 7059 permits the registrar to adopt rules to effect the classification of contractors, such classification must be "in a manner consistent with established usage and procedure as found in the construction business". That section imposes no penalty upon a contractor. Neither does its language require one holding a general contractor's license to register under some other designation or to take out another license. It does not forbid a general contractor to contract while awaiting the action of the board to classify contractors. The only inhibition against contracting without a license is found in section 7030 which makes it a misdemeanor. That section cannot affect Hedde for he held a license at the time of contracting and thereafter. The only provision of 7059 that pertained to his activities is that which permits the registrar to adopt rules. But they must be consistent with established usage and procedure of the construction business and they may "limit the field and scope of the operations of a licensed contractor". However, the only penalty for ignoring a classification is to be "subject to disciplinary action." To be "disciplined" by the registrar does not contemplate the divestment of the contractor from his total profits to say nothing of taking from him his total outlay in material and labor. Since the statute providing for classification is permissive and no penalty is prescribed for a violation of classification, it cannot be enlarged by the application of section 7030. Penal statutes that encroach upon private rights of citizens must be strictly construed, and statutes which provide for a forfeiture must be strictly construed. *Johnson v. Kaeser*, 196 Cal. 686, 700, 239 P. 324; *Binford v. Boyd*, 178 Cal. 458, 462, 174 P. 56; *San Diego & A. R. Company v. State Board of Equalization*, 165 Cal. 560, 567, 132 P. 1044; *People v. Zimbrott*, 35 Cal.

App.2d Supp. 745, 747, 91 P.2d 252; People v. Moss, 33 Cal.App.2d Supp. 763, 767, 87 P.2d 932.

The judgment is inequitable.

[4] It would not be equitable to hold that a contractor who has substantially complied with all the statutory law enacted for his governance should be deprived of his capital and labor honestly invested in the construction of a building that is itself essentially a service to the State. To demonstrate the injustice of a decree that divests appellants of their compensation we need only consider the contemporaneous construction of the statutes prior to and during the year 1947.

When Mr. Hedde applied for his license he explained his qualifications and the type of construction he purposed to embrace within his activities. He stated that whereas he held a partnership license he "wanted to take out an individual license * * *. I told her I was doing all types of construction * * * both building and heavy construction * * * that I had an Engineering Degree * * *. She told me that the Class A license entitled me to do all types of construction work * * *. I took the blanks and * * * there was some additional material that I had to look up, and I put that on and then went back up and finished filling it out there * * *. I filled out * * * the part that says 'type of work that you intend to engage in' * * * in the office up there." At the time he applied at the office of the Contractors' Board he conferred with Miss Smith, the "senior stenographer clerk" who had been there employed for nine years. Her duties included giving information about filling out applications for licenses. She was familiar with the policy of the office with respect to information which was given in 1945 and 1946 concerning the scope of the activities of a class A contractor and gave it on various occasions. The customary procedure was to give with every application a list of various classifications with their numbers. It was a general practice to tell applicants for class "A" licenses "they could do anything at that time (1944-1945) under their licenses * * * it covered everything * * * that the 'A' was

the highest classification, and when I first came into the Department, as I recall, that was the policy of the Board * * * [I was] instructed to inform applicants for licenses that the holder of a Class 'A' license was entitled to do any type of building construction." She was not positive as to the date of the change of information she gave to Class A applicants but it was brought about by some new rule. She testified, "we send out a magazine periodically, and in this magazine which is supposed to be sent to all contractors, there was an article, something to the effect of the different classifications. I think that was in the first part of 1948 * * * that is when they were first notified * * *. We probably told them [contractors] they could do any class of construction work up to the time that magazine came out * * * February of 1948."

Further proof of the contemporary construction of the statutes is found in the testimony of one Ralph Bowdle who instructed the clerks as to the procedure to be followed. He testified that he was there from 1930 to 1946 holding a series of positions from inspector to deputy registrar; that throughout that period a class A contractor was not required to obtain a B-1 supplemental classification "in order to engage in General Building contracting work." Appellants offered to prove by Mr. Bowdle that from 1930 to 1946 general engineering contractors customarily performed building work of all kinds, including the erection of buildings for shelter of human beings, and that they still performed general building work as a necessary, integral and important part of their construction business. The exclusion of such testimony was error. Where the good faith of a litigant is a part of his proof of an attempt to comply with a regulatory rule evidence that his conduct was in harmony with the prevailing practice in that respect is admissible. But Mr. Bowdle actually testified that under the prevailing policy of the Board at the time Mr. Hedde filed his application for his contractor's license, in view of the applicant's experience as revealed by previous applications, a supplemental SB-1 classification would have been issued without further examination.

The construction of the statutes in harmony with appellants' theory and contention was not confined to the employees in the office of the Licensing Board. In May, 1944, the Attorney General was asked, "may the holder of a general contractor's license accept a contract covering only one particular field of endeavor without first securing an additional supplemental classification in that particular field, such as painting and decorating, electrical work, etc." In his reply the chief law enforcement officer of the state replied, "if a person is licensed and classified as a general contractor, he can take a contract for construction business for any type of construction work * * *. The holder of a general contractor's license may accept a contract covering only one particular field of endeavor, and he need not secure an additional supplemental specialty classification * * and he may do the entire work himself." (Opinions of Attorney General, Vol. 3, p. 311.)

[5] In view of the contemporaneous construction given the Contractors' License Law by the Registrar, the Board and the Attorney General, no limitation had been prescribed against the permissive scope of the activities of the class A licensee by the Legislature. That contemporaneous construction of a statute by the administrative agencies must be given effect in determining the meaning and legislative intent is the law of this state. In *re Parker's Adoption*, 31 Cal.2d 608, 615, 191 P.2d 420; *Mudd v. McColgan*, 30 Cal.2d 463, 469, 183 P.2d 10; *Whitcomb Hotel Inc. v. California Employment Commission*, 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405. If Hedde was licensed to engage generally in the contracting business under his class A license which entitled him to engage in all types of construction without obtaining a supplemental classification, for what reason should his contract with respondents be annulled? If he was "qualified to engage in the whole," said the Attorney General, "he is necessarily qualified to engage in any part thereof." If other evidence were required to establish Mr. Hedde's substantial compliance with statutes and rules involved and his right to be paid for his labor and investment, it is to be found in his applica-

tion for his license. In attempting to prepare that document in consonance with the regulations, he answered the query as to the type of contracting business in which he purposed to engage. He wrote, "*general building and heavy construction.*" With that disclosure before his eyes it was the imperative duty of the Registrar to issue to him a license to build houses. Since the failure to grant him a license of the proper classification was due to the mistake of the Registrar's office, it was dishonorable for respondents to refuse payment on that account and it would be grossly oppressive for this court to affirm a judgment upholding such refusal. Where statutes have been enacted for the purpose of protecting society against dishonest and unequipped persons in the contracting business and they have not been scorned by an honest and educationally qualified contractor who has in good faith dealt with the State and with his client, it would be inequitable and unjust solely on the ground that he has violated such law to deprive him of a substantial investment in the performance of a contract and, on the assumption that he has violated the law, to make a gift of his wealth to another. Especially is this true where at the time of applying for his license such contractor disclosed his true intentions to the Registrar and relied upon him to issue the appropriate license. To do so would be to convert a statute designed for a shield into a machine gun for the destruction of men of integrity and good faith who are the builders of the state.

While no case parallels the factual situation here presented there are some decisions that indicate a more amiable attitude toward justice than the judgment herein. In *Norwood v. Judd*, 93 Cal.App.2d 276, 209 P.2d 24, 26, the judgment had denied the plaintiff recovery from defendant of any of the profits earned from their partnership contracting business by reason of the fact that the partnership held no contractor's license. About the time they formed the partnership Judd applied for and obtained a contractor's license in his own name. The license was changed nine months later to Fred T. Judd Company, but the application failed to disclose the company was a partnership. The Board was never informed of Nor-

wood's interest in the business. When he left it was agreed Judd would try to dispose of the enterprise, settle its affairs and divide the assets on the basis specified. The lawsuit followed Judd's refusal to account to Norwood. On the trial for a dissolution and accounting it was found that the type of work performed by the partnership required a license "in the name of the copartnership"; that both licenses had been issued to Judd individually; and that none was issued to the copartnership. Such finding was the basis of the judgment that their business was illegal and consequently "plaintiff is not entitled to an accounting or to any division of the profits". After pointing out that "this is not a case where the parties engaged in a business prohibited by statute or public policy, or where a license would not have been issued had application been made" the court holds that there are exceptions to the contractor's license law which forbids recovery by an unlicensed contractor. While the situation of Mr. Hedde is not that of one partner suing another, the doctrine announced by the court there applies with equal propriety, namely, "equity can and will grant relief where the court is not required, in granting the relief, to lend its aid in enforcing a transaction illegal only because a permit that could have been secured was not secured." *Gatti v. Highland Park Builders*, 27 Cal.2d 687, 166 P.2d 265, is more nearly in point. The defense was that the plaintiff partnership held no license. After *Gatti* had contracted for the work he formed the partnership whereupon defendant consented that the partnership might complete the contract, but the latter entity did not obtain a license. Nevertheless, recovery was allowed. The law was passed for the protection of the public and should not be used as a "shield for the avoidance of a just obligation." If an honest partnership may prevail without a license, so also may an honest individual contractor. The statute applies with equal force to both.

If Mr. Hedde's conduct be not a substantial compliance with the Act, his conduct furnishes an exception to the general rule. Not only did he hold a license to "act in the capacity of contractor within the State of California," but he had obtained the same

license for his partnership in April, 1945. In the latter application he wrote that he intended to "engage in all types of heavy building construction"; in his 1946 application he wrote that he intended to engage in "General Building and Heavy Construction." He was qualified by virtue of his technical training and his university degrees as well as by his years of practical experience to receive a Supplemental B-1 classification, could have procured it in 1946 by his mere request and at any time thereafter on application and examination. He did not ask for it in 1946 because he had no actual knowledge of the rules that had been enacted pursuant to section 7059 necessitating the Supplemental B-1 license for builders and the Registrar did not suggest that he do so. No doubt the latter thought, as his aides understood, and the Attorney General had opined, that if a contractor is qualified to engage in the whole, he is necessarily qualified to do any part. No limitation was contained in the general license upon the extent to which Mr. Hedde might contract. Clearly, the position of appellants is a thunderous appeal to equity. The chancellor should denounce with resentment the effort of a litigant who would build his fortune by the addition of the wealth of others to whom he is in debt.

Rule 760 was not violated

[6-8] The rule provides that the Registrar may not extend the "field and scope" of the operations of a licensed contractor to those areas in which he is not classified. But section 7056 defines a general engineering contractor as one whose "principal contracting business" is in connection with "fixed works." From the mere fact that his *principal* business is with fixed works, it must have been the intention of the Legislature that he will do some contracting within a "field and scope" outside of fixed works, perhaps build a house now and then. In the instant action respondents failed to establish that the principal contracting business of Mr. Hedde was such as to violate the rule. The rule-making power of an administrative officer or board arises only from the statute that authorizes it and a rule which conflicts with it is void. The registrar made no attempt to limit the "permissible scope of a general engineering con-

tractor" prior to July, 1947. The latter had been permitted to engage in all kinds of construction business, as indicated by the cited opinion of the Attorney General. If rule 760 should be interpreted to mean that a general engineering contractor may no longer engage in any kind of construction business outside of "fixed works" without an opportunity to qualify, then the rule would be void as being in excess of the scope of sections 7056 and 7059. *Blatz Brewing Company v. Collins*, 69 Cal.App.2d 639, 645, 160 P.2d 37; *Campbell v. Galeno Chemical Company*, 281 U.S. 599, 50 S.Ct. 412, 74 L.Ed. 1063, 1069.

But rule 760 was not designed to impose penalties and forfeitures upon contractors. In view of the language of the resolution (rule 730) declaring the policy of the Board and of the subsequent rules they appear to have been conceived for the purpose of enabling the Registrar better to manage and regulate the professions of engineers, builders and contractors. Rules 732 to 754.8 name all the classes of contractors and define the types of work included. Rule 755 permits a licensee to be licensed in more than one classification. Rule 756 requires the applicant to give a statement of the general nature and type of contracting in which he intends to engage and the *primary* classification in which he would be classified. Rule 758 provides for a change of, or supplemental, classification after a written examination and 759 authorizes the Registrar to waive the written examination upon a conclusive showing of sufficient experience for a supplemental classification. Neither the Legislature nor the Registrar has provided and, indeed, neither could do so, a penalty for breaching such rules, but rule 794 says merely that a violation thereof "shall constitute grounds for disciplinary action." Such action is taken upon a verified complaint, sec. 7090, and the proceedings are conducted in accordance with the Government Code, secs. 11500 to 11528, which provides for judicial review. But section 7095 makes provision for the decision to permit "the licensee to complete any or all contracts shown * * * to be * * * uncompleted" while section 7100 provides that the court may upon his filing

a bond, permit the licensee to continue as a contractor pending entry of judgment.

In the enactment of such statutes providing for a contractor to continue with his contracts while under fire, could the legislative intent have been that he should work and buy more materials and complete his contract and not recover their value? Certainly, if a contractor steps over the line from his principal classification his only punishment can lawfully include no more than might be meted out by a court upon a review of the order of the Registrar. Therefore the court below exceeded its jurisdiction in attempting to enforce a forfeiture of all the investment of appellants by reason of Mr. Hedde's not having a builder's SB-1 classification.

Mrs. Hedde as a party

There is no significance to the fact that Mrs. Hedde was a copayee with her husband on the notes and trust deeds or in the fact of her joining in the notice of completion. The issue as to Mr. Hedde's classification as a builder does not involve Mrs. Hedde. If the contract were void she would suffer no more detriment than the loss of the moneys payable under the notes. Since the notes are valid she shall receive payment as therein provided.

Judgment reversed with instructions to enter judgment for the defendants.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.



101 Cal.App.2d 631

PEOPLE v. RICHARD et al.

Cr. 738.

District Court of Appeal, Fourth District,
California.

Jan. 8, 1951.

Herman Joseph Richard, Margie Bernice Richard and Raymond Louis Richard were convicted in the Superior Court of San Diego County, L. N. Turrentine, J., of arson and defendants appealed. The District Court of Appeal, Mussell, J., held that the

evidence was sufficient to sustain the convictions.

Affirmed.

1. Criminal law ☞961

Where jury returned verdicts finding defendants guilty and trial court remarked that he was "not clearly satisfied that it was wrong", remark was a ruling on verdicts and involved question of sufficiency of evidence and in effect amounted to a ruling that evidence was sufficient to support verdicts and judgment.

2. Criminal law ☞935(1), 1156(2)

A trial court has broad discretion in passing upon a motion for a new trial made on ground that verdict was contrary to the evidence, and its action in denying motion will not be disturbed on appeal unless it clearly appears that it abused such broad discretion.

3. Criminal law ☞961

In arson prosecution, where the jury returned verdict finding defendants guilty and trial court remarked that he was not clearly satisfied that it was wrong, the defendants were entitled to and did receive two decisions on evidence, one by jury and other by trial court and no abuse of discretion appeared.

4. Criminal law ☞961

The trial court is vested with discretion to determine truth of affidavits offered in support of a motion for a new trial.

5. Criminal law ☞938(1), 1156(3)

A motion for a new trial on ground of newly discovered evidence is addressed to discretion of trial court and determination of that motion will not be disturbed on appeal except for a clear abuse of discretion.

6. Criminal law ☞958(6)

In arson prosecution, evidence sustained trial court's conclusion that proposed testimony of a witness offered on a motion for a new trial on the ground of newly discovered evidence was cumulative in nature.

7. Arson ☞37(1)

Evidence sustained conviction for arson.

8. Criminal law ☞1159(2)

An appellate court cannot order a new trial on ground of insufficiency of evidence if there is any substantial evidence by which verdict can be supported.

9. Criminal law ☞1023(9)

In arson prosecution, where imposition of sentence as to one defendant was suspended, her attempted appeal from purported judgment would be dismissed.

Kahn & Block, San Diego, for appellants.

Fred N. Howser, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendants were charged with the crime of arson arising out of the burning of a building known as the Strand Hotel in the city of Coronado. After a lengthy trial by jury, verdicts were returned finding all three defendants guilty of arson as charged in the information. A motion for a new trial was denied and judgment was pronounced as to defendants Herman and Raymond Richard and they were sentenced to the state prison. Sentence was suspended as to Margie Richard and she was granted probation. This appeal is from the judgment of conviction and from the order denying the motion for a new trial.

Defendants present two contentions, both of which relate to the trial court's ruling on the motion for new trial. They are (1) That the court erroneously entertained the opinion that it was legally powerless in passing upon the motion to substitute its opinion for that of the jury; and (2) That there was an abuse of discretion in holding that proposed newly discovered evidence was cumulative in character.

In support of their first contention, defendants set forth at length the remarks of the trial court relative to its duty in passing upon the motion for a new trial. The court quoted from the decision in *Green v. Soule*, 145 Cal. 96, 78 P. 337, and stated that the law relating to the duty of the trial court is as set forth in 145 Cal. on page 103, 78 P. on page 340, in the following

language: "Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might, upon the evidence, have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

The court remarked that in applying these rules, he had given consideration to all the evidence and affidavits and all of the circumstances presented in court; that following the rule in *Green v. Soule*, he could not say that he was clearly satisfied that the jury was wrong. In concluding his comments, the court used the following language: "The statement is made in the cases the judge is a thirteenth juror. I think that means that he must independently weigh the evidence. Having done that, he must determine not what he would have done, but he must consider the jury's verdict and then must say, 'Am I clearly satisfied it was wrong?' And having done that in this case, with all of the circumstances, I am not able to come to that conclusion. So the motion for new trial on both grounds will be denied."

[1,2] Defendants apparently contend that they were denied the independent judgment and ruling of the trial judge as to the sufficiency of the evidence on the supposition that he entertained a reasonable doubt as to their guilt. This contention is without merit. The jury returned verdicts finding the defendants guilty and the court remarked that he was "not clearly satisfied that it was wrong". This was a ruling on the verdicts and involved the question of the sufficiency of the evidence and was made by the court after independently weighing all of the evidence. It was, in effect, a ruling that the evidence was sufficient to support the verdicts and judg-

ment. The record does not show that the trial court had any doubt of the guilt of the defendants and on this appeal no question is raised as to the sufficiency of the evidence to support the verdicts of conviction. It is quite apparent that the trial judge did not deny the defendants the right which they had to his consideration of the sufficiency of the evidence. A trial court has broad discretion in passing upon a motion for a new trial made on the ground that the verdict is contrary to the evidence and its action in denying the motion will not be disturbed on appeal unless it clearly appears that it abused such broad discretion. *People v. Sarazzawski*, 27 Cal.2d 7, 16, 161 P. 2d 934.

As was said in *People v. Mattmueller*, 25 Cal.App.2d 418, 420, 77 P.2d 504, a trial court in a criminal proceeding is vested with so wide a discretion in the matter of passing upon a motion for a new trial that its action in granting the motion will be disturbed only when there is a clear showing of a manifest and unmistakable abuse of such discretion.

In *People v. Sarazzawski*, supra, it was held that a motion for a new trial on the ground that the verdict is contrary to the evidence presents an issue to the trial court upon which an appellate court cannot pass; that an appellate court cannot appraise the weight of the evidence and can only review it for its legal sufficiency; that the trial court in ruling upon a motion for a new trial is not bound by conflicts in the evidence and that while the solemn verdict of a jury should not lightly be vacated, a responsibility, nevertheless, rests with the trial court again to review the cause and only after such review to decide the application for a new trial.

[3] The trial court herein properly considered the verdicts of the jury, again reviewed the cause, and only after such a review, denied the motion for a new trial. The defendants were entitled to and received two decisions on the evidence, one by the jury and the other by the trial judge. No abuse of discretion appears.

Appellants' contention that the trial court abused its discretion in holding that cer-

tain "newly discovered" evidence was cumulative in character is likewise without merit. This contention is made on the basis of the affidavit of Herbert K. Mann and on the statement of the witness Carl Weber as to the availability of records of certain telephone calls.

[4] Defendants contend that there were certain conflicting statements of witnesses as to where they saw a fire in the downstairs building after the explosion; that the evidence offered to be proved by the affidavit of Mr. Mann was the testimony of the only actual eyewitness to the outbreak of the blaze; that this testimony would have served to directly contradict the expert evidence given by one of the witnesses for the prosecution. However, the witness Mann was not the only one at the scene when the fire started and his testimony and conclusions relate to his observation of the building at about the time the fire started and is not inconsistent with the testimony adduced by the prosecution, and, as the trial court remarked, it was essentially cumulative in its nature and there was no reason to believe that the jury would come to any different conclusion from such testimony. The trial court was vested with the discretion to determine the truth of the affidavits offered in support of the motion for a new trial. *People v. Radz*, 119 Cal. App. 435, 6 P.2d 527; *People v. Peyton*, 47 Cal.App.2d 214, 117 P.2d 683; *People v. Poor*, 52 Cal.App.2d 241, 126 P.2d 146; *People v. Coronado*, 57 Cal.App.2d 805, 135 P.2d 647.

The defendants made no showing of diligence to produce the testimony of the purported witness Herbert K. Mann. There is no showing of any unavailability of this witness during the course of the trial except the statement in his affidavit that he did not feel that his testimony would be of any value because he "thought there were other people who observed the fire."

[5] A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and the determination of that motion will not be disturbed on appeal except for a clear abuse of discretion. Such applica-

tions are not regarded with favor. *People v. Yankee*, 79 Cal.App.2d 431, 436, 179 P.2d 582; *People v. English*, 68 Cal.App.2d 670, 673, 157 P.2d 429.

As was said in *People v. Sutton*, 73 Cal. 243, 247-248, 15 P. 86, 88: "To entitle a party to a new trial, on the ground of newly-discovered evidence, it must appear—'First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it is such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence which the case admits.' 1 Hayne, *New Trial & App.* § 83."

[6] The substance of the statement of the witness Carl Weber is not set forth in the record before us, but it was asserted by defendants' counsel in the argument for a new trial that Weber's testimony would be that due to the number of slips required to be counted, it would be impossible for the telephone company to ascertain if there had been a telephone call made by defendant Raymond Richard from El Cajon at about the time of the fire. However, the witness Weber testified for the people and later as a witness for the defendants and made it quite clear that it was almost impossible to obtain the information desired by the defendants, particularly in view of the lack of definiteness in the description of the particular pay telephone station from which the so-called telephone call was made. The substance of Weber's additional testimony would be merely cumulative and entirely negative. There was no showing of the exercise of diligence in obtaining the offered evidence and the trial court's conclusion that the testimony of this witness was cumulative in nature is amply supported by the record.

A brief summary of the evidence is as follows: On October 31, 1949, at approximately 6:50 P.M., a loud explosion was heard in the vicinity of the Strand Hotel, a two story frame structure, in the city of Coronado. Immediately thereafter smoke and flames emanated from the second story

of the structure and the figure of a man dressed in dark trousers and white shirt was seen running in a northerly direction over the rooftop of the building, immediately north of the hotel. Witnesses who were in the hotel a few minutes before the fire noticed a strong odor of gasoline and saw puddles of liquid on the floor of a second story room, and in the midst of one of the puddles was a child's "jack-o-lantern". The hall carpet in front of the door to this room was saturated".

An investigator for the arson department of the National Board of Fire Underwriters qualified as an expert and testified that he had inspected the building after the fire and reached the conclusions that the fire was a gasoline fire and had three separate points of origin, each far removed from the others, and all in the upstairs portion of the building; that there had been an explosion in room number five and that the floor of this room and the lobby area bore marks of gasoline combustion; that there had been a gasoline fire in an unnumbered room and that there was no indication of accidental origin of the fire.

A chemist testified that he had examined a rug and padding taken from room number nine and concluded from his examination that the rug and pad had been saturated with gasoline.

The hotel was operated and managed by the defendants Herman and Margie Richard. The furnishings were owned by them and were insured for the sum of \$3,000, although the retail value of the furniture in the building at the time of the fire was only about \$1,200.

A few minutes before the fire, defendants Herman and Margie hurriedly left the hotel and walked south. One witness testified that he saw defendant Herman Richard several minutes before the fire and on a second floor stairway landing at the rear of the hotel. A heel print was found on the ground beneath the overhanging porch, the roof of which was contiguous to the roofs of the buildings north of the hotel. The heel print bore markings similar to or identical with certain markings on the heel of defendant Raymond's left shoe which he

was admittedly wearing on the night of the fire.

Upon their apprehension on the night of the fire, defendants Herman and Margie were questioned at length by the police and told conflicting stories as to the type and amount of clothes each had in the hotel at the time of the fire. The defendant Raymond was arrested in New Orleans one week after the fire and when questioned, stated that he had left the hotel between 5:30 and 6:00 P.M., and after a five minute stay in Coronado, had taken the ferry across San Diego Bay and proceeded east out of the city of San Diego. However, there was evidence from which the jury could reasonably conclude that defendant Raymond did not leave Coronado at the time claimed by him but that he left at about the time the fire started.

A witness for the prosecution testified that in June, 1949, while she was assisting the defendant Herman Richard in the operation of the hotel, he suggested to her that the hotel could be burned and that he would share one-third of the insurance recovery with her.

There was evidence that the Strand Hotel was not a paying proposition; that the defendants' bank account had been depleted to but a few dollars in October, 1949; and that defendants were not at all times able to pay the rent.

[7, 8] The foregoing evidence and other facts and circumstances shown by the record were sufficient to justify the verdict of the jury and its determination will not be here interfered with. *People v. Pianezzi*, 42 Cal.App.2d 270, 277, 108 P.2d 685. An appellate court cannot order a new trial on the ground of the insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported. *People v. Sarazzawski*, supra, 27 Cal.2d at page 16, 161 P.2d 934.

[9] It does not affirmatively appear from the record that judgment was pronounced as to defendant Margie Richard. The imposition of sentence as to her was suspended. Her attempted appeal from such purported judgment is dismissed. In

re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644.

The judgment of conviction as to defendants Raymond Richard and Herman Richard is affirmed, and the order denying motion for a new trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 621

ANDREW et al. v. CONNER et al.

Civ. 7793.

District Court of Appeal, Third District,
California.

Jan. 8, 1951.

P. G. Andrew and Clyde L. Andrew brought an action against Edmond J. Conner and Alma J. Conner to foreclose a mechanic's lien on defendants land. The Superior Court, San Joaquin County, Thomas B. Quinn, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Peek, J., held that plaintiffs under the evidence were not required to allege and prove that they were licensed contractors.

Judgment affirmed.

Mechanic's Liens ⇨277(2)

In action to foreclose mechanic's lien on defendants' land, evidence sustained finding that plaintiffs did not take job allegedly resulting in lien on a contract basis, and that plaintiffs only agreed to rent to defendants certain equipment at certain price and that defendants alone supervised, directed and controlled doing of work by and for themselves through agency of rented machines and operators, so that plaintiffs were not required to allege and prove that plaintiffs were licensed contractors. Business and Professions Code, §§ 7026, 7031.

Parkinson, Nichols & May, Stockton, for respondents.

PEEK, Justice.

This proceeding arises out of an action instituted by plaintiffs to foreclose a mechanic's lien on defendants' land.

The complaint alleged that between certain dates, at the special instance and request of one of the defendants, plaintiffs furnished labor, machinery and materials for use on defendants' land, and that the reasonable value thereof was the sum of \$3382, no part of which had been paid, and concluded with a prayer for judgment in the sum alleged and for foreclosure of their lien.

Defendants' answer denied generally the allegations of the complaint and affirmatively alleged (1) that plaintiffs had not complied with the provisions of the Business and Professions Code in that they were not licensed as contractors and (2) that the parties had orally agreed that the work would be done for the contract price of \$2000; that plaintiffs had abandoned the work before completion and the work actually done was valueless to defendants.

The cause proceeded to trial before the court sitting without a jury and at the conclusion thereof the court found that plaintiffs did not have a contractor's license; that plaintiffs had not agreed to do the work at a contract price; that the only agreement of the parties was that plaintiffs would furnish defendants "manned and maintained equipment" for the price of \$11 per hour per unit; that plaintiffs had fully performed; that defendants retained all control and direction of the project and that defendants finally ordered the work stopped because of unfavorable weather conditions.

[1] Defendants' first contention is an attack upon the sufficiency of the evidence to sustain the finding that plaintiffs did not take the job on a contract basis. Suffice it to say that the record discloses ample evidence contrary to that relied upon by appellants which adequately supports the attacked finding and hence under the oft repeated rule such finding may not be dis-

Blewett, Blewett & Macey, Stockton, for appellants.

turbed upon appeal. *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970.

Defendants' second contention is premised upon the assumption that under the agreement of the parties plaintiffs were acting as contractors within the meaning of § 7026 of the Business & Professions Code. Therefore, they argue, by reason of the failure of plaintiffs to secure a contractor's license they are now precluded from maintaining their action under the provisions of § 7031 of that code.

Section 7026 defines a contractor as "any person, except an owner * * *, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to * * * or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

Section 7031 provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract.

The record shows that defendants desired to clear, grade and level land, as well as construct a harbor and levees on Acker Island near Stockton, and that to accomplish their purpose they rented equipment and operators from plaintiffs over which defendants retained complete supervision, direction and control. Perhaps it is true, as defendants contend, that the operations here involved were such as normally come within the purview of the provisions of § 7026 of the Business and Professions Code. However, the trial court, as previously noted, upon conflicting evidence, found that plaintiffs did not agree to do the work for defendants on a contract basis but only

agreed to rent to defendants certain equipment at a certain price.

It is to be noted § 7026 does not apply to an owner of property who is improving the same for his own use and not for sale. Additionally said section defines a contractor as one who either by himself or through others undertakes to accomplish a particular project. Thus, defendants, to maintain their contention, would have to show conclusively that plaintiffs affirmatively undertook to perform or did perform some of the work contemplated. Mere reliance upon particular testimony favorable to their case (which testimony was contradicted by plaintiffs), or the fact, if it be a fact, that it was such work as contractors usually perform, is not sufficient.

[2] It necessarily follows that since there is ample evidence to sustain the finding of the court that plaintiffs' sole participation was their rental of equipment and operators and that defendants alone supervised, directed and controlled the doing of the work by and for themselves through the agency of the machines and operators rented by plaintiffs, defendants' second contention must fail for the same reason their first contention is without merit.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



**STATE COMPENSATION INS. FUND et al.
v. INDUSTRIAL ACCIDENT COM-
MISSION et al.**

Civ. 14613.

District Court of Appeal, First District,
Division 2, California.

Jan. 8, 1951.

Hearing Granted March 8, 1951.*

The State Compensation Insurance Fund and Clifford F. O'Connor, doing business as O'Connor Bros., filed a petition against Industrial Accident Commission of the State of California and Paul J. Hull, employee, for annulment of an award made to Hull for injuries Hull received in a fight with his

* Subsequent opinion 242 P.2d 311.

foreman in which Hull was the aggressor. The District Court of Appeal, Dooling, J., held that Hull was not entitled to workmen's compensation because he was the aggressor.

Award annulled.

Workmen's compensation ⇐800

An employee who was the aggressor in a fight with his foreman in which employee was injured was not entitled to workmen's compensation for injuries received in fight.

Donald Gallagher, Royle A. Carter, San Francisco, for petitioners.

Edmund J. Thomas, Jr., Industrial Accident Commission, San Francisco, for respondents.

DOOLING, Justice.

Petitioner asks us to annul an award made to the employee Hull for injuries received in a fight with his foreman in which the respondent commission expressly found that Hull "was the aggressor."

Whatever view we might be disposed to take of this question were it entirely novel in this state we are bound by two decisions of the Supreme Court which expressly state the rule that while an injury received in a quarrel arising out of some dispute connected with the employment may be compensable, this is not true where the injured employee is the aggressor. *Globe Indemnity Co. v. Industrial Accident Comm.*, 193 Cal. 470, 225 P. 273; *Globe Indemnity Co. v. Industrial Accident Comm.*, 2 Cal.2d 8, 12-13, 37 P.2d 1039.

There is nothing in any of the later California cases cited by respondents which limits this rule as applied to aggressors. In the related field of injuries received from horse-play the Supreme Court recently overruled a series of its earlier decisions in *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313, but the case was carefully limited to an award to one who was not a participant in the sportive conduct. While this decision may indicate a disposition on the part of our highest court to reexamine some of its earlier decisions in cases arising

from injuries inflicted by fellow employees, we are bound to follow its decisions until such time as that court turns its back on them. No purpose would be served by this court reviewing the out of state authorities in the face of the two decisions of our own Supreme Court which are controlling.

Award annulled.

NOURSE, P. J., and SCHOTTKY, J., pro tem., concur.



101 Cal.App.2d 658

In re GREENLEAF'S ESTATE.

GREENLEAF v. FIRST NATIONAL BANK IN SANTA ANA.

Civ. 4161.

District Court of Appeal, Fourth District, California.

Jan. 10, 1951.

Hearing Denied March 8, 1951.

Proceeding in the matter of the estate of W. A. Greenleaf, also known as Walter A. Greenleaf, deceased, on the petition of Annie Greenleaf for instructions to the First National Bank in Santa Ana, etc., as trustee, to which the trustee objected. The Superior Court, Orange County, Robert Gardner, J., made an order in favor of the petitioner, and the objector appealed. The District Court of Appeal, Griffin, J., held that under a testamentary trust providing that if settlor's wife needed additional funds for her proper care and comfort, trustee was to apply sufficient income and principal for that purpose, trustee was directed to provide such funds and did not have discretion in the matter.

Order affirmed.

1. Trusts ⇐112

If there be any doubt or uncertainty in a trust, it will be construed, if possible, in favor of beneficiary and against trustee.

2. Trusts ⇐177

Whenever exercise of trustee's discretion, absolute or otherwise, is challenged, basic inquiry is always whether trustee act-

ed according to state of mind contemplated by settlor.

3. Trusts ⇨177

Generally, power of trustee is discretionary, and if trustee is fairly employing his judgment to advance or not to advance money to beneficiary, court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere.

4. Trusts ⇨177

Court should not be burdened with duty of administration of a trust, nor required nor permitted to substitute its judgment and discretion for that of trustee so long as trustee acts within proper limits, nor in any event until there is an entire failure or refusal on part of trustee to perform duty.

5. Wills ⇨684(10)

Under testamentary trust providing that income was payable to wife in a certain amount, but that if by reason of sickness or other good cause she needed additional funds, trustee was directed to use sufficient income and principal to provide her with proper care and comfort, if good cause arose and wife needed additional funds, trustee was directed to provide such funds and it had no discretion.

6. Wills ⇨684(10)

Where will creating trust for benefit of wife directed trustee to provide sufficient funds for her proper care, and to use and apply sufficient income and principal to that end, after demand was made and trustee failed or refused to act, wife was authorized to call upon court which, upon a proper showing, could direct trustee to act.

7. Wills ⇨684(9)

Where will directed that trustee use and apply sufficient income and principal to provide beneficiary with proper care and comfort, and beneficiary showed refusal of trustee to comply with request for additional funds and showed need for such funds to renovate and refurnish her home, and to provide her with clothes, traveling expenses and a new automobile, and trustee claimed \$200.00 per month allowed was sufficient, court did not abuse its discretion in granting beneficiary's request in part not-

withstanding grant would leave annual deficit.

8. Wills ⇨684(9)

Where general provisions of testamentary trust gave trustee complete management and control of property and income and provided that powers of trustee enumerated should not be a limitation upon general powers, but trust also directed trustee to use and apply sufficient income and principal to provide additional funds to life beneficiary for her proper care and comfort, particular provisions qualified those that were general and did not modify direction to provide for life beneficiary. Civ. Code, § 3534; Code Civ.Proc. § 1859.

Rutan & Tucker, Forgy, Reinhaus & Forgy and Arthur M. Bradley, all of Santa Ana, for appellant.

Head, Jacobs & Corfman, Santa Ana, for respondent.

GRIFFIN, Justice.

In a will of W. A. Greenleaf, deceased, dated March 20, 1941, a trust was created which provided in part:

"During the life of this trust, the net income derived from the trust property, and at the closing of this trust the trust property and principal sums derived from the sale thereof, shall be paid and distributed as follows, to wit:

"During the life of my wife Annie Greenleaf, there shall be paid to her monthly, if possible, if not, as soon as funds are available, a sum amounting to \$60.00 per month. In addition to the sum of \$60.00 per month to be paid my said wife during her lifetime, said Trustee shall at the time of her death pay all costs of her last illness and burial expenses. If my said wife during her life time, by reason of sickness or other good cause, needs additional funds over and above the monthly amount hereinbefore referred to in order to provide her with the proper care and comforts, then I direct my Trustee to use and apply sufficient of the income and principal of my trust property so that my said wife shall have sufficient money to provide for her

support, comfort and needs to the end that she shall be fully and properly cared for and provided for."

During the administration of the estate the wife was granted \$100.00 per month family allowance. On February 4, 1946, the successor trustee, First National Bank in Santa Ana, petitioned the court for instructions as to administration of the trust, in which petition the trustee asked the court for authority to pay the beneficiary \$150 per month under the provisions of the trust. The petition was granted. On February 4, 1947, the wife filed her petition for instructions to the trustee, asking for instructions from the court that the trustee be instructed and authorized to pay her \$1500 for clothing and expenses for a trip, \$300 for dental work, \$600 for an eye specialist, \$600 to repair and refurnish her home, plus the sum of \$300 per month. On the hearing of the petition, the trustee orally objected to the petition. The objection was overruled and the court granted the petition. No appeal was taken by the trustee from that order and the payment of \$300 per month has been made by the trustee to the beneficiary since that date.

On May 16, 1949, Mrs. Greenleaf filed her petition for instructions to the trustee to provide her with additional sums totaling \$4500 to renovate, paint and refurnish her home, to provide her with clothes and traveling expenses, and to provide her with a new automobile. Written objections were filed by the trustee and by ten of the twenty-two named distributees in the trust. The court granted petitioner's request in part and made its written findings and ordered the trustee to continue to pay to the beneficiary (now aged 77 years) \$300 per month, and in addition thereto to pay (a) for the installation of a shower in the home of the beneficiary; (b) for certain furniture and furnishings; (c) a sum not to exceed \$2500 for an automobile; and then provided that the trustee should retain title to the furniture and furnishings and the automobile as property of the trust.

Only the trustee appealed from this order, and contends that the court by such order erroneously superseded the exercise of the trustee's discretion allowed by the trust

since the trustee fixed the sum of \$200 per month as a proper allowance to the wife and no more.

At the hearing on the petition, petitioner testified that she needed the additional funds requested. The trustee showed that the remaining property in the trust consisted of a one-story business building in Santa Ana with a vacant lot adjoining it and it carried, on the books of the trustee, a valuation of \$50,000, in addition to cash not exceeding \$500. The property brought in a rental of \$400 a month under a lease expiring in 1952. The annual taxes on the property amounted to about \$1200, insurance \$188, trustee's fees \$375, and attorneys' fees in preparing annual account \$100. The total amount of annual expenditures of the trust estate, including the wife's allowance, amounts to about \$5600, and the receipts amount to about \$4800, leaving a deficit of about \$800. The trustee argues that to comply with the present order it would be compelled to sell the corpus of the trust or, if possible, obtain a loan upon it for that purpose. It is argued that it would be improbable that such a loan could be obtained by the bank due to the fact that the trust would be unable to repay the amount loaned under the present income.

After a visitation of the home of the widow and an inspection of the conditions under which she was living, the trial judge made the order above mentioned. The main argument of the appellant trustee is that under the trust, the trustee has the *discretion* to determine the amount of money to be paid the life beneficiary, subject to the standard imposed by the testator; that since the trustee, after considering the net income from the trust and the needs of the beneficiary, determined that \$200 per month was a sufficient amount to maintain her in accordance with the standards prescribed, the trial court had no authority or discretion to make additional allowance in the absence of any showing of an abuse of discretion on the part of the trustee, citing *Restatement of the Law of Trusts*, Sec. 187, p. 479; *Ellison v. Ellison*, Tex.Civ.App., 1942, 164 S.W.2d 775; *Atwood v. Kleberg*, 5 Cir., 163 F.2d 108; and *Hallinan v.*

Hearst, 133 Cal. 645, 66 P. 17, 55 L.R.A. 216.

It is also argued that the amount awarded by the court to the life beneficiary was unreasonable; that under the trust provisions of the will the testator had two purposes in mind; that one was the care of the life beneficiary and the other was to make a gift to his other heirs; that the trust gave an external standard that should be considered in determining the amount to be paid to the life beneficiary and accordingly the remainder should go to the heirs.

[1,2] Both counsel agree that the governing principle must be the intention of the settlor, which intention must be gathered from the general purpose and scope of the agreement, as indicated in *Title Insurance & Trust Co. v. Duffill*, 191 Cal. 629, 642, 218 P. 14. In that case it is stated that if there be any doubt or uncertainty in the trust it will be construed, if possible, in favor of the beneficiary and against the trustee. See, also, *Williams v. MacDougall*, 39 Cal. 80; and *In re Estate of Canfield*, 80 Cal.App.2d 443, 181 P.2d 732, where it is stated that the basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor.

The trustee also contends that there was no evidence or finding by the trial court that the trustee acted in bad faith or abused its discretion or that its decision was unreasonable; that to support the action of the trial court a finding would have to be made against the trustee on this issue; and also that the trial court erred in substituting its own judgment for that of the trustee, citing *In re Estate of Ferrall*, 92 Cal.App.2d 712, 207 P.2d 1077; and *In re Estate of Marre*, 18 Cal.2d 184, 114 P.2d 591.

[3,4] It is the general rule that if the power of the trustee is discretionary, and the trustee is fairly employing his judgment to advance or not to advance, the court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere. (Bogert on Trusts

& Trustees, Vol. 4, Part 1, pp. 168-169.) The court should not be burdened with the duty of administration, nor required, nor permitted to substitute its judgment and discretion for that of the trustee so long as it acts within proper limits; nor in any event until there is an entire failure or refusal on the part of the trustee to perform its duty. In *re Shea*, 234 App.Div. 176, 254 N.Y.S. 512; *Lyter v. Vestal*, 2 A.L.R. 2d 1406; *Moxley v. Title Insurance & Trust Co.*, 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838.

In reply to appellant's argument it is respondent's position that the declaration of trust did not give the trustee sole or absolute discretion to determine the amount to be paid the life beneficiary and accordingly the rule above mentioned had no application. The rule in this respect is concisely stated in *Lyter v. Vestal*, 355 Mo. 457, 196 S.W.2d 769, 2 A.L.R.2d 1395:

"Where the trust provision directs the trustee to disburse portions of the principal for a given purpose, the trustee's authority to pay is not discretionary, but is merely conditional upon the existence of a reasonable necessity for the disbursement to accomplish the purpose. Upon proof of such a necessity, a court will compel the trustee to make the disbursement, and usually will direct him as to the amount to be paid. The question of necessity, as well as what it calls for to comply with the condition, is a judicial question." See, also, *In re Martin's Will*, 1936, 269 N.Y. 305, 199 N.E. 491; *In re Downey's Will*, Sur., 87 N.Y.S.2d 60.

This contention calls for an interpretation of the provisions of the will in this respect. The petition for instructions to the trustee describes the property in the hands of the trustee, its income, and its value; alleges petitioner needs the items specified in addition to the amount received by her, and that petitioner "has made demand upon the trustee to exercise its discretion and to furnish her with the sums required by her; that said trustee has *refused* to so exercise its discretion and to furnish petitioner with any sums except on order of court." (Italics ours.) Petitioner then prays for an order to the

trustee to furnish her with the sums mentioned. The trustee replied and objected to the payment of any additional sums as requested. It alleges \$200 per month is a sufficient monthly allowance to provide amply for her support, comfort and needs, and asked that the petition be denied and that her allowance be reduced accordingly. By stipulation, petitioner's petition was amended to read:

"That petitioner has made demand upon the Trustee to exercise its discretion and to furnish her with the sums required by her; that said Trustee has refused to so exercise its discretion and to furnish petitioner with any sums except on order of Court."

After hearing, the court found this last allegation to be true; that under the provisions of the trust the trustee is "authorized and directed to use and apply sufficient of the income and principal of the trust property so that petitioner herein shall have sufficient money to provide her support, comfort and needs to the end that she shall be fully and properly cared for and provided for"; that the trustee "did not have absolute or sole discretion in providing for petitioner herein, and said trustee having failed to exercise its limited discretion as provided for in said trust", finds that the items allowed in the contested order should be paid from the trust funds, and "denied" the objections of the beneficiaries and the trustee.

The trust definitely provides that "If my said wife * * * by reason of sickness or other good cause, needs additional funds * * * in order to provide her with the proper care and comforts, then I *direct* my Trustee to use and apply sufficient of the income and principal * * * so that my said wife shall have sufficient money to provide for her support, comfort and needs to the end that she shall be fully and properly cared for and provided for." (Italics ours.)

[5-7] From an analysis of this provision it seems clear to us that if a good cause arose and the wife needed additional funds in order to provide her with proper care etc., it was a direction to the trustee

to provide said funds, and not a matter of discretion; that after demand was made therefor and the trustee failed or refused to act in this respect, the petitioner was authorized to call upon the court, and upon a proper showing, the court was authorized to direct the trustee to act accordingly. The trial court fully considered the evidence produced and made a determination in this respect, and there is no showing that it abused its discretion.

The trustee argues that this one provision of the will cannot be considered alone in determining whether the trustee was *directed* to so act or whether it had *discretion* in so acting, since there were other provisions of the trust which indicated that the trustee was to exercise its discretion in *all* matters in relation to the trust. It points out that by the first provision of the trust, the trustee is to have complete management and control of the property and its income, distribute it for the use of the beneficiaries named, and to sell and change the character of the property as to the trustee may seem wise. Then follows the statement: "The powers and discretions of the Trustee enumerated herein are not to be construed as a limitation upon his general powers and discretions, but the Trustee in addition thereto, is hereby vested with and shall have the full discretion of this trust as to the trust estate, the income therefrom, and in the execution of this trust, the same and all the powers and discretions that an absolute owner of the property has or might have." Then follows the provisions in respect to the care of the widow as above set forth.

The decree of distribution recites that "During the life of this trust, the net income derived from the trust * * * and all principal sums derived from the sale thereof, *shall* be paid and distributed as follows * * *." Then follows the same provision as is set forth in the will in respect to the widow's allowance pertaining to any additional amount required for her support and comfort.

[8] As to the general provisions of the trust in reference to the sale or disposition of the trust property, it appears that the trustee is vested with a wide discretion.

It does not definitely appear that the general grant of discretion applies to the particular clause here involved, which clause specifically *directs* the trustee to act. Under section 3534 of the Civil Code particular expressions qualify those which are general. (See, also, C.C.P. Sec. 1859.)

We conclude that the trial court was authorized to so construe this particular provision of the trust as a direction to the trustee and was authorized to find that the trustor did not intend by the general words used to confer sole or absolute discretion on the trustee in respect to providing for the life beneficiary.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



101 Cal.App.2d 500

PEOPLE v. KING et al.

Cr. 4476.

District Court of Appeal, Second District,
Division 3, California.

Dec. 28, 1950.

Hearing Denied Jan. 25, 1951.

James Patton King, Jr., and Richard B. Hamilton were convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of murders and robberies in the first degree and defendant Hamilton appealed. The District Court of Appeal, Wood, J., held that evidence sustained convictions.

Judgments affirmed.

1. Criminal law ☞260(11), 400(1)

In murder and robbery prosecutions, where original tape recordings of conversations between defendants while in jail were intentionally destroyed, admission of disc recordings made from tape recordings was error but in view of all evidence other than disc recordings, and fact that trial was without jury, error was not prejudicial.

2. Homicide ☞250

Robbery ☞24(1)

Evidence sustained defendant's convictions on charges of murder and robbery.

3. Criminal law ☞386

In murder and robbery prosecutions, admission of conversations between defendants in jail, as related by police officers who heard conversation by use of ear-phones, was proper.

4. Criminal law ☞417(1)

A witness may testify to part of a conversation if that is all that he heard and it appears to be intelligible.

5. Criminal law ☞317

Where there was evidence that first defendant was similar in appearance to man who was in grocery store at time of alleged murders and robbery and defendants' conversations related by police officers indicated that first defendant was there, fact that first defendant did not testify and deny his alleged participation in attempted robbery could be considered as tending to indicate that first defendant was an accomplice and as indicating that, inferences unfavorable to first defendant were more probable.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants were charged with crimes in six counts as follows: Count 1, the murder of Dorothy Greene; count 2, the murder of Jay Greene; count 3, attempted robbery of Dorothy and Jay Greene; counts 4, 5, and 6, robbery of three other persons. Defendant King pleaded guilty to all said charges and admitted that he was armed with a deadly weapon at the time of the commission of the offenses. Defendant Hamilton waived trial by jury. He was convicted of all said charges, and the murders and robberies were found to be of the first degree. He appeals from the judgment and the sentence. Since there were six judgments, it will be assumed that he appeals from all of them. He makes no contention on appeal with respect to the judgments as to counts 4, 5, and 6,—the robbery

counts. He contends that the evidence was not sufficient to support the judgments as to counts 1, 2, and 3,—the counts charging the murder of Dorothy and Jay Greene and the attempt to rob them.

On July 19, 1949, about 9:45 p.m., defendant King entered the grocery store and vegetable market of Dorothy and Jay Greene at 11119 Burbank Boulevard, North Hollywood. A clerk in that store testified that at said time he heard a person say, "Don't do it. I will give it to you"; then the clerk turned around and saw defendant King, with an automatic gun in his hand, standing by Mrs. Greene; King reached over the counter toward the cash register; Mrs. Greene bent down, and then he (clerk) heard a shot; King started to run from the store; then Mr. Greene came from the front of the store, and the clerk heard shots and saw Mr. Greene fall; King went "straight out front."

A customer, who was in the store at that time, testified that he saw King walking back and forth along the counter with a small automatic gun in his hand; Mrs. Greene said, "Don't do it. I will give it to you"; then she walked toward the cash register and said, "There it is, take it"; King said, "I said give it to me"; Mrs. Greene said, "All right, I will give it to you"; as she reached down under the counter, where she kept cash in a metal box, King shot her, and she never came up; then King shot Mr. Greene who was standing with his hands up; and King then left the store.

Mr. and Mrs. Greene died immediately after they were shot by King.

Mr. Smith testified that in the evening of said July 19th he was standing in front of his home at 11145 Burbank Boulevard waiting for his wife who had gone to a nearby ice cream place; while he was standing there he saw two men approach said market and stand on the sidewalk in front of the vegetable rack and look toward the inside of the market; there was a slight difference in their height; that one of the men was King; when Mrs. Smith returned, he and she walked up the driveway at their home and as he was entering the back door he heard a series of shots;

and he heard the shots about three minutes after he first noticed the two men.

Mrs. Atwood testified that she lived across the street from the market; on said July 19th, about 9:30 p.m., while she was in her house, she heard someone in that vicinity say, "I am going to let you have"; she went upon the front porch and then heard about five shots; after the shots she saw Mr. Greene fall and saw two fellows running toward a car at the side of the grocery store; one of the men was a little taller than the other one; and the defendants are similar in appearance to the two men who ran when Mr. Greene fell.

Mr. Harner testified that on and prior to July 19th King had some things stored in the garage at his (witness') home; that on July 20, 1949, about 11 a.m., he saw King and defendant Hamilton at his home and at that time King went into the house and Hamilton was in King's automobile.

Officer Bouey testified that on July 20, 1949, he and another officer were patrolling Griffith Park in a police radio car, and they stopped to investigate a parked automobile; he (witness) looked up on a hill and saw defendants standing in a group of trees; immediately after he saw them they (defendants) ran in different directions; then he and the officer who was with him drove up to the water tank and waited; King came toward them and they asked him where his friend was; King called Hamilton and then Hamilton came up; the defendants were taken to the parked automobile; he (witness) told King that he resembled the radio description of the person who had held up the grocery store in the valley the night before; King said he was not the one; he (witness) asked King if he had a police record, and King replied that he had a record.

Officer Stoner testified that on July 21st he and two other officers and King went to the garage at the home of Mr. Harner; King directed the officers to a canvas sack in which there were a .25 automatic gun, a .38 revolver, a box of .25 shells and some .38 shells; a loaded clip was in the .25 automatic; on July 22nd, about 10:30 a.m., King and five officers went to Griffith Park, and after searching among the trees they

found a bottle of gun oil and a clip for a .25 automatic; about 1 p.m. of said day the officers, King and Hamilton went to the same location in the park, where the gun oil and clip had been found, and King dug up a gun barrel.

Officer Uhde, a ballistics expert, testified that he fitted the gun barrel, which was found in the park, to the .25 automatic gun, which was found in the garage, and he fired test shots from that barrel; he compared the slugs which were taken from the bodies of Mr. and Mrs. Greene with the slugs used in the test shots and found that the slugs from the bodies were fired from that gun barrel; and he examined some empty shells, which were found at the scene of the murders, and found that this gun was used in firing them.

Officer Stoner testified further that on July 22nd he asked Hamilton, in the presence of other officers, what he had done on July 19th; he replied as follows: That he had been with King during the day and at 6:30 p.m. he had called his wife and made arrangements to meet her at the motorcycle races at Carrell's speedway; King had dropped him off on Western Avenue; he took the bus on Western Avenue and walked from Western to the speedway; he was unable to locate his wife during the races; he left during the last race, hitch-hiked home and was in bed when his wife arrived home at 11:30 p.m. He testified further that on July 23rd Hamilton said that, in going to the motorcycle races, he boarded the Western Avenue bus at Wilshire Boulevard; the main entrance to the speedway was on the east side and the pits were off the north end of the track. He testified that he then told Hamilton that the main entrance to the speedway was on the west side, and that the pits were in the center of the track.

The chief supervisor of the Los Angeles Transit Lines testified that in July, 1949, that company operated a bus south on Western Avenue to Imperial Highway (114th Street), but during that month no bus of that company, or of any company, ran south of Imperial Highway on Western Avenue.

Officer Von Platten testified that on July 22nd, in the presence of three other officers, he asked Hamilton what he did on July 19th; Hamilton stated he went job hunting on the morning and afternoon of that day with another man (not King); he left the man early in the evening and after 6:30 called his wife, with whom he had intended to go to the motorcycle races, and told her he would be unable to go with her but that he would take a bus and see her down there; he then boarded a bus at Beverly and Western Avenue; the bus went on Western to 179th or 180th Street where he got off the bus; he then walked about two blocks to Carrell's speedway; he entered the east gate and watched the races until intermission; he then searched for his wife but could not find her; he left the speedway about four races before the last event; he hitch-hiked to Vermont and Beverly Boulevard, and from there he went on a bus to Glendale Boulevard, and from there he went home on a street car; he had been in bed at his home about half an hour when his wife arrived home about 11:30 p.m.

Officer Von Platten testified further that about two weeks after July 19th he went on a bus from Beverly Boulevard and Western Avenue to the end of the line at Imperial Highway, which corresponds to 114th Street; there was no bus which went south on Western Avenue from Imperial Highway; then he went in the police car south on Western Avenue to 174th Street, then east on 174th Street to the speedway; and the main gate is on the west side of the stadium.

Officer Von Platten testified further that on July 22nd, about 4 p.m., he and another officer took Hamilton and King to a cell in the Chamber of Commerce Building (old sub-station of sheriff) in Tujunga; a microphone had been installed in the cell with a wire leading to the office of the Chamber of Commerce building; the wire was connected to a recording machine which had been installed in said office; the machine made recordings on a series of tapes; thereafter (on that day), over a period between three and four hours, conversations had in the cell between the defendants were

recorded on the tapes; the tapes were then taken from the machines, inserted in four boxes, each box was "labeled consecutively," and the label was "Hamilton and King 7-22-49, Tujunga" number 1, 2, 3 or 4; and the boxes were then taken by the witness to the valley detective division and placed in a closet.

Mr. Stanton, an employee of the police department, testified that he does all the recording work on confessions and installs dictaphones; he installed the recording system in said cell; he picked up a box of tape labeled "Hamilton and King 7-22-49," at the valley division, and took it to the crime laboratory; there were four tapes (each of which was 30 minutes long) and he transcribed them on two 16-inch discs, so that each side of each disc has on it all that was on one tape; he transcribed the tapes by "playing" each tape back on the original machine that it was made on and by fitting it into a disc recorder; the transcription is a mechanical operation which transforms one to the other exactly, and he did not put any sounds on the disc that were not on the tape and he did not omit from the disc anything that was already recorded on the tape; he heard the tape "played," and after the sound was transferred onto the disc, he heard the disc "played," and they were the same; the sound was erased from the tape; that "our original tapes are returned to stock and used over."

Officer Fuson testified that on July 22, 1949, in the said Chamber of Commerce building, he listened, by the use of earphones, to conversation between King and Hamilton that came directly from a microphone at a time when the conversation was being recorded on a tape recorder; he was able to understand clearly what he heard, and he heard the following conversation: King said, "I thought the gun was o.k. I forgot about the ejection marks." Hamilton said, "Did you take them to the gun." King said, "I thought the gun was o.k. The firing pin had been filed down and the barrel changed." Hamilton said, "Have you told them there were two of us yet?" King said, "I believe I did, Dick. I slipped or said something that I should

not have said earlier, and after that I kept referring to it as 'we'." King said, "There are a million guys that look like you and a good lawyer could beat an identification." Hamilton replied, "I wish I had one of those guys here."

Officer Ingham testified that on said July 22nd he listened to conversation of defendants, by use of earphones, while the conversation was being recorded on a recording machine; and he could understand most of the conversation; he heard the following conversation: Hamilton said, "Out at Gardena how far is it from Western to Vermont." King said, "It is about a mile or a little bit more or less." King asked Hamilton if he had walked from Western to Vermont, and Hamilton replied, "No." Hamilton said, "Do you know where Carrell Speedway is?" King replied that it is 179th and Vermont. Hamilton said, "Does the bus go that far?" King said, "No, I don't think it does." Hamilton said, "I have got to have it go that far" or "It better go that far." King said, "I didn't say anything to incriminate you." Hamilton said, "How did they know there was two that night?" King said, "Well, if they had asked me I would have told them that I drove the car."

Officer Von Platten also testified that he listened to conversations of defendants, by use of earphones, while the conversation was being recorded; he heard the following conversation: Hamilton said that on one occasion someone had searched his house thoroughly for a gun and had torn the house up looking for a Mauser. King said that the officers had found the gun, and that it was Paul's brother's gun. (Paul is J. Ratner, hereinafter referred to.) King said that he had told the officers that he had gone to Harner's house and changed the gun barrels. King said that he had already admitted guilt. Hamilton said, "How far down does the Western bus go?" Hamilton said, "I got to have it going that far."

J. Ratner, known as "Paul," testified that on several occasions in the summer of 1949, he let King have his brother's Mauser pistol for a few days; he also got a .25 Colt automatic gun for King in the summer

of 1949; he (witness) also had a .38 revolver (People's exhibit herein) in his room; he left his room unlocked most of the time; he was in jail on July 19, 1949, and when he returned to his room that gun was not there.

As above stated, Hamilton was convicted on counts 4, 5, and 6 (three robberies) but he makes no contention on appeal regarding them. Counts 4 and 5 pertain to the robbery of Sam and Lawrence Marino at a liquor store at 13507 Ventura Boulevard at noon on June 23, 1949. Defendants entered the store and King, with a gun in his hand, said to Lawrence, "This is a holdup, give me the money." Then Hamilton pointed a Mauser automatic at Sam and said, "This is a holdup. We want your money." Defendants obtained money from both victims. Count 6 pertains to the robbery of a Mr. Wallack at a market in Burbank about 10 a.m. on June 18, 1949. Defendants entered the store and Hamilton, with an automatic gun in his hand, said to a boy in the store, "Don't move, this is a holdup." King pointed a .25 automatic gun (People's exhibit) at Mr. Wallack and said, "This is a stick-up. Don't make a move or I will kill you." Hamilton took the money out of one register and King took it out of another register.

As above stated, King pleaded guilty to the six charges herein. For the purpose of showing that Hamilton was engaged in a scheme, plan and conspiracy with King to commit crimes, the district attorney presented evidence pertaining to a robbery which was not charged in the information herein. Mr. Melandri, a clerk in a liquor store, testified that in June, 1949, about 11 p.m., King was in the store with a pistol in his hand; King said, "Get back of the cash register;" Hamilton came in and took money from the cash register; King then ordered Hamilton to look for loot; Hamilton couldn't find anything, and they left the store; he (witness) saw them get in a car and drive away.

The two discs, hereinabove referred to, which purport to be a transcription of the four tape recordings, were offered in evidence by the People. Appellant objected to the offer upon the grounds that no

sufficient foundation had been laid, and that the discs were not the best evidence and were hearsay. The objections were overruled and the discs were received in evidence.

[1-5] Appellant's principal contention is that it was prejudicial error to receive the discs in evidence. As above stated, the original tapes were not produced in court, and the sound had been erased from them. Officer Stanton said, as above mentioned, that original tapes are returned to stock and used over. It appears that the original tape recordings herein were destroyed intentionally. The disc recordings were secondary evidence and, under the circumstances here, they should not have been received in evidence. The evidence was sufficient, however, regardless of the disc recordings, to support the judgments of conviction on the six counts. The evidence established that Hamilton and King conspired together to commit armed robberies. They committed the robberies of Sam Marino, Lawrence Marino, Edward Wallack (counts 4, 5, and 6), and Alexander Melandri in June, 1949. As to counts 1, 2, and 3 (the murders of Mr. and Mrs. Greene and the attempt to rob them), two men participated in committing those crimes, and one of the men was identified positively as King. There was evidence that Hamilton was similar in appearance to the man who was with King. On the morning of July 20, 1949 (the morning after the murders), Hamilton and King were together at Mr. Harner's house. Also on that day they were together in Griffith Park, and they ran away when they were observed by police officers. The gun barrel which was used in committing the murders was found in the park near the place from which Hamilton and King ran when the officers saw them together. Hamilton made false statements regarding his whereabouts on the night the murders were committed. The conversation between Hamilton and King in the jail, as related by the officers who heard the conversation by use of earphones, was properly received in evidence. "[A] witness may testify to part of a conversation if that is all that he heard and it appears to be intelligible." *People v. Adamson*, 27 Cal.2d 478, 485, 165

P.2d 3, 7. It could be inferred from such conversation, as related by the officers, that Hamilton was the man who was with King at the store of Mr. and Mrs. Greene. Whether or not Hamilton was at the store with King was a fact which was necessarily within Hamilton's knowledge. As above stated, there was evidence that Hamilton was similar in appearance to the man who was at the store with King, and the conversation related by the officers indicated that Hamilton was there. The fact that Hamilton did not testify and deny his alleged participation in the attempted robbery of Mr. and Mrs. Greene, which resulted in the murder of them by King, may be considered as tending to indicate the truth of the evidence that he was an accomplice in the commission of those crimes and as indicating that, among the inferences which may reasonably be drawn therefrom, those inferences unfavorable to Hamilton are the more probable. See *People v. Adamson*, 27 Cal.2d 478, 491, 165 P.2d 3. In view of all the evidence other than the disc recordings, the fact that the trial was without a jury, and the other circumstances above mentioned, it was not prejudicial error to receive the disc recordings in evidence.

The purported appeal from the sentences is dismissed. See *People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857. The judgments as to all six counts are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



101 Cal.App.2d 533

SOUSA v. FIRST CALIFORNIA CO.

Civ. 14484.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1950.

Hearing Denied Feb. 26, 1951.

Action by John R. Sousa against First California Company, a corporation, for breach of an alleged oral agreement to pur-

chase the capital stock of a corporation from the plaintiff. The Superior Court in and for the City and County of San Francisco, George W. Schonfeld, J., rendered a judgment on a verdict for the plaintiff, and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that where a buyer and seller enter into an oral agreement for sale of stock worth more than \$500, and a check representing a portion of the purchase price is placed in the hands of buyer's attorney to be delivered to seller on condition only that the contract be reduced to writing, and the buyer withdraws and refuses to sign, there is no part payment which will take the contract out of the statute providing that such a contract shall not be enforceable unless the buyer gives something in part payment.

Judgment reversed with instructions to enter judgment for the defendant.

1. Appeal and error ☞1078(1)

In action for breach of alleged oral agreement to purchase capital stock of corporation, allegations of complaint intended as basis of an estoppel to plead statute of frauds would not be considered on appeal after point was expressly withdrawn by plaintiff's attorney at trial and was not argued on appeal. Civ.Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

2. Appeal and error ☞930(1)

In action for breach of alleged oral agreement to purchase capital stock of corporation, where there was sharp conflict with respect to seller's claim that buyer had closed deal, and judgment was rendered on verdict for seller, verdict would be considered on appeal as implied acceptance of buyer's position.

3. Escrows ☞1

Instrument is "deposited in escrow" when in accordance with agreement to that effect it is deposited with third person to be delivered to other party to agreement on performance of specified condition. Civ. Code, § 1057.

See publication Words and Phrases, for other judicial constructions and definitions of "Deposited in Escrow".

4. Escrows ☞8(1)

Until specified condition of escrow agreement is fulfilled, escrow holder does

not hold as agent of seller alone but as agent or trustee for both parties, and his power to transfer and obtain title for each of them is limited by validly given instructions of both, and only after strict compliance with condition imposed can there be transfer of title and does escrow holder begin to hold for party thereby entitled.

5. Escrows ⚡9

Where prospective buyer of stock refuses to let seller have check to be given in part payment immediately, but places it in hands of buyer's director to be delivered to seller on condition that oral contract between them be reduced to writing and signed by principal parties, and contract is never reduced to writing, seller does not become entitled to check, and hence depository does not hold it for him. Civ. Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

6. Escrows ⚡9

Ordinarily, prevention of performance of condition of escrow agreement by promisor excuses condition, but there is an exception in case the preventing action is allowed under the contract.

7. Frauds, statute of ⚡143(1)

Oral contract under statute of frauds is voidable at election of either party. Civ. Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

8. Escrows ⚡9

Frauds, statute of ⚡95(1)

Where buyer and seller enter into oral agreement for purchase of stock worth more than \$500, and buyer refuses to let seller have check immediately but places it in hands of buyer's director to be delivered on condition that contract be reduced to writing, and condition is not fulfilled because seller refuses to reduce agreement to writing, oral agreement is voidable under the statute of frauds at election of seller, and hence withdrawal does not excuse condition of reduction of agreement to writing and does not cause transfer of the check. Civ.Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

9. Contracts ⚡280(1)

Payment ⚡1(1)

Performance of a contract may take place by delivery and acceptance of things of value other than money, but there is only "payment" when money or other things of value are given and accepted in discharge of obligation in whole or in part. Civ. Code, § 1478.

See publication Words and Phrases, for other judicial constructions and definitions of "Payment".

10. Statutes ⚡192

Where technical legal and common meaning of statutory term coincide, and there is no indication that Legislature intended a signification departing from both, court ought to adhere to common meaning.

11. Frauds, statute of ⚡95(1)

Under the statute providing that oral contract to sell choses in action worth \$500 or more shall not be enforceable by an action unless buyer shall give something in part "payment", quoted word does not include transactions which do not constitute a transfer discharging obligation in whole or in part. Civ.Code, §§ 1057, 1624a, 1724; Code Civ.Proc. § 1973a.

12. Frauds, statute of ⚡121

Purpose of statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable evidence of some writing signed by party to be charged. Civ.Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

13. Frauds, statute of ⚡95(1)

Rationale of statute of frauds permitting part payment to satisfy statute is that when overt act has taken place which presupposes that sale or agreement to sell has been concluded, danger of fraudulent invention and perjury is diminished. Civ. Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

14. Frauds, statute of ⚡94

In sales transaction, deposit is made merely as evidence that party intended in good faith to enter into contract upon terms agreed on thereafter.

15. Frauds, statute of §95(1)

Where seller of stock worth more than \$500 and underwriter make oral agreement for sale, and check consisting of part of purchase price is placed in hands of buyer's attorney-director to be delivered to seller on condition only that contract be reduced to writing signed by the two parties, and buyer thereafter withdraws and refuses to sign agreement, there is no "part payment" within meaning of the statute providing that contract to sell choses in action worth \$500 or more shall not be enforceable unless buyer gives something in "part payment". Civ.Code, §§ 1624a, 1724; Code Civ.Proc. § 1973a.

Bronson, Bronson & McKinnon, San Francisco, for appellant.

Thomas, Beedy, Nelson & King, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by defendant from a judgment on a verdict granting plaintiff \$35,000 damages for the breach by defendant of an alleged oral agreement to purchase from plaintiff all the capital stock of Pacific Box Company, a California corporation, for \$550,000.

[1] Evidently to show satisfaction of the statute of frauds, § 4 of the Uniform Sales Act adopted into our law in §§ 1724 and 1624a, Civil Code and § 1973a of the Code of Civil Procedure, the complaint alleges that pursuant to the oral agreement defendants deposited in escrow the sum of \$25,000 "for and on account of said purchase price." Further allegations of the complaint intended as basis of an estoppel to plead the statute have lost relevancy because at the trial the point with respect to estoppel was expressly withdrawn by plaintiff's attorney and no estoppel is argued on appeal.

Appellant urges that as a matter of law the negotiations of the parties had not yet resulted in an oral agreement; that even if such agreement had been concluded it would be unenforceable under the statute of frauds; that no contract with plaintiff

alone, who owned only part of the stock of Pacific Box Company was proved but, if any, a contract in behalf of all four stockholders of said company whereas there was no written authorization of plaintiff to act for the other three, and finally that there was no proof of damage.

[2] On May 17, 1946, a conference of the parties and their attorneys was held in which were present among others the plaintiff, his attorney, Mr. John B. King, Mr. H. Th. Birr, Jr., executive vice-president of defendant, Mr. Roy A. Bronson, a director and attorney of defendant, and Mr. Harold R. McKinnon, another member of the attorney's firm representing defendant. The conference was held in the offices of said firm. Defendant, whose business is the underwriting of security issues, had for some time prior to the above date been negotiating the acquisition of all the stock of Pacific Box Company for the purpose of bringing it on the market. Plaintiff was president of that company and one of its four stockholders; plaintiff and a partnership of which he was a partner owned the two large holdings, and two friends personally connected with the business of the company owned the small ones. Defendant's representatives and auditors had been investigating the business of Pacific Box Company in detail and an offer to sell at the price of \$550,000 had been made by plaintiff. Meanwhile plaintiff had become interested in the purchase for Pacific Box Company of certain interests in Canada which would provide it with an additional source of supply of lumber. When a few days earlier plaintiff had asked defendant's intention as to both transactions the answer had been in substance that defendant intended to proceed with the purchase of the Pacific Box stock but was not interested in the Canadian transaction. In the conference of May 17, 1946, agreement was reached as to the principle that if the assets of Pacific Box Company on May 31, 1946, would be below a certain level agreed upon (there is some discrepancy in the evidence as to the description of that level) the price of \$550,000 would be adjusted downward accordingly and that seller (or sellers) would assume responsibility for any

undisclosed liabilities or additional tax assessments. Then plaintiff declared that he wished a decision as to the definitive character of the agreement because he had to decide on the Canadian transaction by that same evening and wished to accept it if defendant would not take over the Pacific Box Company stock. Until this point there is little essential conflict in the evidence. However with respect to the answer then given by the representatives of defendant the conflict is as sharp as possible; plaintiff and his attorney testified that Mr. Birr and one of his attorneys declared it was a deal, an agreement, whereas the representatives and attorneys of defendant testified that the answer given was that there could not be a definitive deal so long as there was no written contract containing also provisions with respect to different points not yet agreed upon. (Defendant mentions as such the manner in which the assets would be evaluated, the warranties to be given by sellers, the changing of the capital set-up of the corporation so as to provide for a large number of marketable low priced shares and the obtaining of permits from the commissioner of corporations for the sale of said shares to the public.) However the verdict must be considered as an implied acceptance of the position of plaintiff in this respect.

At any rate it was agreed that the attorneys of defendant would draft a written contract to be signed by the parties, which would not be ready the same day. Plaintiff then demanded a part payment on the purchase price and told Mr. Birr, according to plaintiff's testimony that he "had to have some tangible evidence that they were actually sincere in their desire to buy * * *." Mr. Birr and his attorneys objected but when plaintiff insisted they finally obtained from defendant's office a check for twenty-five thousand dollars to the order of plaintiff. Plaintiff testified about what happened then substantially as follows: The check was laid on Mr. Roy Bronson's desk. I asked about paying the check to me. "Mr. Birr and Mr. McKinnon both objected at the time to releasing the check * * *. I suggested inasmuch as Mr. Roy Bronson was not very active

in all these discussions, if they did not want to release the check to me without any agreement at that time, it be left in Mr. Roy Bronson's possession * * * [u]ntil the agreement Mr. Birr and Mr. Mason [read Mr. McKinnon] promised was to be completed in 24 hours was reduced to writing." Defendant introduced in evidence a letter dated May 17, 1946, from defendant to Mr. Roy Bronson, instructing him to deliver the check to plaintiff if and when a contract for the purchase of the Pacific Box Company stock would be entered into and to return the check to defendant if said agreement would not be executed before May 25, 1946, on which letter Mr. Roy Bronson acknowledged receipt of the check under the same date. The witnesses for defendant testified that said exhibit was dictated and signed in the conference but plaintiff and his attorney testified that such had not taken place in their presence and that its content was unknown to them. No escrow instructions in writing were given by plaintiff.

A few days after the conference, before a draft contract was submitted, defendant withdrew from the transaction. Plaintiff did not institute any action against Mr. Roy Bronson for the delivery of the check, but brought this action against First California Company originally for the full purchase price of \$550,000, later amended to a lower amount of damages.

On the basis of the above facts the judgment cannot be sustained. Even if we assume in support of the verdict, without so deciding, that there was substantial evidence, that in the conference of May 17, 1946, the parties reached an oral agreement as to the stock to be sold and the price to be paid for it, that they at the same time expressly stated their intention that the oral agreement would be definitive, notwithstanding the fact that a written agreement containing more detail would be prepared by the attorneys and signed, that said oral agreement was not so uncertain or incomplete as to make it necessarily invalid contrary to the expressed intention of the parties, and that plaintiff concluded said agreement solely in his own name as alleged (relying on his capacity to dispose

also of the part of the stock not owned by him), then still the agreement would be unenforceable under the statute of frauds as cited before, which reads in part: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall * * * give something in earnest to bind the contract, or in part payment * * *."

It is solely on this part payment clause that respondent relies to show satisfaction of the statute. Appellant contests the applicability of that clause not on the ground that a check does not constitute part payment but on the ground that the check was not given to or received by plaintiff. Plaintiff demanded part payment, but obtained a deposit in escrow which, as will be shown, is not part payment under the statute.

[3, 4] An instrument is "deposited in escrow" when in accordance with an agreement to that effect it is deposited with a third person to be delivered to the other party to the agreement on the performance of a specified condition. § 1057, Civil Code; *Cannon v. Handlĕy*, 72 Cal. 133, 140, 13 P. 315; *Bailey v. Security Trust Co.*, 179 Cal. 540, 548, 177 P. 444. Until that condition is fulfilled the escrow holder does not hold as agent of the vendor alone but as agent or trustee for both parties and his power to transfer and obtain title for each of them is limited by the validly given instructions of both. *McDonald v. Huff*, 77 Cal. 279, 282, 19 P. 499; *Shreeves v. Pearson*, 194 Cal. 699, 707, 230 P. 448. Only after strict compliance with the condition imposed can there be transfer of title and does the escrow holder begin to hold for the party thereby entitled. *Los Angeles High School Dist. v. Quinn*, 195 Cal. 377, 383, 234 P. 313; *Promis v. Duke*, 208 Cal. 420, 425, 281 P. 613; *Shreeves v. Pearson*, supra. A recognized exception to the preceding rules in case of an escrow until an event certain to occur like the death of the grantor, see *Whitney v. Sherman*, 178 Cal. 435, 438, 173 P. 931, is not involved here.

[5-8] That what occurred in this case was such an escrow is shown not only by

the express allegation to that effect in the complaint but also by plaintiff's quoted testimony as to the circumstances under which the check was given to Mr. Bronson. Because defendant refused to let plaintiff have the check immediately, it was placed in the hands of Mr. Bronson to be delivered to plaintiff on the condition only that the contract would be reduced to writing, i. e., that a contract in writing between the two principal parties would be signed. That condition was not fulfilled and therefore plaintiff did not become entitled to the check and the depository did not hold the check for him. Neither can it be said that the condition was excused and that the transfer of the check to plaintiff became effective because defendant prevented its occurrence by withdrawing from the contract. To the rule that prevention by the promisor excuses the condition there is an exception in case the preventing action is allowed under the contract. *Reinstatement Contracts* § 295; 3 *Williston on Contracts*, § 677, p. 1956. An oral contract under the statute of frauds is voidable at the election of either party. *Dessert Seed Co. v. Garbus*, 66 Cal.App.2d 838, 844, 153 P.2d 184. Each party to such an agreement accepts the risk that the other party withdraws. Therefore, the withdrawal was permitted, did not excuse the condition of reduction of the agreement to writing and did not cause transfer of the check.

Plaintiff's further attitude shows recognition of the above conclusions. He did not bring action against Mr. Roy Bronson as his agent for delivery of the check; he did not credit the amount of the check on the purchase price when he sued defendant for that full purchase price and there is no evidence or contention that the amount of the check was ever credited to defendant on plaintiff's books. Compare *Rabe v. Danaher*, D.C., 51 F.2d 777, 778.

[9] Can it be said that there was part payment which took the oral contract out of the statute notwithstanding the fact that no title to the check or to anything else passed to plaintiff? Payment is the performance of an obligation for the delivery of money, § 1478, Civil Code. The per-

formance may take place by the delivery and acceptance of other things of value instead of money, but there is only payment when the money or other things of value are given and accepted in discharge of the obligation in whole or in part. *Borland v. Nevada Bank*, 99 Cal. 89, 95-96, 33 P. 737; *Low v. Warden*, 77 Cal. 94, 99, 19 P. 235.

[10,11] An inspection of the principal dictionaries shows that the general meaning of "payment" is the same as the above legal meaning: the discharge of an obligation or the giving of compensation. Where the technical legal meaning and the common meaning of the term used coincide and there is no indication that the legislature intended a signification departing from both, the court ought to adhere to such meaning. We therefore cannot include in the meaning of payment satisfying the statute transactions which do not constitute a transfer discharging the obligation in whole or in part. Accordingly the two legal encyclopedias, 37 C.J.S., *Frauds*, Statute of, § 165, page 645; 49 Am.Jur. 583, both require that to constitute a payment as earnest or a part payment there must be an actual transfer to and acceptance by the seller of something of value as part of the price. The citation from *Corpus Juris Secundum* contains also the statement: " * * * a deposit of money with another to be paid over on delivery of the goods, does not constitute part payment." In *Leonard v. Roth*, 164 Mich. 646, 130 N.W. 208, the authority cited for the latter statement, a purchaser of stock, which at the time was collateral for an indebtedness of seller to a third party and the title of which was disputed, gave \$600 to the attorney of seller to be used to free the stock and to be paid out only on its delivery; in the meantime purchaser would receive interest on the deposit; a later agreement required the attorney to deposit the money in a bank and entitled purchaser to return of the money at his option if the stock was not delivered within six months. The court said, 130 N.W. at page 211: "We do not regard the transaction with reference to the \$600 as establishing a payment within the meaning of the statute of frauds. The pay-

ment required by the statute is the usual payment, as the term is commonly understood, whereby the vendee unconditionally transfers money or property to the vendor which the vendor unconditionally accepts in discharge, *pro tanto*, of the purchase price."

Respondent's contention that the above interpretation of the part payment clause is not supported by the authorities is without merit. The interpretation conforms to the normal construction of statutory language and finds support in the many cases which, although not directly in point here, refuse to broaden the interpretation of the part payment clause. See for instance: *Stockhammer v. Stevens*, Sup., 56 N.Y.S. 2d 266; *Orr v. Hall*, 75 Neb. 548, 106 N.W. 656; *Baltzen v. Nicolay*, 53 N.Y. 467, 471; *Behnke v. Bede Shipping Co.* (1927) 1 K.B. 649, 659; *Barnsdall State Bank v. Dykes*, D.C., 26 F.2d 696; *Anchor Trading Corp. v. Joseph T. Ryerson & Son*, 272 App. Div. 170, 69 N.Y.S.2d 844, affirmed 297 N.Y. 817, 78 N.E.2d 611; *Clinton Paper Co. v. Mills Paper Co.*, Sup., 83 N.Y.S.2d 875; *Michelin Tire Co. v. Williams*, 125 Or. 689, 268 P. 56; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 P. 1158, 51 L.R.A., N.S., 398; *Patterson v. Beard*, 227 Iowa 401, 288 N.W. 414, 125 A.L.R. 393; *Cassidy v. Kraft-Phenix Cheese Corporation*, 285 Mich. 426, 280 N.W. 814, 817, containing our quotation from *Leonard v. Roth*, supra, and the many cases which hold that the giving of a check only satisfies the statute if it is accepted unconditionally as constituting payment. See Ann. 8 A.L.R.2d 251, 254-58.

The only authority cited by respondent for a broader interpretation of the part payment clause is *Charles R. Ablett Co. v. Sencer*, 130 Misc. 416, 224 N.Y.S. 251, in which case it was held that the giving by buyer of a check for the full purchase price, for which he received seller's receipted bill, was payment taking the oral contract out of the statute, notwithstanding the fact that the buyer stopped payment on the check, the court stating, 224 N.Y.S. at page 255: "It is objected that a draft or check of a debtor is only conditional payment, and not satisfaction of the debt for

which it is given, in the absence of some agreement to the contrary. That, it is submitted, has nothing to do with the application of the statute of frauds. The statute is not concerned with the legal effect of the payment; it says nothing about the payment being in satisfaction, wholly or in part, of the vendor's claim. The purpose of the statute is fully satisfied by the physical delivery of the instrument, the overt act indicating that there was a bargain between the parties." Although there is more good authority that the giving of a check satisfies the statute even if it is taken in conditional payment (See § 205, Restatement Contracts, Illustration 1), the above reasoning of *Charles R. Ablett Co. v. Sencer* is nowhere followed and we do not accept it. I Williston on Sales, p. 242, gives the following better reasoning which does not require an unduly broad interpretation of the meaning of "payment": "The condition of non payment is best regarded as subsequent. From the time the instrument is received the recipient has absolute control of it, may use it as he pleases and, aside from the Statute of Frauds, cannot rescind the transaction if the instrument is not fraudulent and has not been dishonored. Consequently if the instrument is not fraudulent the seller should be regarded as having received payment, with a right to renounce it on a possible later contingency." The majority view however is still that the giving of a check only satisfies the statute if it is accepted as unconditional payment. See Annotation 8 A.L.R.2d 251, 254-58, *supra*. Obviously even a reasoning analogous to the one of Williston can not be applied in our case because plaintiff never obtained possession of or title to the check.

[12-14] Even if an interpretation of payment in satisfaction of the statute wider than the normal legal import of the term were permitted under certain circumstances—quod non—there would be no rational ground to apply it here. Purpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable evidence of some writing signed by

the party to be charged, *Sherwood v. Lowell*, 34 Cal.App. 365, 375, 167 P. 554; 37 C. J.S., Frauds, Statute of, § 1 page 513. The rationale of the provision permitting part payment to satisfy the statute is that when an overt act has taken place which presupposes that a sale or agreement to sell has been concluded the danger of fraudulent invention and perjury is diminished. The deposit in escrow here offered as such overt act need not necessarily be preceded by the conclusion of an agreement to sell or sale. A deposit is also made "merely as evidence that a party intended in good faith to enter into a contract upon terms to be agreed on thereafter", *Karp v. R. Ritter & Co.*, 110 Misc. 668, 180 N.Y.S. 769, 770, or as plaintiff expressed it as "evidence that they were actually sincere in their desire to buy." That a definitive oral agreement had been arrived at remained supported solely by the oral testimony of plaintiff and his attorney. Although the proof of actual part payment must sometimes also rest in parol there can be no good reason to extend the part payment provision by artificial construction to transactions which do not provide any of the protection which is the purpose of the statute. Compare *Mahoney Bros. v. Hansen Packing Co.*, 67 Mont. 120, 215 P. 506, 508.

Finally, we wish to mention a case which superficially might seem to be in conflict with *Leonard v. Roth*, *supra*, and to support the position of respondent. In *Alexander v. Moore*, 19 Mo. 143, it was held that when a firm which had bought cattle orally deposited money with a third party to be delivered to seller provided he deliver the cattle to buyer within a stated time and otherwise to be returned to purchaser and seller timely tendered the cattle to buyer but purchaser refused to accept it the statute was satisfied by part payment. No reasoning is given, the court being only concerned with the circumstance that in the escrow instruction the name of seller was incorrectly stated. However, the result may possibly be explained by holding that the condition was fulfilled by seller's tender and that thereafter the depository held for him. Compare *Gambrell v. Tatum*, Tex. Civ.App., 228 S.W. 287, 290.

[15] We conclude that as a matter of law there was here no part payment satisfying the statute.

Nowadays earnest and part payment are regarded as having the same meaning, 37 C.J.S., Frauds, Statute of, § 162, page 643; 49 Am.Jur. 583; 1 Williston on Sales, § 97, Note 19, the former meaning as something given to bind the bargain and not to be applied on the purchase price having become obsolete. It is not contended that any such obsolete transaction has taken place in this case.

The judgment is reversed with instructions to the trial court to enter judgment for defendant.

DOOLING, J., concurs.

Hearing denied; CARTER, J., dissenting.



101 Cal.App.2d 579

**LLOYD v. FIRST NAT. TRUST & SAV.
BANK OF FULLERTON et al.**

Civ. 4138.

District Court of Appeal, Fourth District,
California.

Jan. 3, 1951.

Action for declaration of rights by Hubert B. Lloyd, individually and as administrator of the estate of Mrs. J. A. Lloyd, against the First National Trust and Savings Bank of Fullerton, Charles Tuffree, and others. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered judgment and plaintiff appealed. The District Court of Appeal, Griffin, J., held that under will bequeathing land to tenant's sister as long as sister should live and providing that at sister's death the income should go to remainderman, tenant intended that on sister's death the land and income should go to remainderman, and hence income derived from orange crop after crop's maturity and after life tenant's death vested in remainderman, and life tenant's estate was entitled to be reimbursed for money paid

for care of orchard prior to life tenant's death.

Judgment affirmed.

1. Executors and administrators ⇨315(5)

While the will cannot be looked to in order to impeach a decree of distribution, once a decree has become final, it is the law that if a decree is uncertain, vague or ambiguous, the will may be used to resolve such uncertainty or ambiguity. Probate Code, § 1021.

2. Crops ⇨1

At common law, annual crops did not include fruit grown on trees.

3. Life estates ⇨15(1)

Wills ⇨684(2)

A controversy concerning distribution of income between parties entitled to income and to corpus of estate should be decided with a view to the intention of the grantor or testator as disclosed by the language of the deed or will, interpreted in the light of the circumstances which show the quantum or amount of benefit intended to be conferred upon the life beneficiary and the remainderman respectively.

4. Wills ⇨684(7)

Under will bequeathing land to tenant's sister as long as sister should live and providing that at sister's death the income should go to remainderman, tenant intended that on sister's death the land and income should go to remainderman, and hence income derived from orange crop after crop's maturity and after life tenant's death vested in remainderman, and life tenant's estate was entitled to be reimbursed for money paid for care of orchard prior to life tenant's death. Probate Code, § 1190.

—◆—
Forgy, Reinhaus & Forgy, Santa Ana, for appellant.

McFadden, Turner & Owens, Anaheim, Head, Jacobs & Corfman, Santa Ana, for respondents.

GRIFFIN, Justice.

Action for declaration of rights. This is a dispute between plaintiff Hubert B. Lloyd,

as administrator of the estate of Mrs. J. A. Lloyd, and defendant Charles Tuffree. In 1912, Mrs. Lloyd was given a life estate in 30 acres of land, by will, with the remainder on her death to Tuffree. Subsequently, she planted the land to Valencia Orange trees. In January, 1931, she conveyed to the defendant First National Trust and Savings Bank of Fullerton, in trust, the life estate in the 30 acres, under which trust the plaintiff, Hubert B. Lloyd, individually, and his mother, Mrs. Lloyd, who died February 14, 1948, were beneficiaries. The bank arranged for the care of the grove and collected the income therefrom, with the exception of the 1947-48 crop of oranges.

The position of plaintiff is that at the time of the death of the life tenant the 1947-48 crop of oranges was a "made" crop on which no further work was necessary to bring it to maturity. The 1947-48 orange crop blossomed, or was "set" about April, 1947, and matured about May 15, 1948, but was not picked and sold by Tuffree until the months of July and September, 1948. The net proceeds were \$12,586.56. Plaintiff claims these proceeds as administrator for the estate of the life tenant. Tuffree claims them as remainderman. Defendant bank claims \$1894.25 for reimbursement from the proceeds for money expended by it, as trustee under the trust, for the care and maintenance of the orchard until the date of Mrs. Lloyd's death.

The trial court found generally that decedent Charles P. Tuffree executed a will in 1909 which recites in part: "I also leave my 14 shares of water stock and my 30 acres of land to Mrs. J. A. Lloyd (his sister) as long as she lives and at her death the income to go to * * * J. S. Tuffree * * *"; that by a decree of distribution in his estate dated in 1912, there was distributed to Mrs. Lloyd the described land, for life, the remainder to vest in defendant Tuffree; that in a proceeding dated March 5, 1948, under sec. 1190 of the Probate Code, it was decreed that title to said *real property* vested in Charles Tuffree; that subsequently, plaintiff was appointed administrator of his mother's estate; that the trustee collected all income from said

property except the amount herein involved; that it charged the estate with \$1894.25 for money it spent in raising and growing a crop up until the time of Mrs. Lloyd's death; that thereafter, neither the trustee nor plaintiff administrator, in any capacity, spent any time or money on the crops or in relation to the property; that after Mrs. Lloyd's death plaintiff advised defendant Tuffree that the care of the orchard was defendant Tuffree's obligation "thenceforth"; and that Tuffree then entered upon the premises and spent money and time in bringing the crop to healthy maturity in order that it might be harvested.

As to the facts found there is little dispute. It is sufficient to say the evidence fully supports the findings above mentioned. The main objection is that the findings do not support the conclusion reached therefrom and the judgment resulting. The court concluded that the will explained the decree of distribution in the Charles P. Tuffree estate and did not impeach it; that the will bars plaintiff administrator from claiming the *income* from the property after the death of Mrs. Lloyd; that since the 1947-48 crop of oranges did not become *income* until after her death, plaintiff was not entitled to such income, and that defendant Tuffree was entitled to all funds derived from the sale of that crop, subject to the payment by the said defendant to the administrator of the charges of \$1894.25 made against the estate by the trustee in growing and caring for the crop prior to Mrs. Lloyd's death. Judgment was entered accordingly.

It should be here noted that the will provides that the deceased leaves "30 acres of land" to Mrs. Lloyd, as long as she lives and at her death the "*income to go to*" Tuffree. The decree of distribution does not specifically mention the income from the property, but distributes "said property both real and personal" to her for life, and the remainder shall vest in Tuffree upon the termination of the life estate.

[1] It is first argued that the terms of the will of Charles P. Tuffree, deceased, could not be considered in determining the intent of the testator in reference to the *income* of the property even though the state-

ment therein, in this respect, was not in accord with the language of the decree of distribution; that such decree is conclusive as to the rights of all devisees under the will, and that the terms of the will cannot be used to impeach the terms of the decree, citing sec. 1021 of the Probate Code and such cases as *Luscomb v. Fintzelberg*, 162 Cal. 433, 438, 123 P. 247; and *Estate of Gardiner*, 45 Cal.App.2d 559, 114 P.2d 643. This general statement is true as a proposition of law. While the will cannot be looked to in order to impeach a decree of distribution, once a decree has become final, it is the law that if a decree is uncertain, vague or ambiguous, the will may be used to resolve such uncertainty or ambiguity. *Estate of Wallace*, 98 Cal.App.2d 285, 219 P.2d 910; *In re Ewer's Will*, 177 Cal. 660, 662, 171 P. 683.

The general rule is stated in 22 Cal.Jur. pp. 811-812, § 15, to be that at the termination of the primary or preceding estate, the taker of the future estate becomes entitled to possession and enjoyment of the property, in accordance with the terms of the instrument by which it is created or limited. Unless a contrary intention is expressed by the deed or will, all such profits and produce as are within the definition of "emblems" pass to the representatives of the life tenant.

Where the taker of the primary estate is entitled to the income of property, it is sometimes a difficult question to determine whether certain funds belong to him or to the remainderman. No subject has been more prolific of controversy or productive of more divergent judicial opinions than that of the distribution of revenue of trust property between the parties entitled to the income and the corpus of the estate. *Estate of Gartenlaub's Estate*, 185 Cal. 375, 379, 197 P. 90, 24 A.L.R. 1.

In 31 C.J.S. Estates § 40, p. 47, it is said: "A tenant for life, or his legal representative, is entitled to emblements, that is, the crops planted by him prior to the termination of the life estate, in all cases where the life estate is terminated by the act of God, as by the death of the tenant, * * *" and "The right to emblements carries with it a right of ingress and egress to preserve

the crop and gather it and carry it away." It is likewise stated 31 C.J.S. § 41 that "In general a life tenant is entitled to everything in the nature of income or profits accruing during the continuance of the life estate", in the absence of any limitation or restriction thereof, and at his death it passes to his representative.

Plaintiff cites Lord Coke [1 Co. Litt. 55b], as stating that under the common law, the estate of a life tenant sowing a crop and dying before its maturity was entitled to the crop under the doctrine of right of emblements, which allowed one who held agricultural lands for an uncertain period, upon its termination, to harvest and take therefrom any annual crop which he had sown prior to such termination. The reason for the rule thus stated is set forth by Blackstone (2 Blackstone's Com. 122, 1 Cooley's Ed. p. 528) under the theory that the representatives of the tenant for life shall have the emblements to compensate for the labor and expenses of tilling, manuring, and sowing of the lands; and also for the encouragement of husbandry which, being a public benefit, tending to increase the provisions, ought to have the utmost security and benefit the law can give it.

[2] At common law annual crops did not include fruit grown on trees. (See Restatement of the Law of Property, Sec. 121f, p. 382.) It is plaintiff's position that the common-law rule has been modified pertaining to fruit grown on trees because, for income tax purposes, where citrus groves are sold with fruit on the trees, a portion of the sales price must be allocated to the fruit and the balance to the land and trees; that gain from the sale of the fruit constitutes ordinary income; that a crop of oranges is separate and distinct from the real property on which it is produced; and that under the decisions in *Blaeholder v. Guthrie*, 17 Cal.App. 297, 119 P. 524; and *Vallejo and Northern R. R. Co. v. Reed Orchard Co.*, 32 Cal.App. 347, 162 P. 914, fruit has been said to be within the rule as to emblements. See, also, *California Employment Commission v. Kovacevich*, 27 Cal.2d 546, 165 P.2d 917; *Story v. Christin*, 14 Cal.2d 592, 595, 95 P.2d 925, 125 A.L.R. 1402.

In *Blaeholder v. Guthrie*, 17 Cal.App. 297, 19 P. 524, an orange and walnut crop grown during the period the life tenant was alive was held to be governed by the doctrine of emblements, but in that case all work had been done upon the crop for that year, the fruit had *matured* and was ready to pick at the time of the death of the life tenant.

In *Smith v. Baker*, 95 Cal.App.2d 877, 214 P.2d 94, this court held that growing crops (lettuce) are subject to absolute sale and are subject to reservation on the sale of the land and if it be intended that such growing crops were to be forfeited on expiration of the leasehold period it must affirmatively appear that such a forfeiture was clearly intended.

If the doctrine of emblements were applied to fruit on trees, under all conditions, a life tenant's estate would have a claim from the moment the fruit is set, even though the fruit did not mature and was not picked until 14 or 15 months after the death of the life tenant and even though all labor had been performed by the remainderman.

According to some authorities, intention has been declared the criterion in deciding whether fruit of trees and perennial roots should be included within the doctrine of emblements, and it has been held that if the trees, bushes or vines require only one planting and will bear successive annual crops, the produce goes to the betterment of the land and will be classed with *fructus naturales*, and the right of emblements will not attach. *Sparrow v. Pond*, 49 Minn. 412, 52 N.W. 36, 16 L.R.A. 103; 15 Am.Jur. Sec. 4, p. 198.

In the situations where the application of the doctrine of emblements is sought to be applied to fruit grown on trees the cases have not drawn an exact line of demarcation as to where the doctrine will apply. It was held in *Blaeholder v. Guthrie*, supra, that if the fruit is mature at the termination of the estate, the doctrine should be applied.

[3] In the instant case, regardless of the nature of the growing crop on the trees

and whether the doctrine here applies, another rule comes into consideration, i. e., the intention expressed in the instrument creating the life estate and vesting the remaining interest in the remainderman. The rule in this state, as stated in 22 Cal. Jur. p. 812, § 15, is that such a controversy is to be decided with a view to the intention of the grantor or testator as disclosed by the language of the deed or will, interpreted in the light of the circumstances which show the quantum or amount of benefit intended to be conferred upon the life beneficiary and the remainderman, respectively.

[4] Under this rule and the authorities heretofore cited, the trial court was justified in finding that it was the intention of the testator who created the life estate that not only the "30 acres of land" and its "income" should go to Mrs. Lloyd, as long as she lived, but that upon her death the land, as well as the "income" therefrom, should go to defendant Charles Tuffree. The decree of distribution here involved is not repugnant to this finding. In its several provisions it distributes "A life estate in all of said property * * * to be held by her (Mrs. Lloyd) for and during her natural life * * *. Said estate in remainder shall vest upon the termination of the * * * life estate * * *." There was no "income" from the property during the year 1947-48 until the mature crop was sold in July and September, 1948. Therefore, under the terms of the will, construed in connection with the decree of distribution, such "income" derived from the crop after its maturity and after the life tenant's death, materialized and came into existence, and accordingly, vested in the remainderman. 125 A.L.R. Annotated, 285; see, also, *Wilhoit v. Salmon*, 146 Cal. 444, 80 P. 705. There a grantor reserved a life estate in herself and by deed granted the remainder in certain real property to her son and daughter. The deed contained the clause: "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and

profits thereof." After leasing the property the grantor (life tenant) died and the proceeds from the crops growing at the time of her death were claimed as rent by the executor of the grantor's estate as emblements against the grantees. The court there said: "We must look to it (the deed) to ascertain whether, by its terms, she intended to divest the life estate she reserved of its common-law incident as to emblements. * * * If she saw fit by the terms of her deed to cut off the common-law incidents of a life estate—the right to emblements—by words clearly having that effect and operation, that was her right. And this is what, by the express terms of her deed, she did."

Judgment was then given in favor of the grantee remainderman.

The finding of the trial court in the instant case is fortified by the apparent construction placed upon the terms of the will by the parties themselves. Plaintiff Hubert B. Lloyd had apparently been assisting the bank in the operation of the grove prior to the death of the life tenant, and had been having some difficulty in producing satisfactory income from it. The day of Mrs. Lloyd's funeral plaintiff approached defendant Tuffree and said: "Well, it (the grove) is your baby now; it has been a headache to me". Defendant immediately went into possession, cultivated and cared for the trees and crop, and it was not until some time after the sale of the fruit that any claim was made by plaintiff that the estate was entitled to any portion of the proceeds.

There is some dissention in the briefs between counsel as to whether the cultivation, irrigation, and care of the grove benefited only the trees or whether they benefited only the 1947-48 growing crop. To decide this argument would be like determining which came first, the hen or the egg. The trial court, in the exercise of its general powers, properly held that the crop was benefited by the care given to it by the trustee and that accordingly the estate was entitled to be reimbursed in the sum of \$1894.25 for money paid by it to the trustee for the care of the orchard for the period

in question. The findings fully support the conclusions and judgment.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



101 Cal.App.2d 568

HAWTHORNE v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 17933.

District Court of Appeal, Second District,
Division 1, California.

Jan. 2, 1951.

Hearing Denied March 1, 1951.

Proceeding by Carl L. Hawthorn against the Industrial Accident Commission to review an award of the commission. The District Court of Appeal, Drapeau, J., held that leave of absence without loss of salary accorded a city fireman while disabled imports an administrative act by city-employer and it is not a workmen's compensation benefit but is given in lieu of temporary disability payments and that Commission has no jurisdiction to compel a city to grant such leave of absence but its only responsibility was to determine on request whether disability claimed arose out of and in course of employment.

Award affirmed.

Workmen's compensation ⚙863

Statute providing that when fireman is disabled by injury or illness arising in line of duty he becomes entitled to leave of absence while so disabled without loss of salary in lieu of temporary disability payments for period not exceeding one year imports an administrative act by city-employer and does not give a workmen's compensation benefit but is given in lieu of temporary disability payments, and Industrial Accident Commission has no jurisdiction to compel a city to grant such a leave of absence, but its only responsibility is to determine on request whether disability claimed arose out of and in course of employment. Labor Code, §§ 3201-6002, 4850-4855, 4851, 4854.

Charles A. Son, Los Angeles, for petitioner.

Edmund J. Thomas, Jr. and T. Groezinger, San Francisco, for respondent.

Donald Gallagher and Royle A. Carter, San Francisco, for State Compensation Insurance Fund.

Richard C. Waltz, City Atty., and Richard L. Sieg, Jr., Asst. City Atty., Beverly Hills, for City of Beverly Hills.

Henry McClernan, City Atty., and Joseph R. Roark, Deputy City Atty., Glendale, and Royal M. Sorensen, City Atty., Santa Monica, amici curiæ on behalf of respondent.

DRAPEAU, Justice.

This is a proceeding to review an award of the Industrial Accident Commission.

On February 15, 1950, petitioner filed application for adjustment of a claim with the respondent commission. From December 1, 1928, he had been in the employ of the City of Beverly Hills as a fireman. On December 21, 1949, petitioner was injured in line of duty. At that time he was a member of the State Employees' Retirement System.

As insurance carrier for the City of Beverly Hills, the State Compensation Insurance Fund provided medical treatment and temporary disability indemnity from January 8 through January 31, 1950, at \$30 per week. This money petitioner turned over to his employer. Employer paid him his full salary from December 29, 1949, through January 31, 1950, on account of accumulated vacation and overtime. Petitioner's services were terminated on the latter date by his employer, by reason of his having reached retirement age.

After hearing before a referee, on April 18, 1950, respondent made findings as follows:

"3. Said injury caused temporary total disability beginning December 29, 1949 to and including March 23, 1950 and thereafter, to a date to be determined subsequently by this Commission on petition of any party in interest.

"4. Applicant is entitled to a leave of absence without loss of salary, in lieu of disability payments, during the time he is dis-

abled by said injury, for a period not exceeding one year from date of injury.

"5. Applicant is in need of and entitled to, at the expense of the defendants herein, further medical treatment reasonably required to cure and relieve from the effects of said injury.

"6. There is no compensation now due on which a lien may be allowed for applicant's attorney."

The Commission's award reads as follows: "It Is Ordered that the defendant carrier herein furnish to the applicant further medical treatment reasonably necessary to cure and relieve from the effects of said injury."

Petitioner's sole complaint is the failure of the Commission to include in its award the benefits recited in finding numbered 4. It is urged that such benefits are Workmen's Compensation benefits, and that exclusive jurisdiction to award them is in the Commission.

Division 4 of the Labor Code, sections 3201 through 6002, is denominated "Workmen's Compensation and Insurance." Article 7 thereof, sections 4850 through 4855, has reference specifically to the disabilities of city policemen and firemen, who are members of the State Employees' Retirement System.

Finding numbered 4, above quoted, was made pursuant to section 4850 of said code which provides that when a fireman in the special class covered by Article 7 is disabled by injury or illness arising in line of duty, he becomes entitled to "leave of absence while so disabled without loss of salary, in lieu of disability payments under this chapter, for the period of not exceeding one year. * * * This section refers to temporary disability only."

Upon request of any city or of the State Employees' Retirement System, the Industrial Accident Commission shall determine whether the disability referred to in section 4850, supra, arose out of and in the course of duty, Sec. 4851, Labor Code; and no disability indemnity shall be paid to such city fireman concurrently with wages or salary payments, Sec. 4854, Labor Code.

Diametrically opposed to petitioner's contention that the leave of absence without loss of salary in lieu of disability payments provided for in section 4850, *supra*, is a compensation benefit and within the Commission's jurisdiction to award is the case of *Kutz v. Ind. Acc. Com.*, 13 Cal. Compensation Cases 255. That is the only case cited to this court which directly construes section 4850, *supra*. Petitioner Kutz, a fireman employed by the City of Glendale and a member of the State Employees' Retirement System, suffered an industrial injury. Medical and Indemnity benefits of \$30 per week were provided by the city. Kutz sought an award from the Industrial Accident Commission for full salary during the period of his temporary total disability. Said Commission, among other things, on May 4, 1948, found as follows:

"3. Said injury caused temporary total disability beginning November 29, 1946 to and including January 14, 1947.

"4. Said injury did not result in permanent disability.

"5. The applicant contends that he is entitled to receive full salary from the defendant employer during said period of disability, as provided in Section 4850 of the Labor Code. The authority of this Commission is limited to a determination of the questions whether or not disability referred to in said Section arose out of and in the course of duty, and, in a disputed case, when such disability exists. This Commission is without jurisdiction to award applicant full salary under Section 4850 of the Labor Code."

Accordingly, the Commission ordered that applicant take nothing by reason of his asserted claim.

A petition for writ of review in that case was denied by this court on November 15, 1948. (Case No. 16,691.) A petition for hearing in the Supreme Court was denied on January 13, 1949.

Petitioner here urges that the Commission fell into error in the Kutz case by misconstruing the opinion in *Dept. of Motor Vehicles v. Ind. Acc. Comm.*, 78 Cal.App.2d 626, 178 P.2d 43.

In that case the court was considering section 4800, Labor Code, which affects members of the California Highway Patrol, and is very similar to section 4850, *supra*, covering city firemen.

In the cited case the employee Cope sustained an injury resulting in total permanent disability. Thereafter, he took a leave of absence with full pay for 52 weeks. An award of \$6,000 on account of *permanent* disability was made, payable at the rate of \$25 per week commencing one week after the injury.

In a proceeding to review the award, it was contended by the employer that the full salary received in lieu of disability payments under section 4800, was a *temporary* disability allowance and a compensation benefit within the meaning of section 3207, Labor Code (as claimed herein); hence credit should have been allowed the employer against the permanent disability award for all salary theretofore paid.

In rejecting this argument, the court stated, 78 Cal.App.2d at page 629, 178 P.2d at page 45:

"It is further argued by the petitioner that the salary paid to a patrolman while he is on leave of absence on account of injury is in itself a temporary disability allowance, and being such, no permanent disability may be paid concurrently therewith under the provisions of Section 4661 of the Labor Code. This contention is based on an interpretation of Section 3207 defining compensation. It is urged that the salary paid to a patrolman while on leave is compensation as the term is defined in Section 3207, that is, a disability allowance, or compensation for his injury, as distinguished from salary. Such an interpretation, however, produces an immediate conflict with the express provisions of Section 4800 that the salary is in lieu of disability payments. If the legislature had intended the salary to be paid as a disability allowance, it undoubtedly would have said so. What it did say is exactly to the contrary * * *.

"Viewing the several sections of the Labor Code under consideration in the light of the established rules of construction, it is manifest that it was intended by the legisla-

ture to provide an injured patrolman with his full pay for a year in the place of any temporary disability allowance, but in no way to limit his right in accordance with the general rule to receive an award of permanent disability indemnity concurrently with his salary."

From the foregoing it is plain that the leave of absence without loss of salary accorded a city fireman while disabled imports an administrative act by the city-employer; that it is not a workmen's compensation benefit but is given in lieu of temporary disability payments. Sec. 4850, *supra*. From this it follows that the respondent commission has no jurisdiction to compel a city to grant such leave of absence. Under the sections comprising Article 7, above mentioned, respondent's only responsibility is to determine upon request whether the disability claimed arose out of and in the course of the employment. Sec. 4851, *supra*.

For the reasons stated, the award is affirmed.

WHITE, P. J., and DORAN, J., concur.



101 Cal.App.2d 612

C. DUDLEY DE VELBISS CO. v. KRAINTZ.

Civ. 14178.

District Court of Appeal, First District,
Division 2, California.

Jan. 8, 1951.

C. Dudley De Velbiss Company, a California corporation, sued R. J. Kraintz, as county building inspector of the County of Contra Costa, for a declaratory judgment that county zoning ordinances were void and that plaintiff should not be required to comply with the provisions thereof. The Superior Court, Contra Costa County, Hugh H. Donovan, J., rendered judgment sustaining a general demurrer to the complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Dooling, J., held

that the plaintiff was entitled to declaratory relief since the complaint alleged an existing actual controversy as to the ordinances attacked.

Reversed with directions.

1. Appeal and error ⇨863

On appeal by plaintiff from order sustaining general demurrer, without leave to amend, to his complaint for declaratory judgment that zoning ordinances were void, appellate court would not be required to pass on specific questions of unconstitutionality urged by plaintiff further than to determine that there were justiciable questions suggested which could not be definitely determined in absence of evidence of actual facts existing which might or might not make classifications attacked reasonable or unreasonable.

2. Declaratory judgment ⇨129

In suit by land-owner for declaratory judgment that county building ordinances were void, where complaint alleged existing actual controversy as to ordinances attacked, plaintiff was entitled to declaratory relief.

3. Declaratory judgment ⇨325, 385, 389

Where complaint in declaratory judgment suit alleges existing actual controversy court should not sustain demurrer to complaint and dismiss action, since it is not essential to entitle plaintiff to seek declaratory relief that he should establish his right to a favorable declaration, and even where plaintiff is not entitled to favorable declaration court should render judgment embodying such determination and should not merely dismiss action.

4. Appeal and error ⇨1170(3)

In declaratory judgment suits, if it appears that under no circumstances could plaintiff hope for favorable declaration, trial court's error in sustaining demurrer to complaint alleging existing actual controversy might not call for reversal, because of lack of prejudice to plaintiff. Const. art. 6, § 4½.

5. Appeal and error ⇨1170(3)

In suit by landowner for declaratory judgment that county zoning ordinances

were void, constitutional questions suggested in complaint were sufficiently supported by facts actually alleged in complaint to entitle plaintiff to reversal of trial court's order sustaining defendant's demurrer to the complaint without leave to amend. Const. art. 6, § 4½.

6. Appeal and error ⇨1170(3)

On appeal from order sustaining demurrer, without leave to amend, to complaint for declaratory judgment that county zoning ordinances were void, where it appeared that ordinances were made applicable to buildings constructed on subdivisions approved by county planning commission while unapproved subdivisions were exempted from regulation, appellate court could not say, as matter of law without regard to factual background which would be developed on trial, that classification was necessarily constitutional one, and therefore trial court's order would be reversed. Const. art. 6, § 4½.

7. Constitutional law ⇨208(1)

Not every classification based upon chosen date or specified lapse of time is constitutional, and facts in relation to date or time made basis of classification must be such as to support conclusion that there is reasonable basis for imposing regulation upon one class and not upon another.

8. Appeal and error ⇨1170(3)

In suit by land owner for declaratory judgment that county zoning ordinances were unconstitutional, trial court erred prejudicially in sustaining demurrer to complaint without leave to amend, where even though allegations of complaint might not be sufficiently specific as to some or all of the asserted grounds of illegality, it could not be said that such defects might not be cured by appropriate amendment. Code Civ.Proc., § 472c; Const. art. 6, § 4½.

Breed, Robinson & Stewart, Oakland, for appellant.

Francis W. Collins, Dist. Atty., Matthew S. Walker, Deputy Dist. Atty., Martinez, for respondent.

DOOLING, Justice.

The appellant sued for a declaratory judgment. A general demurrer to the complaint was sustained without leave to amend and this appeal was taken from the judgment for the defendant for costs.

Ordinance 385 is Contra Costa County's Building Ordinance, enacted in 1947. In 1948 it was amended by ordinances 449 and 456. All three were pleaded in full.

Appellant attacks ordinance 385 and particularly sec. III thereof as amended, in numerous respects and for various reasons, claiming *inter alia* that it fails to intelligibly classify buildings subject to its own regulatory provisions; that there is an intermixture of zone lines, dates of subdivision, character of subdivision, legal method of subdivision, type of operation, and type of property; that it is not only discriminatory in its application but vague and indefinite.

The complaint alleges that plaintiff is a California corporation; that defendant is County Building Inspector; that plaintiff owns a large number of lots in "Strandwood Estates Unit No. 2" and is engaged in constructing a large number of residences on its lots therein. Further, that plaintiff was engaged at the time of the commencement of the action in the construction of a large number of residences upon the lots owned by it; that the construction of some of the homes was commenced subsequent to the passage of ordinance 385 but prior to the amendment thereof by ordinance 449 and that the construction of some commenced after the passage of ordinance 449 but prior to the passage of 456. Further, that "plaintiff plans and intends to commence the construction hereafter of additional homes upon said lots in Strandwood Estates."

The complaint then alleges:

"That said ordinances * * * are written instruments, and that an actual controversy exists between plaintiff and defendant relating to the legal rights and duties of the respective parties, as follows:

"a Defendant contends that said ordinances are applicable to plaintiff's build-

ing operations hereinabove described, and that plaintiff is required to secure permits and submit its dwelling structures to inspection, and to make its dwelling structures conform to the provisions of said ordinances.

"b Plaintiff contends that each and all of said ordinances are void for the reason that they do not have a uniform operation within the County of Contra Costa, and that no reasonable grounds for the classifications set up in said ordinances and each of them with respect to structures subjected to said ordinances and structures not subjected to said ordinances, and with respect to areas subjected to said ordinances and areas not subjected to said ordinances exist, and for the further reason that said ordinances are vague and indefinite.

"Plaintiff contends and points out the following particulars among others in support of his claim of invalidity:

"The ordinances apply only to structures within certain specified zones, and do not apply to similar structures in the unrestricted and agricultural zones;

"The ordinances do not apply to agricultural, horticultural, viticultural and floricultural or animal husbandry buildings or structures, even though located within the included zones designated as the Transition Residential Agricultural;

"The ordinances do not apply to industrial buildings or structures, but do apply to dwellings located within light industrial and heavy industrial zones;

"Ordinance No. 449 applies to residential subdivisions, but not to non-residential subdivisions, even though dwelling structures may be erected in non-residential subdivisions, and that there is no method of determining from a subdivision map whether the same is residential or non-residential;

"That said ordinance No. 449 applies to residential subdivisions filed after November 2, 1933, but not to similar subdivisions filed prior thereto;

"That ordinance No. 456 applies to records of survey, whether residential or non-residential in character;

"That ordinance No. 456 applies to records of survey filed subsequent to November 2, 1933, but not prior thereto;

"That neither ordinance No. 449 nor 456 apply to residential or other structures outside of the area defined by ordinance No. 385, when the same are constructed on lots for which neither a subdivisions map nor a record of survey is required to be filed by law.

"That the real property of plaintiff upon which it has and proposes to erect residential structures is not included within the area subjected to the application of ordinance No. 385, but is purported to be covered as a residential subdivision by the terms of said ordinance No. 449."

The prayer is "that this court determine that each and all of said ordinances are void, and that plaintiff is not required to comply with the provisions thereof, for costs of suit, and for such other and further relief as may be fit and proper in the premises."

[1] We need not pass on the specific questions of unconstitutionality urged in appellant's brief further than to determine that there are justiciable questions suggested which cannot be definitely determined in the absence of evidence of the actual facts existing in Contra Costa County which may or may not make the classifications of the ordinance under attack reasonable or unreasonable.

[2,3] The complaint alleges an existing actual controversy as to the ordinances attacked which entitles the plaintiff to declaratory relief. *Jones v. Robertson*, 79 Cal.App.2d 813, 819, 180 P.2d 929. Where that fact appears the court should not sustain a demurrer to the complaint and dismiss the action. "It is not essential to entitle a plaintiff to seek declaratory relief, that he should establish his right to a favorable declaration." *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 760, 161 P.2d 217, 220, 162 A.L.R. 747. Even "where the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss

the action." *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062.

[4-6] However if it appeared that under no circumstances could plaintiff hope for a favorable declaration the error in sustaining the demurrer without leave to amend might not call for a reversal because of lack of prejudice to the plaintiff. Cal. Const. Art. VI, sec. 4½. But here the plaintiff's complaint at least suggests constitutional questions which we cannot certainly say lack merit on the facts actually alleged in the complaint. We need only mention one of them, since the questions of constitutionality should be left to a full development of the facts in the trial court. The ordinance as amended is applicable "to all buildings or structures in the unincorporated territory of Contra Costa County which is included in any residential subdivision filed for record in the office of the Recorder * * * on or after November 2, 1933." (Ordinance No. 449.) Also "to all buildings or structures in the unincorporated territory of Contra Costa County which is included within the boundaries of any record of survey map as defined in the State Map Act and which * * * has been recorded * * * on or after November 2, 1933." (Ordinance No. 456.)

The complaint alleges (par. VIII): "That a large number of record of survey maps, and a large number of maps of subdivisions and of residential subdivisions were filed in the office of the Recorder of the County of Contra Costa prior to November 2, 1933." This suggests the question whether there is any reasonable ground for a classification based upon whether or not the survey map or subdivision map was filed prior to November 2, 1933. Respondent asserts, although the record does not show this fact, that on that date a county ordinance became effective requiring all subdivisions and records of survey recorded thereafter to be approved by the County Planning Commission and the Supervisors, whereas prior to that date any one could subdivide property as he saw fit. It is not so readily apparent why the character of buildings constructed on approved

subdivisions should be regulated while the character of buildings constructed on unapproved subdivisions is exempted from regulation that we can say as a matter of law without regard to the factual background, which would be developed on a trial, that the classification is necessarily a constitutional one.

[7] Not every classification based upon a chosen date or specified lapse of time is constitutional. The facts in relation to the date or time made the basis of the classification must be such as to support the conclusion that there is a reasonable basis for imposing the regulation upon one class and not upon the other. *Accounting Corp. v. State Board of Accountancy*, 34 Cal.2d 186, 208 P.2d 984; *Del Mar Canning Co. v. Payne*, 29 Cal.2d 380, 175 P.2d 231; *Soares v. City of Santa Maria*, 38 Cal.App.2d 215, 100 P.2d 1108; *In re Fassett*, 21 Cal.App.2d 557, 69 P.2d 865; *In re Wacholder*, 1 Cal.App.2d 254, 36 P.2d 705.

The reasonableness or unreasonableness of the classification cannot definitely be determined from the face of the complaint and this seems equally true of at least some other grounds of possible unconstitutionality alleged in the complaint.

[8] Even though the allegations of the complaint might not be sufficiently specific as to some or all of the asserted grounds of illegality it would still be prejudicial error to sustain the demurrer without leave to amend, as was done in this case, since we cannot say that any such defects might not be cured by appropriate amendment. *Code Civ.Proc. sec. 472c*; *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 42, 172 P.2d 867; *Fabbro v. Dardi & Co.*, 93 Cal.App.2d 247, 253, 209 P.2d 91; *King v. Mortimer*, 83 Cal.App.2d 153, 158, 188 P.2d 502.

Judgment reversed, with directions to permit the filing of an amended complaint if plaintiff so requests.

NOURSE, P. J., and GOODELL, J., concur.

SUNRISE PRODUCE CO., Inc., OF SAN FRANCISCO v. MALOVICH.

No. 14433.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1950.

Hearing Denied Feb. 26, 1951.

Suit on common counts by Sunrise Produce Co., Inc., of San Francisco, against Charles Malovich, individually and doing business as Arvin Vegetable Farms, to recover for goods sold and delivered to defendant, wherein defendant filed a counterclaim and cross complaint for trailer rentals. The Superior Court for the City and County of San Francisco, Lile T. Jacks, J., granted plaintiff's motion to strike cross complaint and counterclaim from answer and plaintiff's motion for judgment on the pleadings and defendant appealed. The District Court of Appeal, Bray, J., held that cross-demand for trailer rentals, though barred by statute of limitations at time original suit was filed, could be set up as a counterclaim.

Judgment reversed.

1. Pleading ⚡354(2)

Where complaint sought recovery on common counts for goods sold and delivered to defendant, cross complaint for trailer rentals was properly stricken, since the matters set up therein were completely foreign to the transaction pleaded in complaint. Code Civ.Proc. § 442.

2. Limitation of actions ⚡41

Cross-demands, which have coexisted in point of time, are deemed compensated to the extent that they equal each other and statute of limitations should not bar the right to show such compensation. Code Civ.Proc. § 440.

3. Set-off and counterclaim ⚡35(1)

A counterclaim may be based upon an unliquidated demand. Code Civ. Proc. § 438.

4. Account stated ⚡7, 20(1)

Account stated includes all cross-demands arising out of the same transaction, but whether cross-demands arising out of separate and distinct transactions are included in statement of the account depends upon the circumstances and is a question of fact.

5. Account stated ⚡7**Limitation of actions** ⚡41

In suit on common counts for goods sold and delivered to defendant, cross-demand for trailer rentals could be set up as a counterclaim, though barred by statute of limitations at time principal suit was filed, regardless of whether cross-demand was a liquidated or unliquidated claim and notwithstanding admission that an account had been stated between the parties. Code Civ. Proc. §§ 438, 440.

Calvin H. Conron, Jr., Bakersfield, for appellant.

Elios P. Anderlini, San Francisco, (Herbert Chamberlin, San Francisco, of counsel), for respondents.

BRAY, Justice.

Defendant appeals from a judgment on the pleadings in favor of plaintiff.

Question Presented.

May a claim barred by the statute of limitations at the time plaintiff's action is filed, nevertheless be pleaded as a counterclaim?

Record.

Plaintiff filed suit on common counts for the sum of \$3850, for goods, wares and merchandise sold and delivered to defendant. Defendant answered, admitting the allegations of the complaint but setting up a counterclaim for trailer rentals in the sum of \$40,450. He also cross-complained for the same amount. The court sustained without leave to amend plaintiff's demurrer to the cross-complaint, granted plaintiff's motion to strike the cross-complaint and the counterclaim from the answer, and granted plaintiff's motion for judgment on the pleadings.

Cross-complaint.

[1] Both the counterclaim and cross-complaint were for trailer rental alleged to have accrued between December 1, 1946, and June 15, 1947. This suit was filed July 6, 1949, or a little over two years from the last date. Defendant concedes that the court was correct in striking the cross-complaint for the reason that the matters set

up therein are completely foreign to the transaction pleaded in the complaint and hence do not meet the requirements of section 442 of the Code of Civil Procedure which limits cross-complaints to the "contract, transaction, matter, happening or accident upon which the action is brought" etc.

May Outlawed Claim Be Pleaded In Counterclaim?

Prior to the year 1946 and the case of *Jones v. Mortimer*, 28 Cal.2d 627, 170 P.2d 893, it seemed to be the well-settled rule in California that whatever claim would be barred if separately asserted, was not available as a setoff or counterclaim. *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 47 P.2d 273. There was an exception to the effect that the filing of plaintiff's complaint suspended the running of the statute as to the counterclaim, and hence if the latter was not barred at that time, it could be pleaded later. As the statute had run against defendant's claim at the time the suit was filed, defendant could not have come within either the rule or the exception. But the rule was changed in the *Jones* case, which arose out of the following circumstances: In December, 1933, the petitioner sued the California Mutual Building and Loan Association and Mortimer, the Building and Loan Commissioner, who, prior thereto, had taken over the association, for services rendered. In 1938 the commissioner levied an assessment of \$100 per share against all of the stockholders of the association. Petitioner held four shares and hence was liable for an assessment of \$400. In 1940 petitioner obtained a judgment against the association and the commissioner for \$1536.10, the judgment being payable in course of liquidation. The commissioner did not plead the \$400 indebtedness as a counterclaim or offset in the suit. In 1941 the commissioner sued petitioner for \$368.05, being the amount of the assessment less some liquidating dividends which were credited against it. Petitioner then applied for a writ of execution or other relief to enforce his judgment. The commissioner claimed the right to set off the \$368.05 balance of the assessment as against plaintiff's judgment. The court

allowed such setoff. "To support his claim that the commissioner may not set off the assessment against his judgment, plaintiff contends that the right was lost by virtue of the commissioner's failure to file a counterclaim for the amount of the assessment in plaintiff's action, relying upon section 439 of the Code of Civil Procedure. That section provided in 1940 (the time that plaintiff obtained judgment in his action), and at the present time: 'If the defendant omits to set up a counterclaim upon a *cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim*, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.' (Emphasis added.) Aside from any other reason the italicized portion of that section prevents its application here. As far as appears from the record, the transaction involved in plaintiff's action was for services rendered to the association, whereas the assessment against plaintiff was based on his liability as a stockholder of the corporation. Giving the word '*transaction*' its broadest meaning we cannot bring the two claims here involved within its meaning. They arose out of two separate and wholly independent transactions." 28 Cal.2d at pages 629-630, 170 P.2d at page 895.

"There is the matter of the statute of limitation having run on the assessment. Assuming that to be true the assessment is still a proper setoff. It has been held generally or assumed without discussion that a counterclaim in its setoff aspects may be defeated by the defense of the statute of limitation. [Citations.] On the other hand it has been intimated that where claims are compensated under section 440 of the Code of Civil Procedure the statute of limitations is not a bar. [Citation.] But none of these cases, holding the statute to be a bar, except *Lyon v. Petty*, supra [65 Cal. 322, 4 P. 103], mention section 440 of the Code of Civil Procedure heretofore quoted. The cross-demands here, in the language of section 440, '*have existed* between persons'—plaintiff and defendant. They existed between them at least at the time the assessment became due and plaintiff's action on his claim was pending. They have existed

under circumstances where if either brought an action thereon the other could have set up a counterclaim. Defendant could have set up the assessment as a counterclaim when the two coexisted and there was no question about the statute of limitation on either claim. The next step is that the demands are *compensated*. That can mean nothing more or less than that each of the claimants is *paid* to the extent that their claims are equal. To the extent that they are *paid*, how can the statute of limitation run on either of them? There is no outstanding claim upon which the statute may run. It is discharged." 28 Cal. 2d at pages 632-633, 170 P.2d at page 896.

[2] This is a fair rule as it provides in effect that plaintiff's and defendant's claims, having coexisted in point of time, are deemed compensated to the extent that they equal each other, and the statutes of limitation should not bar the defendant's right to show that compensation.

Plaintiff attempts to distinguish our case from the Jones case upon three grounds. The first is that in the Jones case the defendant's counterclaim did not arise until after the commencement of the action and hence the statute of limitations was not available to plaintiff. While there is that distinction between the two cases, the reasoning of the court, extracts of which are herein set forth, shows that the rule it adopted is not limited as claimed by plaintiff.

The second alleged distinction is that the counterclaim in the Jones case was a liquidated one while that here is an unliquidated one. We can see no logical difference in applying the rule to the two situations. There is language in 23 Cal. Jur. 254 which seems to support plaintiff's contention. It is based solely on dicta in the case of Iowa & C. Land Co. v. Temescal Water Co., C.C., 95 F. 320. Counsel have cited, and we have found, no other case supporting this theory. In the Iowa Land case the court reasons that the cross-demands which section 440 of the Code of Civil Procedure permits to be set up, must be liquidated ones, and that "The operation of the statute now under consideration is quite a different thing from the judicial procedure by which a claim for unliquidated damages is set off against fixed indebtedness. If A.

sues B. to recover on a promissory note, and B. counterclaims against A. for unliquidated damages, the court can ascertain the damages, and apply them to the note, rendering judgment for the party in whose favor a balance is thus made to appear. The doctrine of compensation declared in said section 440, however, cannot be applied in the supposititious case above stated, for the reason already indicated,—that the statute operates upon the cross demands to which it refers the instant they co-exist, and at that time the cross demands in the case above supposed are incapable of mutual application, as one of them (the claim for unliquidated damages) is indeterminate." 95 F. at page 321.

[3] This reasoning is not only artificial but also destructive of the legislative purpose. The language of section 440 is explicit. "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other * * *." Section 438 specifies that a counterclaim "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had * * *." There is nothing in either of these sections that requires the cross-demand to be a liquidated one. It is a little difficult to understand the reasoning in the Iowa case where the court in its illustration of A. suing B. on a promissory note, says that B. may counterclaim for unliquidated damages and yet goes on to say that under section 440 such a counterclaim cannot be set up. In Terry Trading Corp. v. Barsky, 210 Cal. 428, at page 438, 292 P. 474, at page 478, the court said: "Nor is it a valid objection to a counterclaim that it is based upon an *unliquidated* demand. Neither the old nor the new statute requires that the claim be liquidated."

Moreover, defendant alleged not only that the amount he was suing for was the reasonable rental value of the trailers, but also the *agreed* value. So on the face of the counterclaim it appears that it was a liquidated claim.

Account Stated.

[4] The third attempted distinction of plaintiff of the Jones case is that here the plaintiff alleged in one of its causes of action that on June 11, 1948, an account was stated between plaintiff and defendant by which it was determined that defendant was indebted to plaintiff in the sum of \$3850. Defendant's answer admitted all of the allegations of plaintiff's complaint including this. Therefore, contends plaintiff, whatever demands defendant had against plaintiff were settled, superseded, and eliminated as cross-demands. But the admission of an account stated does not necessarily mean that cross-demands are included in the statement of the account. Demands arising out of the same transaction are; but here, two separate and distinct transactions are involved. Whether the statement of the account between the parties actually included the cross-demands or another transaction depends upon the circumstances, and is a matter for proof at the trial. It may very well be that the acknowledgment by defendant of the account for goods, wares and merchandise in this case, in no wise included the transaction concerning the rental of trailers, apparently an entirely different and independent matter. Plaintiff has cited a number of cases to support its contention that an account stated settles all transactions between the parties. An examination of the cases shows that the courts were passing on the effect of the accounts stated after hearing the evidence and determining what transactions were included. In none of them was there a situation where the court was called on to hold that the fact that there was an account stated, as here, for one transaction, included, as a matter of law, and in the absence of proof, a settlement of the cross-demands on a separate, independent transaction.

[5] The court correctly sustained the demurrer to the cross-complaint and struck out the cross-complaint, but incorrectly struck out the counterclaim and granted the motion for judgment on the pleadings.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

101 Cal.App.2d 652

PATCHEN v. EICHMEYER et al.

Civ. 17613.

District Court of Appeal, Second District,
Division 1, California.

Jan. 10, 1951.

Action by Ronald Charles Patchen, by his guardian ad litem, Charles S. Patchen against William Eichmeyer, by his guardian ad litem, Glen Eichmeyer, and others for injuries sustained when minor plaintiff who was walking across street at place other than marked crosswalk was struck by defendant motorcycle. The Superior Court of Los Angeles County, Harold B. Jeffery, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that defendant motorcycle was negligent and that his parents consented to his operation of the motorcycle.

Judgment affirmed.

1. Appeal and error ⇨931(1)

For purposes of appellate review, evidence must be reviewed in light most favorable to respondents, and if record discloses substantial evidence in support of judgment, an affirmance is called for.

2. Automobiles ⇨244(7)

In action for injuries sustained when minor plaintiff, who was crossing street at place other than marked crosswalk, was struck by motorcycle operated by minor defendant, evidence sustained finding that minor defendant was guilty of negligence.

3. Automobiles ⇨244(55)

In action for injuries sustained when minor plaintiff, who was crossing street at place other than marked crosswalk, was struck by motorcycle operated by minor defendant, evidence sustained finding that plaintiff was not contributorily negligent in allegedly failing to yield right of way to motorcycle. Vehicle Code, § 562.

4. Automobiles ⇨244(24)

In action for injuries sustained, when minor plaintiff who was crossing street at place other than at marked crosswalk, was struck by motorcycle operated by minor defendant, evidence sustained finding that

parents of minor defendant consented to his operation of motorcycle.

Alexander H. Schullman, David S. Smith, Los Angeles, for appellants.

Newell & Chester, and Robert M. Newell all of Los Angeles, for respondents.

DORAN, Justice.

This is an action for personal injuries suffered by the infant respondent as a result of being struck by a motorcycle operated by the infant appellant. On February 27, 1948, the day of the accident, both boys were students at John Marshall High School and were in the act of leaving the school at 3:15 p. m. of that day.

As found by the trial court, "Ronald Charles Patchen * * * was walking in a generally westerly direction across Monon Street; * * * the defendant William Eichmeyer was operating that certain 1940 Harley-Davidson motorcycle in a generally southerly direction on Monon Street, where it passes by said school". The court found that the motorcycle was operated "in such a careless, reckless, and negligent manner as to cause the same to run into, against, upon and collide with" respondent's person, "thereby hurling him with great force onto the street".

A judgment was rendered in favor of the infant respondent in the sum of \$2,800, and in favor of the boy's father for \$372.86 for money expended for the son's medical treatment. The judgment was against the infant appellant's father and mother as well as being against the son William Eichmeyer who was riding the motorcycle. Liability of the parents was predicated upon findings that Blanche Eichmeyer, the mother, "signed the application of her son William Eichmeyer for a permit to operate a motor vehicle", and that the son "was operating said motorcycle with the consent and permission of his parents and co-defendants".

It is the appellants' contention that "There was no evidence to support a judgment against the defendant, Glen Eichmeyer" (the boy's father); that "The evidence as a matter of law established the

negligence of the Plaintiff, Ronald Charles Patchen proximately contributing to and causing the accident"; and that William Eichmeyer in operating the motorcycle "was not guilty of any negligence".

Answering the above contentions, respondents point to evidence, which if believed, would support the trial court's findings. As disclosed by the record, it appears that the Patchen boy, aged 16, with two other school boys, started to cross Monon Street in the middle of the street. There was no marked crosswalk at that point but there was evidence that it was common practice for students to cross the street in the middle of the block.

As the boys started across Monon Street, each looked both ways and saw no approaching traffic. Ronald was a few feet ahead of the other boys; half way across the street the boys heard appellant's motorcycle coming around the corner from Griffith Park Boulevard. William Eichmeyer, aged 17, with a student passenger on the rear of the motorcycle, made a left hand turn from Griffith Park Blvd. onto Monon Street "cutting the button" by some 14-16 inches in making the turn. It was William's testimony that a previous speed of 25-30 miles per hour had been cut to 25 miles in making the turn; that in turning, the machine leaned at an angle of about 45 degrees and had just pulled out of this bank before the impact. The motorcycle missed striking respondent's companions by some 1½-2 feet but struck Ronald, who upon seeing the approaching vehicle, "tried to jump to the opposite curb as I was almost all the way across the street". The point of impact was 6-8 feet from the west curb of Monon Street, and after the impact Ronald landed in the gutter next to the curb. There was an unobstructed view of Monon Street; William saw the three boys crossing the street and claimed to have applied the brakes; however, no squeal of brakes being applied was heard.

The motorcycle had been purchased about a year before the accident; William Eichmeyer lived at home, kept the motorcycle there and used it for school transportation. William's parents did not testify, and the only testimony in regard to the parents'

consent was given by William who stated that "both my mother and father had voiced their disapproval of me riding the cycle". As before noted, the mother had signed William's application for a permit to operate a motor vehicle.

It is appellants' theory that "When the plaintiff saw the motorcycle, instead of yielding the right of way thereto, he attempted to beat the motorcycle", in violation of Section 562 of the Vehicle Code requiring that pedestrians yield to motor vehicles "at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection", and that the accident resulted from respondent's failure to exercise care during all the time that the boys were crossing the street. It is maintained that William Eichmeyer did everything possible in trying to avoid the collision; that the motorcycle was not proceeding at "a high rate of speed", and that there was no causal connection between appellant's "cutting the button" in making the turn and the subsequent accident.

[1] The present case resolves itself into the consideration of factual issues only. The substance of appellants' contentions is that upon the evidence presented the trial court should have arrived at a different result from that mirrored in the judgment. Such position, however, is based upon a partisan survey of the record, choosing those portions of the testimony favorable to appellants' theory of the case. But such an approach is not that authorized to be employed for purposes of appellate review. On the contrary, the evidence must be reviewed in the light most favorable to the respondents, and if the record discloses substantial evidence in support of the judgment, an affirmance is called for. That the present record does reveal such evidence can hardly be denied.

[2-4] The questions of negligence and of contributory negligence are pure questions of fact which in this case have been resolved by the trial court in respondents' favor. The matter of the parents' consent to the son's operation of the motorcycle is likewise a question of fact. From evidence that the parents had permitted Wil-

liam to buy and use the vehicle for more than a year and that the motorcycle could have been taken away from the son if the parents objected to its use, coupled with the fact that the mother had signed the application to operate a motor vehicle, an inference of consent to its use can hardly be deemed unsupported. In such a situation the decision of the trial court must stand.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



101 Cal.App.2d 597

WEST v. HUNT FOODS, Inc.

Civ. 14291.

District Court of Appeal, First District,
Division 1, California.

Jan. 5, 1951.

Rehearing Denied Feb. 3, 1951.

Action by O. R. West against Hunt Foods, Inc., to recover certain salary claimed to be due plaintiff and to recover certain retirement benefits. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., at close of plaintiff's case granted a nonsuit and rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to establish a prima facie case based on theory of an express parol agreement to pay plaintiff a fixed pension if he would remain with company as treasurer and evidence was sufficient to establish a prima facie case on theory of promissory estoppel.

Judgment and order of nonsuit reversed.

1. Trial 165

A trial court is justified in granting a motion for nonsuit when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of

sufficient substantiality to support a verdict in favor of plaintiff.

2. Trial ⚖️142

Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal, or trial court to set it aside as a matter of law, trial court is not justified in taking case from jury.

3. Corporations ⚖️308(11)

Where discharged officer and employee of defendant company had received more than his usual salary for year in which he was discharged and after discharge immediately found other employment and was not available for work with defendant company during period for which back salary was sought, he was not entitled to salary.

4. Corporations ⚖️308(11)

In action by discharged officer and employee against defendant corporation to recover retirement benefits, evidence did not establish that defendant had a fixed pension or retirement policy.

5. Master and servant ⚖️78.1(5)

Where employer has a fixed pension plan and employee knows of it and continues in employment in honest belief that he will be recipient of such plan, employee may enforce his rights to a pension.

6. Corporations ⚖️308(11)

Evidence that discharged officer told new president of defendant company precise terms of what he believed company's retirement policy to be, that president stated he had no intention of changing policy and would on officer's retiring personally see that arrangement was carried out, that after president and other officers of company had full opportunity to investigate plaintiff was refused a salary increase because company would have to pay officer retirement pay or pension in a couple of years, and evidence that more than a year after first conversation president stated that pension agreement would remain in effect, was sufficient to establish prima facie case based on theory of an

express parol agreement to pay plaintiff a fixed pension if he would remain with defendant company.

7. Estoppel ⚖️85

A "promissory estoppel" is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee and which does induce such action or forbearance and is binding if injustice can be avoided only by enforcement of promise.

See publication Words and Phrases, for other judicial constructions and definitions of "Promissory Estoppel".

8. Estoppel ⚖️118

Although defendant company had no retirement custom or policy, evidence that plaintiff told president what plaintiff believed retirement policy to be and after president and officers had full opportunity to investigate plaintiff was refused a salary increase because of plaintiff's forthcoming retirement on a pension, and more than a year after first conversation president stated that pension agreement would remain in effect, was sufficient to establish prima facie case for pension, on theory of promissory estoppel.

9. Corporations ⚖️432(1)

President and general manager of corporation would be presumed to have authority to make contracts or representations on behalf of corporation to employee regarding pension and retirement benefits.

Theodore M. Monell, San Francisco, for appellant.

W. F. Williamson, Percy J. Creede, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff was discharged by defendant company in October of 1944. He brought this action to recover certain salary claimed to be due to him, and to recover certain retirement benefits to which he claims he is entitled. At the close of plaintiff's case a nonsuit was granted. Plaintiff appeals.

[1, 2] It is elementary law that "A trial court is justified in granting a motion for

nonsuit " * * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190, 191; [Citing several cases.] As stated in *Re Estate of Lances*, supra, 216 Cal. [397], page 400, 14 P.2d [768], page 769, "Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." *Blumberg v. M. & T., Incorporated*, 34 Cal.2d 226, 229, 209 P.2d 1, 3. When the evidence here involved is tested by these standards it is apparent that it was error to have granted the nonsuit.

The complaint is in two counts. The first is for salary from the date plaintiff was discharged until October 31, 1945, less certain payments received, it being alleged that plaintiff was an officer of defendant; that he was employed pursuant to a resolution of the board of directors of defendant for the fiscal year starting March 1, 1944, at a fixed salary and bonus and improperly and illegally discharged on October 20, 1944, when his salary and bonus were discontinued; that according to the bylaws of defendant all officers are elected for one year by resolution of the board of directors, and continue in office until their successors are appointed; that his successor was not appointed until October 31, 1945.

The second cause of action is for retirement benefits. It is there alleged that it has been the policy of defendant to pay a pension amounting to fifty per cent of salary at the time of retirement to employees with many years of service, plus the assumption by the company of certain insurance premiums; that the president of the defendant, Norton Simon, and the

vice-president and general manager of the company, Frederick Weisman, "promised and agreed" that such arrangement would be carried out with plaintiff, and that such a pension would be paid to plaintiff if he would continue as treasurer and later as assistant treasurer; that plaintiff so agreed and performed the duties of his office; that he was improperly discharged in October of 1944, and has not received the promised pension.

The sole witness at the trial was plaintiff. He testified that he first went to work for defendant company as auditor in 1918, and in the next year became treasurer and a director; that except for several short periods of time he was a director until 1940; that he continued to act as an officer—either treasurer or assistant treasurer—until his discharge on October 20, 1944; that there were several reorganizations of the company during these years; that in February, 1943, one Norton Simon secured control of defendant and became its president; that in February of 1943 Simon told plaintiff that one of the factors that had influenced him to acquire control of the company was that he had been assured that the old staff would continue under the new management; that Simon then asked plaintiff if he would continue as treasurer; that plaintiff replied that he would stay under certain conditions. His exact testimony on this point is as follows: "I said to him that my position was that I was receiving a certain salary and in accordance with a practice or a policy that had been established and in force ever since I had been with the company, since 1918, I was to receive on my retirement, whenever that date took effect, the same treatment that had been accorded to other employees retiring either by reason of age or infirmity or other reasons, after they had served the company for a number of years, and explained to Mr. Simon that that had been in effect for quite a number of years; in fact, since I had been there. His reply to me was that he had no intention whatsoever of changing any practice with relation to treatment of employees or anyone else that had been established and in effect." He also testified that: "I told him that it had been the prac-

tice on retirement of such employees as I mentioned, that they had received a retirement pay of one-half of their salary at the time of retirement, and the company would assume the payment of their group life insurance premiums which previously had been shared by the employee and the company."

Plaintiff then testified that Simon replied "that he was very happy that I had decided to stay, and he then said that when the time came for me to retire, he would personally see that the arrangement that I had explained to him as being in effect in the past would be carried out in my case."

Plaintiff also testified that all during the years that he had been a director of defendant the matter of pensions and retirement pay had been held by the board of directors to be a matter controlled by management not requiring the approval of the board, and that pensions were always fixed by the officers, usually the president.

The conversation with Simon took place in February, 1943. Following that conversation, and in reliance upon the promises then made, plaintiff remained with the company as treasurer. In June of 1943 he had a conversation on the subject with Frederick Weisman, the vice-president and general manager of the defendant. This conversation took place at a time the company was contemplating moving its offices from San Francisco to Hayward, and Weisman asked if plaintiff would move to Hayward. Plaintiff demurred on the ground that he only had at best a few years to work for the company—he was then 67—and that he did not want to retire then and find himself located in Hayward. Plaintiff testified that Weisman agreed that this was a logical objection. He also testified that he had another conversation with Weisman sometime between July and October, 1943; that in this conversation he and Weisman first discussed problems relating to the salaries of other employees, and then he pointed out to Weisman that, after the 1943 reorganization, he was the only one of the old employees that had not received a raise in salary. Weisman replied: "I fully realize that, Mr. West, and I know you are correct, but I want to point out to you that it

would be relatively only a few years until we are going to retire you and you will then be paid a retirement pay or pension." He also testified that Weisman stated that in a few years when he retired "we will then have to pay you a retirement pay or pension, in accordance with your agreement with Mr. Simon."

In April of 1944 Simon asked plaintiff to step down from treasurer to become assistant treasurer at the same salary and bonus he was then receiving, explaining that because he, Simon, was located in Southern California it would be more convenient to have the treasurer located in the south. Plaintiff agreed, and "pointed out to him [Simon] our previous agreement in regard to retirement pay, saying to him that it would be but a few years that I would have to retire and I reminded him of our agreement and he said that the agreement we had would remain in effect and it was satisfactory to him."

Plaintiff, in reliance on these promises, continued in the employ of defendant until October 20, 1944. On that date Weisman told him that he had been removed from the pay roll as of October 15th, and that the company would not pay him a pension; that the company had applied to the proper governmental board for permission to pay him severance pay of \$9,000, but the board had approved the payment of but \$3,900; that that sum and no more would be paid to him. These statements were later verified by Simon. Both Weisman and Simon requested plaintiff's resignation, but plaintiff refused to resign.

In January and February, 1945, plaintiff received from defendant checks totalling \$4,800 (less withholding taxes) which he endorsed "Accepted on Account," and which he deposited in his account in September, 1945.

In discussing the past policies of the company in reference to retirement benefits, plaintiff named about six employees out of the several hundred employed by defendant that had received some sort of benefits from the company upon leaving its employ. He also named one officer who had turned down a retirement allowance in favor of a cash settlement, and another, who, while

not officially retired, was aged and ill and inactive during the last years of his life during which he was paid full salary. Plaintiff admitted that he did not know of any policy of the defendant establishing a definite age for retirement, claiming that each case was decided on its merits.

Plaintiff introduced a bylaw of the defendant providing that officers shall be elected and appointed by the board of directors, and another providing that "The President shall have general supervision and direction of all other officers of the corporation and shall see that their duties are faithfully performed." Another bylaw providing that officers are elected for one year and until their successors are appointed was also introduced.

[3] On this evidence the trial court granted a nonsuit, holding that plaintiff had failed to prove any cause of action. This conclusion is correct as to the first cause of action—for back salary. While the last bylaw above mentioned might have supported a prima facie case that plaintiff was entitled to remain an officer until his successor was appointed by the board (and this was not done until October of 1945), plaintiff's other evidence refuted this cause of action. The resolution, appointing plaintiff treasurer, fixed his salary at \$6,200 per annum, plus a bonus. He received his monthly salary from March 1, 1944, to October of 1944, totalling \$3,874.95, and a pro rata bonus of \$1,000. He received a severance allowance of \$3,800. Thus he has already received more than his yearly salary for 1944. Moreover, after he was fired in October of 1944, he immediately found another job and has been steadily employed ever since. Therefore, he has not been and was not available for work with defendant up to October of 1945, and is not entitled to salary for that period.

[4,5] The trial court also was correct in holding that plaintiff had failed to prove a custom of defendant to pay retirement benefits to officers and employees upon which he relied to his detriment. While it is undoubtedly the law of this state that, where the employer has a fixed pension plan and the employee knows of it and

continues in the employment in the honest belief that he will be the recipient of such plan, the employee may enforce his right to a pension, *Hunter v. Sparling*, 87 Cal. App.2d 711, 197 P.2d 807, in the instant case plaintiff's proof falls far short of showing that the employer had a fixed plan for retiring employees. There is no substantial evidence to show that defendant had a pension or retirement policy. The evidence to the effect that, during the more than twenty-five years plaintiff had been connected with defendant, the company had paid some unfixed sum to six employees out of the several hundred at all times employed, falls far short of showing the existence of such a fixed policy.

But custom and reliance is not the only theory pleaded in the second cause of action. There is also pleaded a specific agreement between the defendant and plaintiff to pay him, upon his retirement, half salary for life plus certain insurance benefits. The evidence supports this cause of action. Plaintiff testified that he told Simon, when the latter took over control of the company, the precise terms of what he believed and understood the retirement policy of the company was, and that Simon told him that if he remained with the company he, Simon, had no intention of changing that policy, and would, upon plaintiff retiring "personally see that the arrangement that I had explained to him * * * would be carried out in my case." While this conversation alone would not be sufficient to prove a contract to pay a pension, because it was based upon a misunderstanding of the existence of a custom, several months later, after Simon and the other officers of the company had full opportunity to investigate the truth of plaintiff's representations, Weisman, the vice-president and general manager of defendant, refused plaintiff an increase in salary because plaintiff would retire in a couple of years and the company "will then have to pay you a retirement pay or pension in accordance with your agreement with Mr. Simon." More than a year after the first conversation with Simon, and in April of 1944, Simon, upon being reminded of the pension agreement, stated that such agree-

ment "would remain in effect and it was satisfactory to him."

[6] That evidence is sufficient, under the rules already set forth, to require a denial of the motion for a nonsuit. That evidence, on such a motion, is sufficient to establish a prima facie case based on the theory of an express oral agreement to pay plaintiff a fixed pension if he would remain with the company as treasurer. Plaintiff fully performed. The fact that plaintiff's understanding of the policy of this company in reference to pensions may have been in error, is not necessarily decisive of the action. Certainly, Simon knew or must have known between February of 1943 and March of 1944 that no such policy existed, and that plaintiff was laboring under a misapprehension on the subject. Nevertheless, Simon saw fit to renew his promises in March of 1944. Instead of telling plaintiff that he was in error, Simon and Weisman continually referred to the agreement and reaffirmed it, and led plaintiff to believe the agreement existed.

Although Simon's first promise was to treat plaintiff in accordance with defendant's retirement custom or policy, and no such custom or policy existed, plaintiff definitely and precisely told Simon what he, plaintiff, believed that policy to be. The conversations with Simon and Weisman during the next thirteen months can be construed either as promises by Simon and Weisman to pay plaintiff a pension in accordance with what he believed that non-existent custom to be, or they constituted deliberate misrepresentations to plaintiff as to the intentions of the company, intended to induce him to remain with the company. If the conversations be so construed they might well raise a promissory estoppel.

[7] According to the Restatement of Contracts, § 90, a promissory estoppel is defined as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." See, *Hunter v. Sparling*, 87 Cal.App. 2d 711, 725, 197 P.2d 807.

[8,9] The evidence, on a motion for nonsuit, was sufficient to establish a prima facie case on either of these two theories. It cannot be successfully argued that, as a matter of law, plaintiff failed to prove that Simon, as president, and Weisman, as vice-president and general manager, did not have authority to make the contract or representations on behalf of the company. The president and general manager are presumed to have such authority. *Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 513, 185 P. 388.

The judgment and order of nonsuit are reversed.

BRAY and FRED B. WOOD, JJ., concur.



PEOPLE v. CHAMBERS.

Civ. 4212.

District Court of Appeal, Fourth District,
California.

Jan. 8, 1951.

Rehearing Denied Jan. 27, 1951.

Hearing Granted March 8, 1951.*

Action by the People of the State of California against Lovell C. Chambers to quiet title. The Superior Court of San Diego, C. M. Monroe, J., entered a judgment quieting title in state and defendant appealed and the State filed a cross appeal. The District Court of Appeal, Mussell, J., held that where property was held in trust by the park commission for the people of the State, action of trial court in conditioning decree quieting title in the State upon reimbursement to the defendant of amount paid by defendant in acquiring the tax deed of property and paying property taxes subsequently levied, was error.

Judgment affirmed as modified.

I. Taxation ⚡805(4)

Where action by state was filed in 1947, to remove a cloud upon its title created by defendant's tax deed, which was recorded on March 11, 1940, action was

* Subsequent opinion 233 P.2d 557.

not barred by ten year statute of limitation, although state acquired title by deed in 1933 and property was sold for taxes in 1934. Code Civ.Proc. § 315.

2. Adverse possession ⇨8(1)

Where property in question was held in trust by state park commission for the state and was acquired and accepted by the park commission for state purposes, doctrine of adverse possession was not applicable. Code Civ.Proc. § 315.

3. Adverse possession ⇨7(2)

There can be no adverse holding of public land which will deprive public of right thereto or give or create title in a person by virtue of statute of limitations.

4. Statutes ⇨233

Generally, state and its agencies are not bound by general words of statute limiting rights and interests of its citizens unless such public authorities be included within limitation expressly or by necessary implication.

5. Limitation of actions ⇨11(1)

Where property was acquired by state and held in trust for people of state by park commission, statute of limitation did not apply to an action by state to remove a cloud upon its title by virtue of defendant's recorded tax deed to land. Code Civ. Proc., § 335 et seq., 345.

6. Taxation ⇨514

Where title was acquired by state by purchase, lien for delinquent taxes was merged and lost in the title which the state acquired.

7. Taxation ⇨679(3), 730

Where state acquired title to land by purchase and recorded deeds, but at time of purchase there were unpaid property taxes on land, subsequent action of county in attempting to sell property to collect delinquent taxes was void as was the subsequent deed issued to purchaser at tax sale based upon county's action.

8. Taxation ⇨814(1)

In quiet title action, where property was held in trust by park commission for people of state, action of trial court in conditioning decree in favor of state upon

reimbursement to defendant of amounts paid by defendant in acquiring tax deed and paying property taxes subsequently levied, was error. Revenue and Taxation Code, §§ 3728-3731, 3897, 3897d.

Fred N. Howser, Atty. Gen., and Walter S. Rountree and Dan Kaufmann, Deputies Atty. Gen., for appellant and cross-respondent.

Solon S. Kipp and W. E. Starke, San Diego, for respondent and cross-appellant.

MUSSELL, Justice.

Action to quiet title.

Both parties appeal from a judgment quieting title in plaintiff to a section of land in the Anza desert region in San Diego county. Plaintiff's appeal is directed to that part of the judgment which quieted title in plaintiff, conditioned upon reimbursement to defendant of amounts paid by him for the purchase of said property under tax deed, and the taxes paid thereon by him from the date of his deed to judgment.

The property involved was conveyed by Louis T. Busch and Lorraine Busch to the State of California by deed, dated November 17, 1932, acknowledged May 19, 1933 and accepted by the State Park Commission by resolution dated April 11, 1933. The deed and resolution were recorded June 6, 1933. At the time the State acquired title there were unpaid property taxes on the land in question for the year 1933. In 1934 the county of San Diego instituted proceedings to collect the 1933 delinquent state and county taxes, and pursuant to such proceedings, the property was "sold" to the state on June 28, 1934, and was "deeded" to the state July 1, 1939. On March 11, 1940, the section involved was "sold" by tax deed from the State to the defendant, Lovell C. Chambers, and all annual property tax assessments thereon from March, 1940, through 1948 have been paid by him.

The trial court concluded that since April 11, 1933, title to the property involved was vested in the State in its sovereign capacity and from that date forward was held

in trust for the people of the State; that the lien for taxes existing at the time of acquisition by the State was merged in the State's title and was extinguished; that the property could not thereafter be lawfully subjected to property taxes and that the delinquent tax proceedings instituted by the county and the tax deed pursuant thereto were void. The trial court pronounced judgment quieting title of the State to the property, but conditioned its decree upon the reimbursement to the defendant of the amounts paid by him for the purchase of the property under tax deed and the taxes paid by him from the date of the tax deed to the date of the judgment.

The defendant Chambers, relying on his tax deed and appealing from the whole of the judgment, contends (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) That the action is barred by the statute of limitations.

Defendant argues that since the State acquired title to the property involved in 1933 and the complaint was filed on May 28, 1947, the action is barred by the provisions of sections 315 and 345 of the Code of Civil Procedure.

Section 315 provides:

"When the people will not sue. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

"1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

"2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or some part thereof, within the space of ten years."

In *People v. Banning Co.*, 167 Cal. 643, 646, 140 P. 587, the court, in commenting upon said section, held that the words "right or title" in the first subdivision must of necessity refer to the right or title of the State to sue, not to the right or title

upon which the state bases its right to sue and that if this were not so, the state could not maintain an action in respect to land to which it held title for more than ten years prior to the beginning of the action, although the invasion of its right which created the cause of action had been very recent and within ten years.

In *People v. Kings County Development Company*, 177 Cal. 529, 171 P. 102, which was an action by the State to cancel a patent on the ground of fraud in its procurement and that the plaintiff be adjudged to be the owner of the lands free of any right of the claimant thereto, it was held that the action was not barred by the period of three years fixed by section 338 of the Code of Civil Procedure, but by a period of ten years fixed by section 315 of the same code and that such action was not barred until the expiration of ten years from the issuance of the patent attacked.

[1] In the instant case, we conclude that the cause of action accrued when the defendant acquired and recorded a tax deed to the property in question on March 11, 1940, and that since the action was filed in 1947, it was filed within the ten-year requirement of section 315. Moreover, in the instant action it appears that the principal relief sought is to remove the cloud upon plaintiff's title created by defendant's recorded tax deed and to prevent the defendant from asserting any right, title or interest in and to the property adverse to the plaintiff.

As was said in *Newport v. Hatton*, 195 Cal. 132, 145-146, 231 P. 987, 991: "A claim of title, even of record, unaccompanied by adverse holding, will not start the statute. A party holding the paramount claim to a legal title is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title. An outstanding adverse claim, which amounts only to a cloud upon a title, and which is not of such a nature as to give the adverse claimant a prescriptive title, is a continuing cause of action, and is not barred by lapse of time until the hostile claim is asserted in some manner to jeopardize a superior title."

[2,3] The record shows that the property with which we are here concerned is held in trust for the people of the state by the State Park Commission. It was acquired and accepted by the park commission for state park purposes. Under such circumstances, the doctrine of adverse possession is not applicable and section 315 is not a bar. There can be no adverse holding of such land by defendant which will deprive the public of the right thereto or give or create title in the defendant by virtue of the statute of limitations. *People v. Kerber*, 152 Cal. 731, 734, 93 P. 878.

As was said in *Henry Cowell Lime & Gement Co. v. State*, 18 Cal.2d 169, 172, 114 P.2d 331, 332: "The rule with respect to the acquisition of title by adverse possession as against a governmental agency is set forth in *Richert v. City of San Diego*, 109 Cal.App. 548, 553, 554, 293 P. 673, 676, as follows: 'Where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant.'"

This rule is again stated in *Fresno Irr. Dist. v. Smith*, 58 Cal.App.2d 48, 59, 136 P.2d 382, and in *People v. Banning Co.*, supra, 167 Cal. 649, 140 P. 590, where it is said: "The running of the statute of limitations does not depend upon the presumption of the existence of any grant. It operates upon the state, with respect to any property not dedicated or held for a public use, as soon as adverse possession thereof begins, without regard to the existence or presumed existence of a lawful grant. By the section cited an adverse occupancy for the period of limitation confers title to the property occupied, regardless of the possible existence of a previous grant. This, of course, applies, so far as the state is concerned, to proprietary land alone. It does not apply to property dedicated to public use."

Section 345 of the Code of Civil Procedure provides in part as follows: "The limitations prescribed in this chapter apply to actions brought in the name of the State or county or for the benefit of the State or county, in the same manner as to actions

by private parties". This provision is found in Part 2, Title 2, Chapter 3 of the code and as is indicated by the heading of that chapter, section 345 and the preceding sections in said chapter relate to the time of commencing actions other than for the recovery of real property.

[4] It is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. *C. J. Kubach Co. v. McGuire*, 199 Cal. 215, 217, 248 P. 676; *In re Estate of Miller*, 5 Cal.2d 588, 597, 55 P.2d 491; *Berton v. All Persons*, 176 Cal. 610, 617, 170 P. 151; *Balthasar v. Pacific Elec. Ry. Co.*, 187 Cal. 302, 305, 202 P. 37, 19 A.L.R. 452.

In *Bolton v. Terra Bella Irr. Dist.*, 106 Cal.App. 313, 327, 289 P. 678, 684, the court said, quoting from *People v. Doe G.* 1,034, 36 Cal. 220, 222: "'The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and persons, and not including public property of the state, or any subordinate part of the state government.'"

[5] We conclude that the code sections contained in Chapter 3, Title 2 of the Code of Civil Procedure are inapplicable to the instant case and that there is no necessary implication that the legislature intended to include therein the limitation on the right of the state to maintain the present action to remove the cloud upon its title.

In *Smith v. City of Santa Monica*, 162 Cal. 221, 121 P. 920, plaintiff sought to quiet title to certain lots in the city of Santa Monica. Plaintiff's ownership of the land involved rested upon tax deeds from the state. Two tracts of land were involved. The assessment under which one was sold was for the year 1895 and the other for the year 1894. The one was sold to the state in 1896 and the other in 1895. The controller's order to the tax collector to sell in both cases was on May 9, 1908, and the tax collector's deed in both instances was made on June 10, 1908. The city of Santa Monica had brought an action in 1895 to condemn these lands for

public purposes as a city park. Judgment in the action in favor of the city was entered December 20, 1897. The court held that under the circumstances shown, the state, to enforce the payment of state and county taxes, was selling into private ownership the public property of one of its agencies and that the assessment was void; that the controller's order to the tax collector to sell on May 9, 1908, was without authority of law and void, and that the sale by the tax collector pursuant to such order was also void; that when the municipal corporation acquired the property under the circumstances shown, the title which the state took by the tax collector's deed was merged into the larger title which the municipality held under the trusts, both for the public as distinguished from the state and also for the state as the supreme sovereign.

[6,7] In the instant case title was acquired by the State by purchase and the lien for the 1933 taxes was merged and lost in the title which the State acquired. Under the circumstances shown, the county's action in attempting to sell the property was void as was the deed issued to defendant based upon such proceedings. *Smith v. City of Santa Monica*, supra; *City of Los Angeles v. Ford*, 12 Cal.2d 407, 410, 84 P.2d 1042; *Webster v. Board of Regents*, 163 Cal. 705, 709, 126 P. 974. The state, by recording its deed and resolution of acceptance by the Park Commission, gave notice that the property involved was being held in trust as a part of the state park system. Thereafter proceedings to enforce a lien for taxes against the State were void, and defendant may not rely on the statutes of limitation to establish title by such proceedings. As was said in *People v. Kerber*, supra, 152 Cal. 734, 93 P. 879: "The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights."

The State contends that the portion of the judgment which conditions the decree upon reimbursement to the defendant of

amounts paid by him in acquiring the tax deed and paying property taxes subsequently levied is error.

The statutory provisions relating to the reimbursement of a purchaser of a tax deed which is held by the court to be void are found in sections 3728, 3728.1, 3729 and 3730 of the Revenue and Taxation Code, and section 3731 of the 1949 Revenue Laws of California, Revenue and Taxation Code.

Section 3728 provides, in effect, that before a tax deed is held void by a court, the court shall determine the correct amount of taxes, penalties and costs that should be paid upon redemption to discharge the tax and assessment liens of all taxing agencies and revenue districts had the purported tax sale not been held and the court shall order the former owner or other party in interest to pay such amount within six months as therein provided.

Section 3728.1 provides that if the amount required to be paid in accordance with section 3728 is not paid within six months, the court shall order a new tax deed issued by the county tax collector to the original grantee or his successor in interest and shall thereupon execute and deliver a new tax deed with certain enumerated provisions specified therein.

Section 3729 provides that when a court holds a tax deed given under the provisions of chapter or chapters 3, 4.3 or 8 of that part of the code or under former political code sections 3897 and 3897d void, the purchaser from the State is entitled to a refund from the county of the amount paid as purchase price in excess of the amount for which he has been reimbursed for taxes, penalties and costs. The refund shall be made in the same manner as a refund of an overpayment of tax, except that the claim shall be presented within one year after the judgment becomes final.

Section 3730 provides that: "The purchaser of tax sold or tax deeded property is entitled to a refund of the amount paid as purchase price whenever it is determined by the board of supervisors that the property belongs to the United States, this State, a city, or other political subdivision of this State and should not have been

sold for taxes. The refund shall be made in the same manner as a refund of an overpayment of tax."

Section 3731 of the 1949 Revenue Laws of California is as follows; "The purchaser of tax-sold or tax-deed property, upon execution of a quitclaim deed, is entitled to a refund of the amount paid as purchase price whenever it is determined by the board of supervisors, and upon the written approval of the district attorney, that the property should not have been sold for taxes. The refund shall be made in the same manner as a refund of an overpayment of tax."

[8] These statutory provisions are not applicable where, as here, the state holds the property involved in trust by the Park Commission for the people of the State of California. Under such circumstances the state is not subjected to the tax laws and its title cannot be alienated except under constitutional and statutory authorization. The doctrine of adverse possession cannot be applied to acquire the title of public lands held in trust for the public. *People v. Kerber*, supra; *Henry Cowell Lime & Cement Co. v. State*, supra.

If the quoted code sections were held to be applicable under the circumstances here shown, the title to the state would be conditioned upon a reimbursement to the purchaser, putting him in the position of being able to acquire adverse title to property held by the State in trust for the public, a situation which is contrary to the principles announced in the foregoing cases. Moreover, if the reimbursement were not made, as decreed by the court in the instant case, under the provisions of section 3728.1, the county tax collector would be required to issue a new tax deed to the original grantee or his successor in interest as designated in his order. Such proceedings could not affect title of property held by the state in trust for the public.

The provisions of sections 3730 and 3731, supra, indicate that the purchaser may be entitled to a refund to be determined by the board of supervisors of the taxing county. Therefore, the defendant, as the purchaser, must look to the county for re-

imbursement. Moreover, the trial court not only required the state to reimburse the defendant as to sums paid by him in acquiring the tax deed, but also as to sums paid by him to cover the annual assessments made by the county subsequent to the date of the tax deed to the date of the judgment. Section 3728, supra, requires reimbursements only as to sums expended by the purchaser "in pursuit of the state's title to the property". In *Clayton v. Schultz*, 18 Cal.2d 328, 333, 115 P.2d 446, 448, it was held that reimbursement should not be allowed for payment of property taxes made by the purchaser subsequent to the tax deed.

The judgment is modified by striking therefrom the portion reading "It is further ordered, adjudged and decreed that the relief sought herein by the plaintiff is conditioned upon reimbursement to the defendant Lovell C. Chambers of the amounts paid by him for the purchase of said property under tax deed and the taxes paid thereon by the said Lovell C. Chambers from the date of said tax deed to the date of judgment herein."

As so modified, the judgment is affirmed. Each party to pay own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 558

**CRUISE et al. v. CITY AND COUNTY
OF SAN FRANCISCO.**

Civ. No. 14534.

District Court of Appeal, First District,
Division 1, California.

Jan. 2, 1951.

Action by Richard C. Cruise and Fannie B. Cruise against the City and County of San Francisco, a municipal corporation, for injuries allegedly sustained while Fannie B. Cruise was a passenger on a city bus. The Superior Court in and for the City and County of San Francisco, Frank T. Deasy,

J., granted defendant city's motion for judgment on the pleadings and the plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that where governmental agency had been notified of accident in timely fashion, had full opportunity to investigate and was supplied with all information requested of injured person, main purpose of claim statute was fulfilled, and allegations of complaint and those of the amendments, properly pleaded an estoppel against city's contention that claim was filed after expiration of required sixty day period.

Judgment reversed.

1. Pleading ⚡245(7), 350(3)

If plaintiff has a good cause of action which by accident or mistake he has failed to set up in his complaint, court, on motion for judgment on pleadings, should on his application to do so, permit him to amend, and when facts stated indicate that party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and defects have not been called to his attention by demurrer or by a notice of motion for judgment on pleadings, court should not grant motion without first giving party an opportunity to elect whether he will stand on his pleadings or amend them.

2. Estoppel ⚡119

If a complaint alone, or with proposed amendments pleads an estoppel, question whether such estoppel exists is a question which should be left to trier of fact to be determined as a question of fact.

3. Municipal corporations ⚡1021

A city, in a proper case, may be estopped from relying on defense of non or late compliance with claim statute, and substantial compliance is all that is required.

4. Municipal corporations ⚡1008

In ascertaining whether failure to comply strictly with claim statute should be excused or an estoppel held to exist against a city, it is important to keep in mind that purpose of claims statute is to provide city with full information concerning rights asserted against it, so that it may settle those of merit without litigation.

5. Municipal corporations ⚡857

Where injured passenger on city bus was allegedly told by city claim adjuster to

file claim with city representative, and she mailed requested document to representative and was told no further information was required unless passenger was notified and her claim would be taken care of and on last day for filing claim under claim statute passenger on returning home after 4 p.m. found notice that claim had to be filed that same day by 4 p.m., and claim when filed was ten days late, allegations pleaded an estoppel against city.

6. Estoppel ⚡52

The vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing expectations on which he acted.

7. Estoppel ⚡52

Essentials to application of doctrine of equitable estoppel are that party to be estopped must be apprised of facts must intend that his conduct shall be acted on, or must so act that party asserting estoppel has a right to believe it is so intended, other party must be ignorant of true state of facts and must rely upon conduct to his injury.

8. Estoppel ⚡62(1)

Whether an estoppel exists against government should be tested generally by same rules as those applicable to private persons.

M. Mitchell Bourquin, Franklin A. Dill, San Francisco, for appellants.

Dion R. Holm, City Atty. of the City and County of San Francisco, Joseph F. Murphy, Deputy City Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

The trial court, after first denying plaintiffs' motion to amend their complaint, granted defendant city's motion for judgment on the pleadings. Plaintiffs appeal. It was the theory of the trial court that the complaint was fatally defective in that it disclosed that the claim required to be filed in such actions was filed ten days too late, and that facts sufficient to raise an estoppel were not pleaded.

The complaint alleges that plaintiff Fannie B. Cruise, while a passenger on a city bus, was injured as the result of the negligence of the operators of the bus, and that, as a result of the injuries suffered, was unable to work for fourteen weeks. The accident occurred on October 25, 1947. Special damages in excess of \$739.20 are pleaded and general damages of \$10,000 alleged. The answer of the city denies the allegations of the complaint and pleaded contributory negligence as a defense, but, at the hearing, the city admitted liability, urging that there were only two issues to be determined, first, the extent of the damages, and secondly, the validity of the city's defense that a claim had not been seasonably filed.

So far as the claim is concerned, Paragraph VII of the complaint contains the key allegations. It alleges: "That on October 28, 1947, and within three days after the occurrence of said accident, the claim adjuster of said City and County called upon plaintiff Fannie B. Cruise and obtained from her a full report of said accident, including her name and address, the date and place of the occurrence, the injury from which damage arose, the nature and character of said injury and damages, and the items making up the same; that on said occasion said claim adjuster asked plaintiff if she desired to settle her claim and, being advised that she did, told her to take the same up with another representative of said City and County at Room 8, 2600 Geary Blvd., as soon as she was able to be out. That on November 28, 1947, plaintiff Fannie B. Cruise called upon the representative designated at the address aforesaid and he told her to furnish him with a doctor's report of her injury and a statement from the union of which she was a member certifying that she would have been working had she been able to work during the period since said accident, and to bring the aforesaid in to him when she was able to obtain them. That on December 19, 1947 plaintiff Fannie B. Cruise telephoned the last-mentioned representative of said City and County to make an appointment for the following day to deliver the report and statement requested of her; that upon said

occasion said representative of said City and County told said plaintiff that he would be unable to see her the following day but to mail the documents in to him and if he needed further information *she would hear from him but otherwise nothing further would be required.* [Italics added.] That on the 20th day of December, 1947 said plaintiff mailed to the aforesaid representative of the City and County at Room 8, 2600 Geary Boulevard, the report of her doctor of the nature and extent of her injuries and a statement of her union testifying to her working status, and heard nothing more from said City and County until her return to her home at the end of the day on December 24, 1947, when she found under the door a communication from said City and County, together with a form of claim, with the advice that she must sign and file the same with the Controller before 4 P.M. of said date. That the hour of 4 P.M. had already passed. That on the 3rd day of January, 1948, plaintiff filed and presented to the Controller her written, verified claim of the injury and damage aforesaid in the manner and form prescribed by law."

During the hearing of the motion for judgment on the pleadings appellants requested that they be permitted to amend the complaint to allege:

1. That the city's representatives told Fannie Cruise that if she supplied the requested information (name, address, doctor's report, statement from her union that work was available, and a description of her injuries) that "they would take care of her claim"; and

2. "That the claims representatives of the City and County of San Francisco in their discussions with this lady, did not tell her that it would be necessary to hire any attorney or outside help to settle her claim, and said that, upon receipt of the information set forth in the paragraph, which she furnished, that they would settle her claim," and that this plaintiff relied upon these representations.

[1] The trial court denied the request to amend. If the proposed amendments, together with the allegations contained in Paragraph VII of the complaint, aver an

estoppel, it was clearly error to deny the request to amend. The proper rule was stated in *MacIsaac v. Pozzo*, 26 Cal.2d 809, 815, 161 P.2d 449, 452, quoting *Kelley v. Kriess*, 68 Cal. 210, 212, 9 P. 129: "If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend' * * * and when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits."

It should be noted that in the present case neither a demurrer nor a notice of motion for judgment on the pleadings was filed. The point in reference to the claim was first raised on the day set for trial.

[2] Another rule of law must be kept in mind. If the complaint alone, or with the proposed amendments, pleaded an estoppel, the question as to whether such estoppel exists is a question which should be left to the trier of fact to be determined as a question of fact, and not determined as a question of law. *Judelson v. American Metal Bearing Co.*, 89 Cal.App.2d 256, 266, 200 P.2d 836; *Gump v. Gump*, 42 Cal.App. 2d 64, 69, 108 P.2d 21.

Under the present state of the law there can be no doubt that the tardy filing of the required claim may, in a proper case, be excused, and the governmental agency may, in such a case, be estopped from urging strict compliance with the statutory provision. While it is true that prior to 1944 the courts had held that strict and literal compliance with claims statutes was required, and that, regardless of the harsh-

ness of the result, a governmental agency could not be estopped from pleading non or late compliance, in that year the Supreme Court reappraised its former opinions and adopted a more liberal, just and fair rule. In the well-reasoned case of *Farrell v. County of Placer*, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, it was held that, in a proper case, the governmental agency may be estopped from relying upon the defense of late compliance, and that substantial compliance is all that is required. In so holding, the court stated 23 Cal.2d at page 630, 145 P.2d at page 573: "Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature [citations omitted] and is analogous to a statute of limitation. [Citations omitted.] It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. * * * From the standpoint of the agency it has general power to pay claims arising from the liability imposed by the public liability act. Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel. There are cases where the procedure specified in the statute is manifestly the measure of the power. [Citation omitted.] There are instances where the procedural steps are not the measure of the power and estoppel may be invoked against a governmental agency from relying upon irregularities therein. [Citations omitted.] This court has held that compliance with the claim statute is not jurisdictional with respect to the power of a court to give judgment against the governmental agency where no claim was filed. *Redlands High*

School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490."

The rule of the *Farrell* case has been applied to various factual situations. *Tyra v. Board of Police, etc., Com'rs*, 32 Cal.2d 666, 197 P.2d 710; *Sacramento County v. City of Sacramento*, 75 Cal.App.2d 436, 171 P.2d 477; *Benner v. Industrial Acc. Comm.*, 26 Cal.2d 346, 159 P.2d 24; *Katz v. A. J. Ruhlman & Co.*, 69 Cal.App.2d 541, 159 P.2d 426; *Schulstad v. City and County of San Francisco*, 74 Cal.App.2d 105, 168 P.2d 68; *Mendibles v. City of San Diego*, 100 Cal.App.2d 502, 224 P.2d 42.

[3] These cases establish the law to be that a city, in a proper case, may be estopped from relying on the defense of non or late compliance with the statute, and that substantial compliance is all that is required. The old doctrine of strict and literal compliance, with its attendant harsh and unfair results, has disappeared from our law.

[4] Inasmuch as strict compliance with the claims statute is no longer required and an estoppel may exist, in ascertaining whether or not failure to comply strictly should be excused or an estoppel held to exist it is important to keep in mind the purpose of the claims statute. It has been repeatedly stated by the courts that "The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation." *Natural Sod Products Co. v. City of Los Angeles*, 23 Cal.2d 193, 203, 143 P.2d 12, 18; see, also, *Knight v. City of Los Angeles*, 26 Cal.2d 764, 767, 160 P.2d 779; *Holm v. City of San Diego*, 35 Cal.2d 399, 217 P.2d 972.

[5] Tested by the standards set up by these cases, and keeping in mind that, where the governmental agency has been notified of the accident in timely fashion, has had full opportunity to investigate it, and is supplied with all information requested of the injured person, the main purpose of the claim statute has been fulfilled, there can be no reasonable doubt but that the allegations of Paragraph VII, and certainly those allegations plus the proffered amend-

ments, properly pleaded an estoppel. It is alleged that within three days of the accident the plaintiff Fannie Cruise gave a claim adjuster of the city a complete account of the accident, and told him that she desired to settle her claim; that the claim adjuster then told her who to see in order to accomplish this result; that within a month thereafter this plaintiff called upon the representative of the city designated, and he told her to furnish him with certain documents; that on the 55th day after the accident this plaintiff telephoned the proper representative of the city and tried to make an appointment to deliver the requested documents the next day; that she was informed that the city's representative could not then see her, but that she should mail the requested documents to him "and if he needed further information she would hear from him but otherwise nothing further would be required"; that she immediately mailed the requested documents to the proper person; that she heard nothing more from the city or its representatives until December 24th (which was the 60th day within which under § 87 of the charter the claim should have been filed); that on that day she returned home after 4 p. m. and found under her door a notice telling her that the claim had to be filed by 4 p. m. of that day; that the claim was filed on January 3, 1948, ten days late. By the proposed amendments plaintiffs offered to plead that the city's representatives told Fannie Cruise that if she supplied the requested information "they would take care of her claim" and that "they would settle her claim," and that she relied upon these representations.

[6, 7] While it is true that the city's representatives were not required to tell plaintiff to file a claim or to secure the services of an attorney, and while it is also true that there is no allegation, as there was in the *Farrell* case, that the governmental agents told plaintiff not to see an attorney, those representatives if they did speak were required not to tell plaintiff anything that would reasonably tend to mislead her. The story of the transaction here involved as disclosed by the pleading is one in which the plaintiff is approached by the city's

representatives and told that all that is necessary for the settlement of her claim is for her to produce certain information and certain documents. She is told, according to the complaint and proposed amendments, that if she does these things the city will settle her claim. She gives the information and produces the documents. Now the city claims that she should have also filed the formal claim within the time specified in the charter. The city had all the information necessary to investigate the accident. It concedes that such investigation disclosed that the claim is meritorious because it admits liability. Certainly from these pleaded facts, if proved at the time of trial, the trier of the facts could reasonably infer that the representations lulled the plaintiff into the reasonable belief that nothing more need be done by her, and were intended, by the city representatives, to have this effect. The rules as to estoppel, supported by many cases, are thus stated in 10 Cal.Jur. p. 626, § 14: "The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted * * *. In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury."

[8] Certainly, if a governmental agency were not involved it would be held that the facts pleaded allege an estoppel. Whether an estoppel exists against the government should be tested generally by the same rules as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one. It should be mentioned that the city in its brief does not cite

one case in support of the rulings of the trial court.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



101 Cal.App.2d 449

SULLIVAN et al. v. SAN FRANCISCO
ART ASS'N et al.

No. 14564.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1950.

Hearing Denied Feb. 19, 1951.

John A. Sullivan and others, as trustees of residuary trusts created by a decree of final distribution in the estate of James D. Phelan, deceased, and others sued the San Francisco Art Association, a corporation, and others for a declaration of rights under the decree. From a judgment of the Superior Court in and for the City and County of San Francisco, Lile T. Jacks and Frank T. Deasy, JJ., dismissing the action on the pleadings, and an order denying plaintiffs' motion to set aside the judgment and grant leave to amend the complaint, plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that the complaint stated sufficient facts to constitute a cause of action.

Judgment and order reversed.

1. Declaratory judgment ☞314

In action by trustees of residuary trusts, created by final distribution decree in deceased testator's estate, and testator's heirs, against trust beneficiary and Attorney General for declaration of rights under decree, complaint stated sufficient facts to constitute cause of action under statute for binding declaration of parties' rights and duties. Code Civ.Proc. § 1060.

2. Appeal and error ☞840(1)

On appeal from judgment dismissing action by trustees of residuary trusts,

created by decree of partial distribution in testator's estate, and testator's heirs, against trust beneficiary and Attorney General for declaration of rights under decree, Attorney General's contentions that plaintiffs have no legally protectible interest in trusts or trust property, and hence no standing in court concerning trusts, because decree contained no reversionary clause and expressed general charitable intent, are premature, as appellate court cannot determine at such stage of proceeding whether respondents' or appellants' interpretation of decree is correct. Code Civ. Proc. § 1060.

3. Declaratory judgment $\hookrightarrow$ 312, 328

In considering sufficiency of complaint for declaratory relief, whether plaintiff is on right or wrong side of controversy is immaterial, and complaint may not be dismissed because court disagrees with plaintiff's construction of instrument involved. Code Civ.Proc., § 1060.

Cushing, Cullinan, Trowbridge, Duniway & Gorrill, San Francisco, for appellants.

Fred N. Howser, Atty. Gen., R. L. Chamberlain, Deputy Atty. Gen. (John J. Dailey, San Francisco, of counsel), for respondent Fred N. Howser.

FRED B. WOOD, Justice.

Plaintiffs appeal from a judgment on the pleadings and from an order denying their motion to set aside the judgment and for leave to amend the complaint, in an action for declaratory relief.

The complaint was brought by the trustees of the residuary trusts created by decree of final distribution in the Estate of James D. Phelan, and amended to join as plaintiffs the heirs of Phelan, against The San Francisco Art Association and the Attorney General of California, for a declaration of rights under a decree (set forth at length in the complaint) of partial distribution in that estate, rendered July 23, 1931, which distributed certain real property and the sum of \$250,000 to the art association in trust.

The trust was expressed by the decree in these words: "The real property hereinbefore described (subject to the aforesaid rights of way in favor of Noel Sullivan) is distributed to said The San Francisco Art Association, in trust, to maintain the same as a public park, which shall be open to the public under reasonable restrictions, and to use the buildings and grounds immediately surrounding the buildings, as far as possible, for the development of art, literature, music and architecture by promising students. Said sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) is distributed to said The San Francisco Art Association, in trust, to invest the said fund and to use and apply the income thereof for the maintenance of the said real property, with power from time to time to sell the securities in which the said fund may be invested and to reinvest the proceeds in other securities to be held upon the same trust."

These dispositive provisions are silent as to any reversionary interest in the property but in the recitals of the decree appears a copy of that portion of Phelan's will which provided for this trust and concluded with these words: "If this gift shall not be accepted by The San Francisco Art Association, the entire property shall go to my trustees herein named as a part of the residue of my estate." The decree also recites that the art association had petitioned for a decree distributing to it the property devised and bequeathed unto it under the terms of the will.

The complaint then alleges the exchange of certain parcels of land between the art association and Noel Sullivan, and that the association has been in the full use and enjoyment of the real property received by it under the decree until the exchange, and, ever since then, of the property held by it after the exchange; and during all of that time has had full use and enjoyment of the money received under the decree.

Upon information and belief the complaint alleges that on May 14, 1931, the board of directors of the art association adopted a resolution which purported to

accept the real property and the money upon the trust declared in the will; that in taking such action the association mistakenly believed that sum would be sufficient to make the trust effective, and acting upon such belief passed the resolution and received possession of the property; that ever since then the association has been seeking to make the trust effective but the income from the money has proved in practice to be entirely insufficient to make said trust purposes or any of them effective; that the association in so accepting believed it would be possible to obtain additional income from private sources to fulfill the terms of the trust, but it has been entirely impossible to obtain any substantial additional income for such purposes; that it is entirely impossible for the association to continue any longer to attempt to perform the terms of said charitable trust; and, therefore, none of the provisions of the trust are being performed and this charitable trust has entirely failed and is not being administered as provided by the will or in accordance with the decree.

Next, it is alleged the decree of final distribution rendered January 19, 1933, distributed to the trustees for the residuary beneficiaries the entire rest, residue and remainder of the estate of Phelan, specifically including all right, title and interest remaining in the estate to the property given by the will in trust to the art association; also, all right, title and interest of the estate therein by reason of nonacceptance of the trust or existing or arising if the objects of the trust are or become impossible or unlawful or arising out of any failure of the trust for any reason.

It is then alleged that the People of the State of California, acting through the attorney general, claim some right, title and interest in the property by reason of the alleged charitable character of the trust, but that such claim is without any right or foundation in law.

Finally, the complaint alleges that an actual substantial controversy has arisen between the plaintiffs and the art association (1) as to whether there has been a

substantial violation of the terms and conditions set forth in the 1931 decree of partial distribution sufficient to have the court declare that the trust has completely failed, and (2) whether, assuming there has been a complete failure of the trust, the plaintiffs who are trustees of the residuary trusts or the plaintiffs who are heirs of Phelan are entitled to have the property conveyed to them free and clear of all claims of the art association and the People of the State of California; and prays for judgment declaring and determining that the trust has wholly failed and whether in such event the property should be conveyed to the heirs or to the residuary trustees, and that the defendants have no interest in the property.

Each defendant filed its answer to the complaint and then, upon motion of the attorney general, the trial court rendered judgment on the pleadings against the plaintiffs, dismissing the action. The judgment is silent as to the reasons for it, but the notice of motion declares that the complaint raises no issue for determination by the court, does not state facts sufficient to constitute a cause of action, lacks any allegation showing the basis for any right, title, claim or interest of any kind in the trust properties or purposes, and shows on its face that the plaintiffs do not and cannot have a right, title, claim or interest of any kind in the trust properties or purposes.

The test as to the sufficiency of a complaint for declaratory relief is furnished by the applicable statute, section 1060 of the Code of Civil Procedure. It declares that "Any person interested under a deed, will or other written instrument, * * * or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties" bring an action "for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument * * *." He may ask for such a declaration either alone or with other relief and "the court

may make a binding declaration of such rights or duties," a declaration which "may be either affirmative or negative in form and effect," and "shall have the force of a final judgment."

[1] The complaint herein states facts sufficient, under this statute, to invoke the jurisdiction of the court to make a binding declaration of the rights and duties of the parties to the action.

Among the questions presented by this complaint are these: Has the trust failed because of impossibility of performance? If it has failed, does the *cy pres* doctrine apply, or not? If the *cy pres* doctrine does not apply and the trust is at an end, in whom does the property vest, in the residuary trustees as a reversionary interest passing to them by the decree of final distribution or in the heirs as a mere possibility which later matured into a right in their favor?

We see no escape from the conclusion that this complaint is presented by persons interested under a written instrument and who desire a declaration of their rights and duties with respect to other persons and in respect to certain property. The complaint shows that an actual controversy relating to the legal rights and duties of the respective parties has arisen and now exists. And it is an action for declaration of the plaintiffs' rights and duties in the premises, including a determination of questions of construction of the written instrument, the decree of partial distribution of 1931. The complaint would seem to satisfy all of the requirements of the statute when challenged for sufficiency of facts to constitute a cause of action under the statute.

Such a complaint gives the court jurisdiction, in the action, to "make a binding declaration of such rights or duties," a declaration which "may be either affirmative or negative in form and effect," a declaration that "shall have the force of a final judgment" (§ 1060, Code Civ. Proc.), and thus serve the practical end of quieting and stabilizing an uncertain and disputed jural relation.

[2,3] The attorney general, in support of the judgment of dismissal, urges that the complaint presents no justiciable controversy. He says that the plaintiffs have no legally protectible interest in the trust or in the trust property for which they may seek declaratory relief; that they could not possibly have any standing in court except as relators, under proper circumstances, in a quo warranto proceeding concerning the administration of the trust; that only the attorney general, a relator, or the art association as trustee, has any standing in court concerning this trust, its purposes, or the trust property—any other person is a mere interloper.

This, his view of the situation, is based upon his interpretation of the dispositive provisions of the 1931 decree of partial distribution. That decree, which long since became final, contains no reversionary clause. That fact, plus the fact that his reading of those dispositive provisions convinces him that a general charitable intent is expressed, persuade him there can never be any possibility of an interest in the property arising and vesting in any of the plaintiffs. He says that the 1931 decree, in creating a charitable trust and expressing no reversion, severed the property entirely from the estate and cut off any right which the heirs or the residuary trustees otherwise might have therein; also, that that decree was a final, conclusive determination of the fact that the art association did accept the property, a fact which he asserts is further confirmed by the exchange of property between the association and Noel Sullivan.

All this, however, is premature at this stage of the proceeding. It may well be appropriate for presentation upon the trial when the court is considering what "declaration" it should make of the "rights and duties" of the parties and whether that declaration should be "affirmative or negative." At this stage, a court is not, cannot, be concerned with the question whether the respondent's views or the appellants' views (which, upon this appeal, are as vigorously and earnestly expressed as the opposing views of the attorney general)

are correct, concerning the interpretation of the instrument, the meaning of the words it uses, the extent to which, if any, resort may be had to the recitals of the instrument or to the provisions of the will which it was designed to express, and the bearing of those interpretations upon the respective claims of the parties. For that is what a declaratory relief action is about, to determine and declare the respective rights and duties of the parties, *at the end*, not at the beginning, of the inquiry. Thus, it is well established that when the sufficiency of a declaratory relief complaint is being considered, it is of no consequence whether the plaintiff may be on the right side or on the wrong side of the controversy. The complaint may not be dismissed because the court disagrees, if it does, with the construction which the plaintiff would put upon the instrument involved. *Maguire v. Hibernia Savings & Loan Soc.*, 23 Cal.2d 719, 728-731, 146 P.2d 673, 151 A.L.R. 1062; followed in *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747; *La Hue v. Dougherty*, 34 Cal.2d 1, 5, 206 P.2d 640; *Wolas v. Crescent Commercial Corp.*, 86 Cal.App.2d 740, 745, 195 P.2d 471; *Dallman Supply Co. v. Sweet*, 86 Cal.App.2d 780, 783, 195 P.2d 864; *Ingrao v. Karsten*, 94 Cal.App.2d 517, 522, 211 P.2d 41; *Ralphs Grocery Co. v. Amalgamated Meat etc.*, 98 Cal.App.2d 539, 220 P.2d 802.

The attorney general places considerable reliance upon *Society of California Pioneers v. McElroy*, 63 Cal.App.2d 332, 146 P.2d 962; *Merkley v. Merkley*, 12 Cal.2d 543, 86 P.2d 89, and *Vincent v. Security-First National Bank of Los Angeles*, 67 Cal.App.2d 602, 155 P.2d 63 as supporting the view that the complaint herein does not state a cause of action. But they are not applicable. In the *McElroy* case the question, upon appeal from a judgment rendered after a trial upon the merits, was whether one of the parties had made out a case for a declaration favorable to him, quite a different question from that now before us. In the *Merkley* case, also, there had been a trial. In addition, plaintiff's claim of an interest under an instrument affecting her divorced husband's

right in certain property was predicated upon the possibility that some day she might have occasion to assert a lien on his interest therein to collect alimony from him, in case some time in the future he might default in the payment of alimony to her. The court deemed that an interest too remote and speculative to furnish a basis for declaratory relief; quite different from a claim to a present interest in property, predicated upon a trust having already failed. The *Vincent* case involved a complaint to amend a decree of distribution, not to interpret the decree and declare the rights and duties of the plaintiff and defendant under it.

Because the complaint herein states a cause of action for a declaration of rights, the judgment should be reversed. The order denying the motion to set aside the judgment and for permission to amend the complaint, likewise should be reversed. The reversal of the order does not constitute a granting of the motion to amend, which may be considered anew by the trial court if presented anew, whether in the same or a different form.

The judgment and order appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



101 Cal.App.2d 548

FORD v. CHESLEY TRANSP. CO.,

Inc., et al.

Civ. 17684.

District Court of Appeal, Second District,
Division 3, California.

Dec. 29, 1950.

Rehearing Denied Jan. 16, 1951.

Hearing Denied Feb. 26, 1951.

Action by Mary C. Ford against the Chesley Transportation Company, Inc., a corporation, and others to recover damages for personal injuries sustained by her in a collision between an automobile in which she was riding as a guest and a truck and trailer owned by corporate defendant and driven

by its employee. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment for defendants after jury verdict and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that under the evidence of the case the giving of an instruction that it was presumed that the truck driver exercised due care in the premises was prejudicial error.

Reversed.

1. Automobiles ⇨246(60)

In action for damages by guest sustained as a result of a collision between automobile and defendant's truck, where guest was unconscious for over two months after accident and had no recollection whatever as to the circumstances of the accident nor as to what had taken place during the several weeks immediately preceding it, guest was entitled to an instruction that it was a presumption that guest at time of accident was exercising due care for her own safety.

2. Automobiles ⇨246(60)

In action by the guest in an automobile to recover damages arising out of a collision between automobile and defendant's truck, where truck driver testified fully concerning his conduct in backing the truck and trailer across the highway in front of oncoming automobile, the giving of an instruction that truck driver was presumed to be taking ordinary care at time of accident was error.

3. Automobiles ⇨242(1)

The presumption of the exercise of due care by operator of a vehicle may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises.

4. Appeal and error ⇨1064(1)

Automobiles ⇨246(60)

Where defendant's truck at night blocked passage on arterial highway while it backed into defendant's parking lot but no flares were put out nor a flag man stationed to warn approaching motorists, the giving of an instruction that it was presumed that truck driver used due care, was prejudicial error.

5. Trial ⇨237(1)

In action by a guest in an automobile for damages sustained when automobile

collided with defendant's truck, an instruction to the effect that if the testimony of truck driver was believed, the testimony would justify a verdict in accordance with his testimony, was improper, in that it confused the rule as to legal sufficiency of evidence with rule of preponderance of evidence. Code Civ. Proc. § 1844.

6. Automobiles ⇨246(2)

In action by a guest for damages sustained as the result of a collision between an automobile and defendant's truck, an instruction that there is no law which requires operator of any kind of motor vehicle to display flares to indicate the presence of a moving vehicle on highway was erroneous.

Lane & McGinnis and Henry E. Kappler, all of Los Angeles, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondents.

SHINN, Presiding Justice.

Plaintiff, Mary C. Ford, appeals from a judgment entered pursuant to a verdict in favor of defendants in an action to recover damages for personal injuries sustained by her in a collision between a car driven by George Sargent in which she was riding as a guest and a truck and trailer owned by defendant Chesley Transportation Co., driven by its employee Porter.

The accident occurred at about 9:30 p. m., on Cherry Avenue, an arterial highway. Cherry Avenue, which is 52 feet in width from one edge of the pavement to the other, runs in a northerly and southerly direction. The office of Chesley, called defendant, was situated in a building on the southeast corner of Cherry Avenue and Twenty-eighth Street. Immediately to the south of the building was a lot used by the defendant for storing its trucking equipment. Directly opposite on the west side of Cherry Avenue was a vacant lot. There was evidence that the drivers of defendant's trucks drove their equipment off the highway into this vacant lot prior to backing across Cherry Avenue into the parking lot owned by defendant.

On the night in question, defendant Porter was driving defendant's truck and flat-topped trailer with an overall length of 60 feet. There was evidence that the truck and trailer were equipped with headlights which were lighted; three clearance lights on each side of the trailer; two clearance lights in front of the driver's cab; a fixed lamp facing to the rear mounted on a rod in the rear of the driver's cab; and two tail lights on the rear of the trailer. With the exception of the headlights and the tail lights, the evidence was conflicting with respect to whether they were lighted at the time in question. The truck was equipped with a horn which was not sounded prior to the accident. The truck and trailer were equipped with flares which were not used. There was no street illumination of any kind at the point of accident.

Defendant Porter who had been driving north on Cherry Avenue, drove the truck and trailer approximately 90 feet into the west side vacant lot preparatory to backing it across the street into the east side parking lot. He testified that he then got out, walked to the edge of Cherry Avenue, looked in both directions and that he believed he saw one car approaching from the north and two cars approaching from the south. He then returned to the cab of the truck, having been absent about two minutes, and proceeded to back it toward Cherry Avenue. When he reached the edge of Cherry Avenue, his vision was limited to only a few feet to the north, and he thought he saw two cars approaching from the south, approximately 200 yards away. After hesitating for from two to four seconds, he proceeded to back the vehicle across Cherry Avenue and when the rear of the equipment reached the center line he again stopped for approximately five to six seconds, having taken from ten to twelve seconds to reach that point. He noticed two vehicles approaching from the south, the drivers of which motioned to him to proceed, and he again backed the equipment across the street. Other approaching cars also stopped. As the rear end of the trailer reached the easterly edge of Cherry Avenue, defendant Porter for the first time saw the lights of the car driven by Sargent

which was then about 10 to 30 feet to the south traveling at from 30 to 35 miles an hour. The Sargent car struck the rear left wheels of the truck.

The evidence was uncontradicted that plaintiff was rendered unconscious as a result of the accident and remained in that condition for over two months. She also suffered permanent injuries.

Plaintiff contends that (1) the defendants were guilty of negligence as a matter of law; (2) plaintiff was not guilty of contributory negligence as a matter of law; (3) the trial court committed prejudicial error in giving and refusing to give certain instructions.

[1] It is not material to our decision whether negligence or contributory negligence was proved as a matter of law. It appears from the evidence recited above that there was ample evidence of defendant's negligence and but meager evidence tending to prove contributory negligence on the part of plaintiff. No more need be said as an introduction to our discussion of the instructions. Plaintiff requested an instruction reading: "You are instructed that it is a presumption that the plaintiff Mary Ford was, at the time of the accident, exercising due care for her own safety." This instruction was refused and the court gave the following instruction: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof." Plaintiff's instruction should have been given. Due to her extended unconscious condition she had no recollection whatever as to the circumstances of the accident, nor as to what had taken place during several weeks immedi-

ately preceding. Only she could have testified as to any efforts she made to observe any dangerous conditions of traffic which might have prompted her to give warning to Sargent. Under these circumstances she was entitled to the benefit of the presumption. *Scott v. Sheedy*, 39 Cal.App.2d 96, 102 P.2d 575; *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590.

[2,3] It was error for the court to give the instruction which extended to defendant, also, the benefit of the presumption. The driver, Porter, testified fully concerning his conduct in backing the truck and trailer across the highway. The presumption may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises. The authorities are unanimous to this effect.

The remaining question is whether it was prejudicial error to give defendant the benefit of the presumption that it exercised due care. We do not doubt that prejudice resulted.

[4] Inasmuch as the question of prejudice depends upon the facts of the particular case it would not be useful to point out the particulars in which the facts of the present case differ from those in which it has been held that the giving of the same instruction, while erroneous, was not prejudicial. From our discussion of the facts which follows, we think that prejudice will appear as clearly as it was shown in the following cases in which the giving of the instruction was held reversible error, namely *Kelly v. Fretz*, 19 Cal.App.2d 356, 65 P.2d 914; *Campbell v. City of Los Angeles*, 28 Cal.App.2d 490, 82 P.2d 720; *Clary v. Lindley*, 30 Cal.App.2d 571, 86 P.2d 920.

It would not be a reasonable supposition that the jury found plaintiff to have been guilty of contributory negligence. There was no evidence that George Sargent had been driving in a manner that should have caused, or did cause, plaintiff apprehension for her safety. There was no evidence that she saw the truck and trailer in time to have warned Sargent of its presence, or if she had seen it that she did not believe Sargent would bring his car safely to a

stop. As to these matters, the presumption operated in her favor and tended to acquit her of contributory negligence. The reasonable explanation of the verdict is that the jury found defendant not to have been guilty of negligence. It must be assumed that the jury in considering this issue, in accordance with the court's instruction, gave some weight to the presumption that defendant used due care. This gave the defendant a decidedly unfair advantage. To an extent that it is impossible to determine, application of the presumption tended to minimize in the minds of the jurors the dangerous nature of defendant's operation, and the precautions that should have been taken. Passage along an arterial highway was entirely blocked off late at night. The driver alone had the duty not only of performing a difficult operation with his equipment, but at the same time observing traffic conditions—an exceedingly difficult assignment. He had flares on his equipment, but these were not used. He was engaged in a procedure which was customary with defendant, and yet did not have the assistance of a flag man to warn approaching motorists. His trailer was merely a long flat platform, and in this respect differed from those most commonly used for heavy trucking on the highways. When it is considered that the truck and trailer obstructed the entire street from curb to curb, under the conditions described, it is quite clear that it was the duty of defendant to take extraordinary care and caution to avoid accidents. Even if it had been believed that the driver was doing the best he could, defendant might have been found negligent in not affording him assistance. The jury could reasonably have determined that only a minimum of care was exercised and that defendant was guilty of negligence. But the jurors were confronted with the duty of applying the presumption in defendant's favor to offset this substantial evidence of negligence.

In view of the verdict it is fair to assume that the jury believed the testimony of Porter as to the lighting of the equipment and the manner in which he backed it across the street. In that event there would have been no other evidence to be consid-

ered in reaching a decision as to whether he exercised ordinary care. But the jury, under the instruction, was told that the presumption existed in his favor and should be weighed as evidence even as applied to the facts found with relation to Porter's conduct. Herein lies the vice of the instruction. The presumption as applied to plaintiff's case would mean, not that specific conduct on her part would be presumed to be free from negligence, but that in the absence of evidence to the contrary it would be presumed that as a passenger she exercised ordinary care to observe the presence of obstructions in the street and was not guilty of any act or omission inconsistent with the conduct of a reasonably careful person. The presumption has no place in the determination of the question, whether certain acts or omissions, believed by the jury to constitute the conduct of a party, were or were not negligent. The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that defendant was not negligent. In our opinion the error in giving this instruction was clearly prejudicial.

[5] Plaintiff's criticism of two other instructions merits attention. Section 1844, Code of Civil Procedure, reads: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." At defendant's request the court gave the following instruction: "The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness." The instruction obviously was intended to be applied to the testimony of Porter. If it had been in the language of the section it would have served its purpose. It was improper, however, as suggesting that

the testimony of Porter, if believed, "would justify a verdict in accordance with such testimony." The instruction confuses the rule as to the legal sufficiency of evidence with that of the preponderance of the evidence. It is further confusing in that the jury could have believed the testimony of Porter and still have found him to be guilty of negligence. The instruction was criticized in *Long v. Standard Oil Company*, 92 Cal.App.2d 455, 462, 207 P.2d 837.

[6] Plaintiff requested the following instruction: "Irrespective of any statutory requirements which may or may not impose certain obligatory conduct in connection with the backing of a vehicle across a public highway, the operator of such a vehicle is obligated to exercise that degree of care which a reasonable person under similar circumstances would exercise to protect another from harm." This instruction was refused, and at defendant's request the court gave one reading as follows: "You are instructed that there is no law which requires the operator of any kind of motor vehicle to display flares to indicate the presence of a moving vehicle on the highway." The wrong instruction was given. The one requested by plaintiff stated the law correctly. *Squires v. City of Los Angeles*, 100 Cal.App.2d 708, 224 P.2d 774. To say that "there is no law" requiring certain conduct might be understood by jurors, or some of them, to mean that the omission of such conduct would not be a breach of duty. It would not have been unreasonable for the jury to conclude that in the exercise of ordinary care flares should have been used by defendant.

We do not decide that the errors in giving the last two instructions would require a reversal of the judgment. Reversible error, however, resulted from the giving of the first quoted instruction. It is not improbable that the verdict would have been in plaintiff's favor, had it not been given.

It is unnecessary to consider other claims of error.

The judgment is reversed.

WOOD and VALLEE, JJ., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

101 Cal.App.2d 592

**WILSON v. SUPERIOR COURT OF
STATE, IN AND FOR CITY AND
COUNTY OF SAN FRANCISCO.**

Civ. 14791.

District Court of Appeal, First District,
Division 2, California.

Jan. 4, 1951.

Hearing Denied March 1, 1951.

Proceeding by Dewey Wilson to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, T. I. Fitzpatrick, J., requiring petitioner and his agent to deliver real and personal property to the executor of the will of petitioner's deceased wife. The District Court of Appeal, Schottky, J., pro tem, held that since surviving husband was in possession and control of the property and claimed that it was community property, Superior Court sitting in probate was without jurisdiction to determine as between him and representative of deceased wife's estate whether the property was community property or separate property of deceased wife or to order husband to deliver possession of such property to representative of deceased wife's estate.

Order of Superior Court annulled.

1. Courts ⇨200½

Title to property cannot be tried in probate proceedings as between the estate or heirs or devisees and a stranger to the estate.

3. Courts ⇨200½

A surviving husband claiming that property was community property at time of death of wife is thereby asserting a claim of title adverse to that of estate of deceased wife which cannot be determined by the court in probate.

3. Husband and wife ⇨262(1)

That record title to apartment hotel stood in name of deceased wife raised a rebuttable presumption that it was her separate property. Civ.Code, § 164.

4. Courts ⇨200½

Presumption, arising from fact that record title to apartment hotel stood in name of deceased wife, that hotel was her separate property, being only a rebuttable presumption, could be considered only as evi-

dence upon trial of the issue of title and did not give probate court jurisdiction to determine the issue of title as between surviving husband and executor of deceased wife's estate. Civ.Code, § 164.

5. Husband and wife ⇨273(1, 8)

Surviving husband retains the power to sell, manage and deal with community personal property, though an administration is pending with respect to one-half of such property under deceased wife's will and, unless claimants under will record notice of their claims in the counties in which the realty is situated within 40 days after wife's death, surviving husband may sell, lease or mortgage such realty and may otherwise dispose of it. Probate Code, §§ 202, 203.

6. Courts ⇨200½

Where surviving husband was in possession and control of property, including apartment hotel record title to which stood in name of deceased wife, and claimed that such property was community property, representative of deceased wife's estate could not have the question of whether property was community property or separate property of deceased wife determined in probate court and probate court was without jurisdiction to order husband to deliver possession of such property to representative of deceased wife's estate. Probate Code, §§ 202, 203.

7. Courts ⇨200½

Superior Court in an appropriate action and upon appropriate allegations has jurisdiction to protect estate of deceased wife against danger that surviving husband may commit waste upon property in his possession which he claims is community property or may fail to account for the rents therefrom and jurisdiction to determine whether such property is community property or separate property of deceased wife, upon the determination of which issue the right to possession must be based. Probate Code, §§ 202, 203.

Hone & Lobree, San Francisco, for petitioner.

Joseph A. Brown, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is a proceeding to review an order of the Superior Court requiring Dewey Wilson, surviving husband of Lillian Wilson, deceased, and Jim Nelson, his agent, to deliver to the executor of the will of said deceased, certain real and personal property.

The will, except for a few minor specific legacies, gives all the estate to a sister of deceased as residuary legatee. The executor filed a petition in the superior court for an order requiring petitioner Wilson and his agent Nelson to deliver over the assets of the estate in their possession, mentioning in particular a rooming house or furnished apartments hotel acquired and recorded in the name of deceased, but in possession of petitioner Wilson and managed for him by Nelson. An order to show cause issued, in response to which petitioner denied the jurisdiction of the court to make the order, on the ground that the property, though presumptively the separate property of deceased, actually was community property, that petitioner as surviving husband was entitled to possession and management of the community property and that the probate court had no jurisdiction to decide whether the property was community or separate property. After a hearing in the probate court, and following the signing of the order the surviving husband filed a petition in this court for a writ of review.

The sole question to be determined is whether or not the probate court had jurisdiction to hear said matter and to make the order here under attack. Petitioner contends that the probate court exceeded its jurisdiction in proceeding to determine a question of title between the executor of the estate and the surviving husband.

[1] It is the rule in California that title to property cannot be tried in the probate proceedings as between the estate of heirs or devisees, and a stranger to the estate.

In the early case of *Ex parte Casey*, 71 Cal. 269, 12 P. 118, it was held that the superior court, in a probate proceeding, has no power to order property in the possession of a person claiming title thereto to be delivered up to the executor or administrator; that the issue of title should be

tried in an appropriate action in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title. In *Re Haas' Estate*, 97 Cal. 232, 234, 31 P. 893, 32 P. 327, it was said that there are many matters relating to the estates of deceased persons of which the probate court has no jurisdiction, and that the question of title to property is essentially one of them; and that when it became apparent to the probate court that matters of title to property were at issue, such matters should have been left to other courts for determination. Those decisions have been cited frequently. See *In re Estate of Klumpke*, 167 Cal. 415, 421, 139 P. 1062; *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820; *Wilkerson v. Seib*, 20 Cal.2d 556, 127 P.2d 904; *McCarthy v. Superior Court*, 64 Cal.App.2d 468, 149 P.2d 55; *In re Estate of Abdallah*, 80 Cal.App.2d 634, 182 P.2d 596; *In re Estate of Escolle*, 134 Cal.App. 473, 25 P.2d 860; *In re Ochoa*, 50 Cal.App. 2d 457, 123 P.2d 106; And *In re Estate of Kurt*, 83 Cal.App.2d 681, this court said at page 683, 189 P.2d 528, at page 530:

"The basic rule and its recognized exception are set out in *Bauer v. Bauer*, 201 Cal. 267, 271, 256 P. 820, 821:

"It is undoubtedly the rule that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. *Ex parte Casey*, 71 Cal. 269, 12 P. 118; *In re Estate of Haas*, 97 Cal. 232, 31 P. 893, 32 P. 327. This is necessarily so, for the reason that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings.'"

And, 83 Cal.App.2d at page 684, 189 P.2d at page 530: "The only cases where the husband's claim against the wife's estate that property was community has been held to be within the probate court's jurisdiction are cases where the husband was the personal representative, thus bringing the case within the exception mentioned in *Bauer v. Bauer*, supra, 201 Cal. 267, 256 P. 820, and the decisions go expressly on that ground. (Citing cases.)"

[2] And In Re Estate of Klumpke, *supra*, the court said, 167 Cal. at page 421, 139 P. at page 1064: "A surviving husband claiming that certain property was community property up to the time of the death of his wife is thereby asserting a claim of title adverse to that of the estate of his wife, which cannot be determined by the court in probate."

The executor does not dispute the foregoing well settled rule but defends the order upon two grounds:

(a) That, although the court had no jurisdiction to try the issue of title, the court had jurisdiction to act on the disputable presumption of section 164, Civil Code, in behalf of ownership of the wife. (b) That even if the property were community the court would have jurisdiction at least over an undivided one-half and the income therefrom, and as the hotel was indivisible, had power at its discretion to place the same in the custody of the executor, who had furnished bond. No authority is cited for this second ground.

[3, 4] In support of his first contention the executor states that by reason of the fact that the property in dispute stood in the name of the deceased wife, there was a presumption that it was her separate property. That such presumption arose is, of course, true, but such presumption is not a conclusive presumption but only a rebuttable one. Such presumption can therefore, only be considered as evidence upon the trial of the issue of title, and cannot clothe the probate court with jurisdiction to determine the issue. The executor, at considerable length, refers to the evidence at the hearing in the probate court and argues that "since there is absolutely no substantial evidence that the property was community property, we are left with the presumption (conclusive in cases of this character) that the property was the separate property of the wife." However, what we are here confronted with is not a question of the sufficiency of the evidence to support the order of the probate court but a question of the jurisdiction of the probate court to try the issue of title as between the executor and petitioner.

[5] As to the second contention of the executor that even if the property were

community the court could vest possession in the representative of the estate, the second part of section 202 of the Probate Code reads: "in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect." This part of the section is construed as follows in 3 Cal. Jur.Supp. 682: "* * * the husband retains the power to sell, manage and deal with the community personal property, notwithstanding an administration is pending with respect to one-half of the property under his wife's will. * * * And the surviving husband, unless claimants under the wife's will record notices of their claims in the counties in which the real property is situated within forty days after the wife's death, may sell, lease or mortgage such property and may otherwise dispose of it." § 203, Probate Code.

In *Makeig v. United Security Bank & Trust Co.*, 112 Cal.App. 138, 296 P. 673, 676, the surviving husband sued the executor of his wife's will to establish that certain moneys on deposit in the wife's name were in fact community property. The executor had taken possession of said money. After trial in the superior court, the court found said moneys to be community property and that the husband was entitled to the possession of same. However upon appeal the court said: "While section 1402 of said Code [Civil Code, same as 202 Probate Code] provides that the possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry the will into effect, in this case where only \$10 is bequeathed to the husband and the entire balance to others, it is without question necessary for the personal representatives of the wife in this case to retain possession of the amount subject to her testamentary disposition in order to carry her will into effect, not only to pay her debts, but the costs, charges, and expenses of administration as well as the legacies." The judgment was

BACK et al. v. HOOK.

Civ. 18198.

District Court of Appeal, Second District,
Division 1, California.

Jan. 10, 1951.

Writ of Supersedeas Denied Feb. 6, 1951.

Action by Earl V. Back and Ruth R. Back against Geraldine W. Hook for damages because of defendant's failure to convey real property pursuant to an alleged agreement. Judgment was entered for plaintiffs. After defendant filed her notice of appeal, plaintiffs caused execution to issue upon two parcels of defendant's property, whereupon defendant filed undertaking to stay execution. On petition for writ of supersedeas to stay execution of judgment of a Superior Court of Los Angeles County, the District Court of Appeal, White, P. J., held that a writ of supersedeas would issue conditioned upon defendant's filing a sufficient undertaking for amount of judgment with a corporate surety thereon.

Order in accordance with opinion.

1. Supersedeas ☞4

Whether writ of supersedeas should issue lies in sound discretion of court.

2. Supersedeas ☞3

Where defendant's two personal sureties to an undertaking to stay execution, failed to justify and two additional personal sureties, also did not justify, and thereafter one surety declined to proceed and defendant was unable to obtain additional surety within time, writ of supersedeas to stay execution would issue conditioned upon defendant's filing of undertaking for amount of judgment with a corporate surety. Code Civ.Proc. § 948.

Gandy & Cockins, Santa Monica, for appellant-petitioner, Geraldine W. Hook.

P. E. Durkee, Los Angeles, for respondents.

WHITE, Presiding Justice.

Petition for a writ of supersedeas. Plaintiffs and respondents commenced an action in the Superior Court of Los Angeles County seeking damages from appellant, petitioner herein, because of her failure to convey real property pursuant to an alleged agreement so to do. Appellant by

ordered modified so as to prevent the executor to retain one-half of the money in his possession, as that amount was subject to her testamentary disposition and it would have been an idle act to have paid one-half delivered to the surviving husband and then returned by him. This case in no way departs from the rule that the question of whether or not property is community or separate property cannot be determined in the probate court as between the representatives of the estate and the surviving husband, for in that case the question was determined in an action in the superior court.

[6,7] We think it is clear under the authorities that where, as in the instant case, the surviving husband is in possession and control of property, and claims that said property is community property, the representative of the deceased wife's estate, even though the property may stand in the name of the wife, cannot have the question of whether the property is community property or separate property determined in the probate court, and the probate court is without jurisdiction to order the husband to deliver possession of said property to the representative of the wife's estate. If, as the executor asserts, the petitioner (surviving husband) may collect and abscond with the rents or may commit waste upon the property, and not being under bond like the executor, may fail to account for same if and when the property is determined to be separate property of the wife, this is still not sufficient to vest the probate court with jurisdiction to determine the question of title. The superior court, in an appropriate action and upon appropriate allegations, has ample powers to protect the estate against such asserted dangers, and to determine the issue of whether the property is community or separate, upon the determination of which issue the right to possession must be based.

It follows necessarily from the foregoing that the probate court was without jurisdiction to make the order complained of and that the same should be and it is hereby annulled.

NOURSE, P. J., and DOOLING, J., concur.

her answer alleged that she was at all times ready to perform pursuant to her written agreement but that plaintiffs had demanded that she modify the agreement and allow them certain credits arising out of the settlement of another and different action between the parties. The trial court found that there was no "meeting of minds", that there was no valid contract, and that plaintiffs were entitled to a refund of sums paid by them to the defendant, as well as sums expended in improving the property and for taxes thereon, totaling \$5,014.55. Judgment was entered accordingly, the judgment further providing that plaintiffs have a lien on the property involved until the judgment be paid.

After appellant had filed her notice of appeal, respondents caused execution to be levied upon two other parcels of property of appellant, whereupon appellant filed an undertaking executed by two personal sureties to stay execution. The sureties were excepted to. Thereafter, according to appellant's petition, the superior court commissioner "ruled that said sureties had failed to justify and continued the hearing to the 13th day of October, 1950, at which time the appellant presented two additional sureties; that because of a claimed impropriety in the affidavit of sureties, said * * * (commissioner) * * * refused to file a bond or to permit said sureties to justify."

Appellant further alleges that "thereafter one of said sureties declined to proceed and it was necessary for defendant and appellant to obtain an additional surety; that inasmuch as these matters took place over the weekend, defendant and appellant was unable to obtain an additional surety, together with proper affidavit of sureties, before Tuesday, October 17, 1950; that October 17, 1950, was the last day in which appellant could under the Code [Code Civ.Proc. § 948] have her sureties justify, twenty days having elapsed since service of the objection to sureties"; that the commissioner held that since the undertaking was being filed on the last day, there was no way to permit the sureties to justify, as five days' notice was necessary; that appellant nevertheless filed the undertaking and "is informed and be-

lieves that these sureties can justify if given an opportunity".

Upon presentation and filing of the petition, it appearing therefrom that the sale of property under execution had been set for October 23, 1950, this court on October 19, 1950, issued an order to show cause why a writ of supersedeas should not issue and stayed proceedings to enforce the judgment until further order of this court. Upon the filing by respondents of written opposition to the issuance of the writ, the matter was argued and submitted.

[1,2] Whether in the circumstances presented the writ should issue lies in the sound discretion of the court. *Kim v. Chinn*, 20 Cal.2d 12, 15, 123 P.2d 438, and cases there cited. From the record now before us it appears that any attempt by appellant to justify the personal sureties she has thus far obtained would be fruitless.

It is therefore ordered that upon the filing by petitioner with the clerk of this court of a good and sufficient undertaking for the amount of the judgment, \$5,014.55, with a corporate surety, approved by a judge or commissioner of the Superior Court of Los Angeles County, within twenty days from the filing of this order, that a writ of supersedeas issue; and further, that proceedings to enforce the judgment be stayed for a further period of twenty days from and after the filing of this order. And, should petitioner fail to file the aforesaid undertaking within the twenty days herein provided, it is ordered that the petition for writ of supersedeas be denied. The writ of prohibition sought as an alternative by petitioner is denied.

DORAN and DRAPEAU, JJ., concur.

Feb. 6, 1951

PER CURIAM.

Petitioner having failed to file the undertaking within the twenty days provided in the opinion filed on January 10, 1951, it is ordered that the petition for writ of supersedeas is denied and the order staying proceedings to enforce the judgment is annulled.

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36 Cal.2d 592

In re McGEE.

MARKWORT v. McGEE.

L. A. 21755.

Supreme Court of California, in Bank.

Jan. 10, 1951.*

Proceeding in the matter of the contest of the nomination of Patrick D. McGee to the Office of Member of Assembly from the 64th Assembly District of California by the Democratic and Republican Parties at the primary election wherein Eldon James Markwort filed an affidavit of contest on the ground that McGee was ineligible to the office of assemblyman. The Superior Court of Los Angeles County, Norman F. Main, J., entered judgment declaring McGee eligible to the office and the contestant appealed. The Supreme Court, Carter, J., held that the Constitution confers exclusive jurisdiction on the legislature to judge the qualifications and elections of its members and that such jurisdiction includes primary elections.

Judgment reversed with directions to dismiss the proceeding.

Prior opinion see, Cal.App., 222 P.2d 66.

1. States ⇨30

The constitutional provisions confer exclusive jurisdiction on the legislature to judge the qualifications and elections of its members. Const. art. 3, § 1; art. 4, §§ 4, 7.

2. Constitutional law ⇨61

Under the constitutional provisions conferring exclusive jurisdiction on the legislature to judge the qualifications and elections of its members the legislature cannot curtail its jurisdiction by delegating it to the courts. Const. art. 3, § 1; art. 4, §§ 4, 7.

* Subsequent opinion 229 P.2d 780.

226 P.2d—1

3. Elections ⇨126(1)

Primary elections in California are an integral part of the election process.

4. States ⇨30

The constitutional power conferred on the assembly over elections and qualifications of its members extends to and includes primary elections. Const. art. 2, § 2½; art. 3, § 1; art. 4, § 7.

5. States ⇨30

The elections code providing that any candidate at a primary election may contest the right of another candidate to nomination to the same office cannot validly apply to the office of assemblyman. Elections Code, §§ 8600, 8603, 8623-8629.

Rollin L. McNitt and Edythe Jacobs, Los Angeles, for appellant.

Frank P. Doherty and Spencer E. Van Dyke, Los Angeles, for respondent.

CARTER, Justice.

Defendant, or contestee, a registered republican, and plaintiff, or contestant, a registered democrat, filed and qualified as candidates, each for both parties, at the June, 1950, primary election for the office of member of the State Assembly, sixty-fourth district. Defendant was nominated on both tickets at that election.

The Elections Code provides that any candidate at a primary election may contest the right of another candidate to nomination to the same office by filing in the superior court an affidavit alleging various grounds including ineligibility to the office in dispute. Elections Code, §§ 8600, 8603. Issue may be joined by the other

candidate, *Id.* § 8623, and the matter heard by the court and decision rendered. *Id.*, §§ 8624-8628. Either party may appeal to the District Court of Appeal within ten days after judgment below and that court must decide the case within ten days after the appeal is perfected. *Id.*, § 8629.

Pursuant to those provisions, plaintiff commenced a proceeding contesting defendant's election at the primary on the ground that he failed to meet the requirement that: " * * * no person shall be a member of the Senate or Assembly who has not been a citizen and inhabitant of the State three years, and of the district for which he shall be chosen one year, next before his election." Cal.Const., Art. IV, § 4. The trial court decided in defendant's favor and plaintiff appeals asserting in chief that the evidence is insufficient to establish that defendant was a "citizen and inhabitant" of the state for three years next before his election as required by § 4 of Article IV of the California Constitution, *supra*.

While defendant contends that the judgment is amply supported by the evidence, he asserts that the trial court lacked jurisdiction to entertain the proceedings. In support of the latter position he relies upon the constitutional provision that: "Each House (of the legislature) shall * * * judge of the qualifications, elections, and returns of its members." Cal.Const., Art. IV, § 7. It is claimed that the assembly, to the exclusion of the courts, is the arbiter and forum for determining whether its members are eligible for the office. The first case touching precisely upon this issue was *Allen v. Leland*, 164 Cal. 56, 127 P. 643, where a candidate had been nominated for the office of assemblyman. An examination of the record shows he was so nominated by direct primary election. Mandamus in this court was sought to compel the county clerk to strike his name from the ballot for the general election on the ground that he lacked the residence requirements of § 4 of Article IV of the California Constitution, *supra*. The court denied relief stating: "The Constitution of the state (article 4, § 7) reads as follows: 'Each house shall choose its officers,

and judge of the qualifications, elections, and returns of its members.' By that article the assembly is made the *exclusive judge of the qualifications* of its members. The law providing for an official ballot cannot be held to have changed the intent of the people in adopting that constitutional provision that the assembly should be the *sole and exclusive judge of the eligibility* of those whose election is properly certified. For this court to undertake to try the question of eligibility and to *deprive the candidate of any chance to be elected* would simply be to *usurp the jurisdiction of the assembly.*" (Emphasis added.) *Allen v. Leland*, 164 Cal. 56, 57, 127 P. 643. Prior to the *Allen* case the court, in *People ex rel. Vejar v. Metzker*, 47 Cal. 524, was concerned with an appeal from a *quo warranto* proceeding contesting an election of a city councilman where the municipal corporation statutes gave the power to the council to judge election contests in language identical to that applicable to members of the assembly, *supra*. The court held the council had exclusive jurisdiction and the court none by analogy to the assembly provision. But in *People ex rel. Swift v. Bingham*, 82 Cal. 238, 22 P. 1039, the court held that exclusive jurisdiction could not be granted to a county board of supervisors by statute for the constitution conferred upon superior courts the right to entertain *quo warranto* proceedings. But doubt was cast thereon by *McGregor v. Board of Trustees*, 159 Cal. 441, 114 P. 566 and *Carter v. Superior Court*, 138 Cal. 150, 70 P. 1067, in the latter of which cases it was held that a provision that gave a council exclusive jurisdiction ousted the court of general jurisdiction in election contest cases. And it has been held that such statutes applying to local governments do not oust the courts of jurisdiction unless the legislative body is expressly given exclusive jurisdiction. *McGregor v. Board of Trustees*, *supra*; *Dawson v. Superior Court*, 13 Cal.App. 582, 110 P. 479.

[1,2] In the instant case we have no question of a conflict between a statutory grant of jurisdiction to a local legislative body and a constitutional provision investing power in the courts. All provisions

concerned here are in the constitution and we think that § 7 of Article IV, *supra*, confers exclusive jurisdiction on the legislature to judge the qualifications and elections of its members. The powers of the government of the state are divided into the legislative, executive and judicial, and neither shall exercise the powers of the other "*except*" as in this Constitution expressly directed or permitted." Cal.Const., Art. III, § 1. And there is expressly vested in the legislature, the power to judge the matters here involved, Cal.Const. Art. IV, § 7, *supra*, a power which is judicial in character. *Barry v. United States*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867. Hence we conclude that it was intended to be exclusive in the legislature, and that *Allen v. Leland*, *supra*, is correct in so holding. The overwhelming weight of authority under identical federal and state constitutional provisions is in accord. See cases collected *State ex rel. Sathre v. Quickstad*, 66 N.D. 689, 268 N.W. 683, 107 A.L.R. 205. Furthermore, it has been held that the legislature cannot curtail its jurisdiction by delegating it to the courts. See *Dinan v. Swig*, 223 Mass. 516, 112 N.E. 91; *Ashley v. Wait*, 228 Mass. 63, 116 N.E. 961, 8 A.L.R. 1463; *Greenwood v. Registrars of Voters*, 282 Mass. 74, 184 N.E. 390; *Reif v. Barrett*, 355 Ill. 104, 188 N.E. 889; *Knox County Council v. State*, 217 Ind. 493, 29 N.E.2d 405, 130 A.L.R. 1427; *In re Hunt*, 191 A. 437, 15 N.J.Misc. 331, court may decide issue but not conclusive on legislature; *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348; *Sutherland v. Miller*, 79 W.Va. 796, 91 S.E. 993, L.R.A.1917D; *State ex rel. Smith v. District Court*, 50 Mont. 134, 145 P. 721.

It is urged, however, that the constitutional power conferred on the assembly over elections and qualifications of its members, Cal.Const., Art. IV, § 7, does not extend to or include primary elections. It has been so held. *State ex rel. Cloud v. Election Board*, 169 Okl. 363, 36 P.2d 20, 94 A.L.R. 1007; *Leu v. Montgomery*, 31 N.D. 1, 148 N.W. 662. The contrary view has been taken. *State ex rel. Wetten- gel v. Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504; *Lucas v. McAfee*, 217 Ind. 534, 29

N.E.2d 403, reaffirmed on denial of petition for rehearing 29 N.E.2d 588. In the *Zimmerman* case, an injunction was sought to prevent the certification as republican nominee of one nominated in a primary election for the office of United States Senator on the ground that he was disqualified as he held a state judicial office. The court held that under the United States Constitution, the Senate had exclusive jurisdiction to decide the elections and qualifications of its members, U.S.Const., Art. I, § 5, and that such provision included primary elections. The court stated 24 N.W. 2d at page 506: "The contention that the election process is wholly within the jurisdiction of the state and no conflict can arise until some candidate has been certified to the United States Senate as the elected representative of the state is unsound.

"The proceedings up to and including the issuance of the certificate of election are wholly within the control of Congress. It was formerly held that primaries were not a part of the election process but that is no longer the established law.

"In *Newberry v. United States*, 1921, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913, the Supreme Court of the United States left undecided whether primaries were a part of elections and therefore subject to federal control. The question left undecided in the *Newberry* Case was decided in *United States v. Classic*, 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 and the doctrine was affirmed in *Smith v. Allwright*, 1944, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110. In *Smith v. Allwright* the Court held: 'The right of a citizen of the United States to vote for the nomination of candidates for the United States Senate and House of Representatives in a primary which is an integral part of the elective process is a right secured by the Federal Constitution.'

"It was further held that when as in the *Allwright* Case the primary became a part of the machinery for choosing officials, state and federal, the same test to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election.

"The Court overruled *Grovey v. Townsend*, 1935, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680, which had held to the contrary.

"There can be no doubt that under the laws of the State of Wisconsin the primary election law is an integral part of the election process. No person can become a candidate of a political party in Wisconsin unless he can be a candidate for nomination by that party at a primary election.

* * *

"Under *United States v. Classic*, supra, and *Smith v. Allwright*, supra, the same rules of law are applicable to a primary for the nomination for United States senator that are applicable to an election for United States senator.

"It is well established that under the provisions of Art. I, sec. 5, courts have no jurisdiction to judge of the returns and elections of United States senators. * *

"What the relator asks the Court to do is to hold that Mr. McCarthy is disqualified to be a candidate for the nomination by the Republican Party for the office of Senator of the United States by virtue of the provisions of sec. 10. The process of nomination under Wisconsin law is an integral part of the election process and is therefore, as has already been stated, wholly within the jurisdiction of the United States Senate. If Mr. McCarthy under Wisconsin law cannot be a candidate for nomination at the primary, he can never be a candidate at the election of any political party. He is therefore disqualified to take the first step if the argument of the relator is sound. His right to be a candidate at the election would be a barren right."

[3,4] By analogy the jurisdiction to judge qualifications and elections of assemblymen lies exclusively with the assembly and it cannot delegate that duty and it cannot achieve that result indirectly by authorizing the courts to decide contests after primary elections. As in Wisconsin, primary elections in this state are an integral part of the election process. See *Communist Party v. Peek*, 20 Cal.2d 536, 127 P.2d 889; *Independent Progressive*

Party v. County Clerks, 31 Cal.2d 549, 191 P.2d 6.

It is true that comprehensive powers are given to the legislature with regard to primary elections by the constitution as follows: "The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory." Cal.Const., Art. II, § 2½. That power is not unlimited. *Communist Party v. Peek*, supra. We see nothing in it that purports to strip or relieve the assembly or senate of their duty and obligation to judge the qualifications, elections, and returns of their members. The anomalous results that would follow if a court could make a binding determination under § 8600 of the Elections Code are apparent. If the trial court gave its judgment, either favorable or unfavorable, to the candidate after the primary election but nevertheless the candidate at the ensuing election received the majority of the votes cast, there can be little doubt that he could present his credentials to the legislative house to which he was elected and that body would be required to pass upon any claimed defect in his selection, regardless of the conclusion reached by the court. Such could easily happen as it has in the instant case. The trial court judgment was favorable to defendant and it was affirmed on appeal by the District Court of Appeal in September. But a hearing by this court was granted and in the meantime his name was on the ballot at the November election and he received a majority of the votes. For this court to rule upon the question would be futile, for the binding and conclusive decision rests with the as-

sembly. If the legislature may, by authorizing court review of primary election contests, prevent a candidate from being on the ballot at the ensuing election for various defects as to the elections or qualifications, it would, in many situations, achieve indirectly what it could not do directly, that is, delegate to the courts its prerogatives under § 7 of Article IV of the California Constitution.

It may be that in some senses a primary election is not an election, See *McClintock v. Abel*, 21 Cal.App.2d 11, 68 P.2d 273; *Miller v. Childs*, 28 Cal.App. 478, 152 P. 972, but as seen from the foregoing discussion, that rule is not here applicable. Also, while the legislature may prescribe tests and conditions for candidates under § 2½ of Article II of the Constitution, See *Socialist Party v. Uhl*, 155 Cal. 776, 103 P. 181; *Hart v. Jordan*, 168 Cal. 321, 143 P. 537; *Heney v. Jordan*, 179 Cal. 24, 175 P. 402, that does not mean that the courts may be given jurisdiction to override the power vested in the legislature to judge qualifications, elections and returns of members.

[5] *Heney v. Jordan*, supra; *Norcop v. Jordan*, 216 Cal. 764, 17 P.2d 123; *Hubbard v. Jordan*, 216 Cal. 788, 17 P.2d 127; *Ackley v. Jordan*, 216 Cal. 789, 17 P.2d 127; and *Puccinelli v. Superior Court*, 183 Cal. 775, 192 P. 707, are cited for the proposition that our courts entertain jurisdiction to determine eligibility of candidates for nominations. The *Heney* case involved the office of Governor which, of course, does not come under § 7 of Article IV of the Constitution. The *Norcop*, *Hubbard* and *Ackley* cases involved the office of representative to Congress, as to the first two and state assembly as to the third. The last two are memorandum opinions based on the first one. In all cases, relief was denied in proceedings for mandamus to compel the placing of a candidate's name on the election ballot after the primary election. There is no mention of the powers of Congress and the legislature with respect to its members. Presumably, the point was not raised. The same comment applies to the *Puccinelli* case. We hold

therefore that § 8600 of the Elections Code cannot validly apply to the office of assemblyman.

The result reached makes it unnecessary to decide whether the evidence is sufficient to sustain the finding that defendant is eligible for the office of member of the State Assembly. The court had no jurisdiction to entertain the proceeding.

The judgment is reversed and the trial court directed to dismiss the proceeding.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



101 Cal.App.2d 782

BOSE v. MILLS.

Civ. 7892.

Sac. 6134.

District Court of Appeal

Third District, California.

Jan. 18, 1951.

Herman H. Bose brought an action against James R. Mills, also known as J. R. Mills, to recover money alleged to be owing and unpaid by virtue of a promissory note executed by defendant to plaintiff's wife who had loaned defendant proceeds from sale of government bonds which were community property of plaintiff and plaintiff's wife, and defendant filed a cross-complaint. The Superior Court, Tuolumne County, J. T. B. Warne, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that defendant had paid the note by check drawn in favor of plaintiff's wife before plaintiff demanded that payment be made to plaintiff, and that such check was payment of note and discharged defendant's obligation under note.

Judgment affirmed.

1. Husband and wife ⇨270(8)

In action to recover amount alleged to be due on note executed by defendant when plaintiff's wife, without knowledge of plaintiff, sold government bonds constituting community property of plaintiff and plaintiff's wife and loaned proceeds to defendant, evidence sustained findings that defendant had paid the note by check drawn in favor of plaintiff's wife before plaintiff demanded that payment be made to plaintiff, and that such check was payment of note and discharged defendant's obligation under note. Civ.Code, § 172.

2. Husband and wife ⇨265

Husband has exclusive management and control of community personalty with like power of disposition other than testamentary, as he has of his separate estate. Civ.Code, § 172.

3. Husband and wife ⇨265

Where note was executed by defendant to plaintiff's wife when plaintiff's wife, without plaintiff's knowledge, sold government bonds constituting community property of plaintiff and plaintiff's wife and loaned proceeds to defendant, and defendant paid note to plaintiff's wife by check which was expressly agreed would be payment, and at time of payment note was in possession of plaintiff who had found it where plaintiff's wife had put note, plaintiff by subsequent notice to defendant that note belonged to plaintiff could not obligate defendant to stop payment on check.

4. Bills and notes ⇨427(2)

Payment to payee of a negotiable instrument, after it has passed before maturity into hands of holder in due course, will not discharge obligation.

Bush & Ackley, Oakdale, by Leo Milich, Riverbank, for appellant.

William C. Coffill, Sonora, for respondent.

VAN DYKE, Justice.

Plaintiff and appellant herein brought this action to recover from defendant and respondent the sum of \$1,000 with interest

and attorneys' fees alleged to be owing and unpaid to appellant by virtue of a promissory note executed by respondent. That note was dated November 1, 1948, and by it respondent bound himself to pay the said sum of \$1,000 to the order of Sara D. Bose, appellant's wife, or Herman H. Bose, appellant. The note was payable on demand.

The following appears from the evidence in the record: Appellant and Sara D. Bose were during all the time with which we are here concerned husband and wife. They lived at Long Barn in Tuolumne County where respondent ran a resort. Sara D. Bose was a part-time employee of respondent. Before this note was executed appellant and his wife had purchased war savings bonds, using their wages for that purpose. All of the bonds they purchased were payable to either of them and the bonds were kept in a metal box in their dwelling to which both had access. About the time this note was executed the wife took some of these bonds and sold them, obtaining therefor \$1,000. She then loaned that sum to respondent and received from him the promissory note upon which this action is based. It appears that this transaction was not disclosed by Sara to her husband and that he did not learn of it until some time in April of 1949, when he discovered the note in an old billfold tucked away beneath seldom-used household linens in a bureau drawer. Although appellant spoke to his wife about the transaction after he discovered the note, he said nothing to respondent and took no action in respect of it until on October 24th, when he mailed a letter to respondent, notifying him that he (appellant) "was the holder of a note for \$1,000" against respondent which he asserted would become due and payable on October 30th following. This, he testified, was his interpretation of the due date of the note. He told respondent that the note was his (appellant's) individual property; that payment must be made to him not later than October 31st and must be in cash. About the time he received the letter, respondent spoke to appellant about it and told him that he had already repaid the money to appellant's

wife. The record discloses that under date of September 30th respondent drew a check in favor of Mrs. Bose for the principal and interest upon the note and received from her a clearance of the obligation dated the same day, in which she stated that the note itself had been lost or stolen and could not be returned to the maker. The document stated that Mrs. Bose had received payment in full of the obligation and asserted that no further demands would be made upon respondent for that reason. In December, 1949, appellant began this action based upon the note, alleging it to be unpaid. After a trial before the court, findings of fact and conclusions of law favorable to defendant were made and drawn and judgment was given that appellant take nothing and that respondent was entitled to have the note delivered up for cancellation as having been fully paid and discharged. From that judgment this appeal is taken.

The findings of the trial court were as follows: The court found the execution of the note and its delivery to plaintiff's wife; that the note was paid by respondent to Sara D. Bose and the indebtedness represented thereby fully discharged by the check of respondent dated September 30, 1949, and cashed November 5th following; that when the note was paid on September 30th Sara gave to respondent a receipt for payment in full; that appellant had possession of the note for more than three months before the date of payment on September 30th and made no demand on respondent or gave to him notice in any way that the money loaned to him was community property of appellant and his wife; that said money was community property but that respondent had no notice thereof and did not know whether the moneys were separate property of Sara or of Herman Bose; that on October 25th appellant notified respondent he was the holder of the note, that it was his individual property and payment must be made to him in cash; that in paying the note respondent acted in good faith without notice of appellant's claim of complete ownership and without notice that appellant had possession of the note; that respondent then believed in

good faith that the note was lost, as stated to him by appellant's wife.

[1] Appellant first contends the finding of the court that the note had been paid is unsupported by the evidence. We think this contention cannot be sustained. To be sure, there was evidence in the record from which the trial court might have determined that the check respondent gave in payment was in fact given after the receipt by respondent of appellant's demand that the money be paid to him. Thus respondent's check book was produced and it appeared that there were checks which bore higher numbers in the numerical order in which checks were drawn from the book than did the check given Mrs. Bose, and these higher numbered checks were dated later than was the check which respondent claimed was given to Mrs. Bose. It appeared also that Mrs. Bose did not cash the check she received until about one month after its date and after appellant's demand had been made upon respondent. It further appeared that during the intermediate time there had not at any time been funds in the bank sufficient to honor the check had it been presented. But these matters were explained satisfactorily to the trial court by respondent. Briefly, he testified he told Mrs. Bose that any time she wanted to cash the check she should let him know and he would put sufficient funds in the bank; that when he drew the check he drew it from the body of the book of check forms so that the fact it had been drawn would not be known to others since his check book was kept on the back bar at the resort. We feel that the trial court's findings as to the time the check was given to Mrs. Bose are supported by substantial evidence and are binding upon this court. But appellant further contends that the mere giving of the check did not discharge the obligation without an express agreement to that effect, citing 19 California Jurisprudence 924. The rule is as stated by appellant, but both the form of the receipt given by Mrs. Bose and the oral testimony of respondent were sufficient to support the finding made by the trial court upon the point that the note was paid when the check was given and the receipt executed by Mrs. Bose. Respondent's

testimony was squarely to the point that such express agreement was actually made when the check was delivered. It was competent for the trial court to find the ultimate fact of payment from the evidence. Appellant contends the court's finding that respondent acted in good faith in believing the note was lost when he gave his check to Mrs. Bose is unsupported by evidence except such as is inherently improbable, but we cannot so characterize the testimony given. While Mrs. Bose was not called to the stand by either party, respondent testified that she told him the note was lost. We see nothing improbable in that. She desired, as named alternate payee in the note, to collect the same. She must have known respondent would expect to receive his note on payment thereof. She knew the same was then in the possession of her husband. There was nothing inherently improbable in her telling him the note was lost. There was nothing inherently improbable in his believing her assertion.

[2, 3] Appellant asserts that the judgment is against law and in support of this assignment of error he argues, first, that since the note was community personal property he, as the husband in the marital community, was entitled to sole management and control and that, therefore, when respondent paid Mrs. Bose after notice from appellant not to do so he acted at his peril and cannot claim that he had paid the note as against the suit of the husband. There is no question, of course, that under the provisions of the Civil Code in respect to community property the husband has the exclusive management and control of community personal property, with like absolute power of disposition other than testamentary, as he has of his separate estate. Civil Code, § 172. Appellant says further that even though it be held, as the trial court did, that the note had been paid before appellant gave notice to respondent that he had the note, and that payment must be made to him only, nevertheless, since respondent's check given in payment had not been cashed when that notice was received, it was incumbent upon

respondent to stop payment of the check and make payment of the note to appellant. In this, however, we think appellant misconceives the effect of the trial court's finding as to payment. Respondent had received the money from Mrs. Bose and had given to her his note payable either to her or appellant. At least until he received notice from her husband that the note was community property and that he was to pay only to the husband, he could pay the note to either of the two alternative payees. This the court found he did by his check. If that finding be supported, and we have held that it is, then the note as an existing obligation was discharged and was no longer a document conferring any rights upon either of the alternative payees. It was as dead in the hands of the husband as it would have been in the hands of the wife. By his belated notice appellant could not cast upon respondent any obligation to undo what had been done by stopping payment upon the check he had given in payment of the note. That check, having been given in payment, passed into the marital community as the only obligation outstanding against respondent.

[4] Under this same assignment that the judgment is against law, appellant further contends that because respondent made payment on the note to Mrs. Bose at a time when she did not have physical possession of the instrument the payment was invalid and the note was not discharged. This contention also cannot be sustained. Appellant relies upon the rule that payment to the payee of a negotiable instrument, after it has passed before maturity into the hands of a holder in due course will not discharge the obligation. But the statement of the rule demonstrates that it does not apply here. Neither of the two named payees were holders in due course—the note had not been negotiated. It had not achieved the characteristics of a negotiable instrument in the hands of a holder in due course of trade. Therefore, respondent could, as he had promised to do, pay the debt to either payee while without notice of any claim from appellant that payment should be made only to him because com-

munity funds had been loaned. This he did; and, as has been said, the trial court held expressly that in doing so he acted in good faith and in reliance upon the representation of Mrs. Bose that the note had been lost.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 624

PEOPLE v. WILLIAMS.

Cr. 2223.

District Court of Appeal, Third District,
California.

Jan. 8, 1951.

Rehearing Denied Jan. 23, 1951.

Hearing Denied Feb. 5, 1951.

Orville Williams, alias Dusty Williams, was convicted in the Superior Court, Calaveras County, J. A. Smith, J., of grand theft, the stealing of cattle, and he appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal law §1144(13)

In testing record on appeal under a claim that evidence is insufficient to support judgment of conviction only that evidence tending to uphold conviction is considered.

2. Larceny §65

Evidence sustained conviction for crime of grand theft, the stealing of cattle.

3. Criminal law §511(1)

It is not necessary that evidence corroborative of an accomplice's testimony prove independently either that defendant is guilty of offense or that he is guilty beyond a reasonable doubt.

4. Criminal law §511(7)

Sufficient corroboration of an accomplice's testimony may be furnished by de-

fendant's own testimony, or by admissions or confessions made by him, or by his silence in face of an accusatory statement.

5. Criminal law §511(1)

The entire conduct of parties, their relationship, acts, and conduct during and after crime, may be taken into consideration by jury in determining sufficiency of corroboration of an accomplice's testimony.

6. Criminal law §511(1)

If corroboration of an accomplice's testimony is inculpatory it is not essential that it extend to all elements of offense, nor to every fact and detail included in testimony of accomplices, and such evidence is sufficient if it tends in some slight degree, at least, to implicate defendant, and it need not be strong.

7. Criminal law §511(3)

Circumstantial evidence suffices for purpose of corroboration of testimony of an accomplice.

8. Criminal law §511(3)

Corroboration of testimony of an accomplice is sufficient, even though circumstantial and slight, if connection of defendant with alleged crime may be reasonably inferred from corroborative evidence.

9. Criminal law §511(2)

Evidence corroborating accomplice's testimony is sufficient if it connects defendant with commission of crime in such a way as reasonably to satisfy fact-finding body that accomplice is telling truth.

10. Criminal law §511(1)

Corroboration of a testimony of accomplice must create more than a suspicion of guilt, but is sufficient even though it be slight and, when standing by itself, entitled to but little consideration.

11. Criminal law §562

The determination of a charge in a criminal case involves proof that offense charged was committed, and also, that it was perpetrated by person or persons accused thereof.

12. Criminal law Ⓒ1144(13), 1159(2)

Appellate court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict, and if circumstances reasonably justify verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant, will not warrant interference with determination of jury.

13. Criminal law Ⓒ1159(6)

Rule that circumstances relied upon by prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for jury, and is not rule for guidance of court on review.

14. Criminal law Ⓒ512

In prosecution for grand theft, the stealing of cattle, evidence corroborative of accomplice's testimony was sufficient to sustain conviction on whole of evidence.

Natalie J. Holly, San Rafael, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Deputy, for respondent.

VAN DYKE, Justice.

Appellant was charged in a single count with the crime of grand theft, the stealing of cattle. The information charged that he stole cattle belonging to Harold Lombardi, Louis Lombardi and Dr. A. E. Ghilotti. The trial was before the court without a jury, and appellant was found guilty. Probation was denied and he was sentenced to prison for the term prescribed by law. He appeals from the judgment.

Appellant contends here that the evidence is insufficient to support the judgment and particularly that the testimony of the accomplice fails to connect him with the commission of the crime and that the corroboration of the accomplice's testimony is legally insufficient.

The accomplice referred to, one Rushing, had previously been charged with the theft of the same cattle and had pleaded

guilty to the theft of one and been granted probation. The following facts were sufficiently shown, without recourse to the accomplice's testimony. During the period involved appellant Williams was foreman of the Red House Ranch upon which Ghilotti's cattle, among others, were being pastured. Appellant testified that he had been handling cattle off and on since early youth. He had gone to work at the Red House Ranch January 1, 1948, working until early January, 1950. It was during the year 1949 that the cattle were taken. Ghilotti had put 25 Hereford heifers to pasture on the Red House Ranch January 12, 1949, and took them off the range May 25th following. At that time only 20 head were found, but later in October two more were recovered. Harold and Louis Lombardi ranged cattle near the Red House Ranch and just before April 4th appellant and other employees of the ranch, while working the ranch cattle, found 10 strays. Acting on information that they belonged to the Lombardis, the appellant sent word and Harold Lombardi and his brother Oswald came to see the cattle. They were being held in a field on the ranch which was fenced with woven wire with barbed or smooth wire strands above, and when inspected by the Lombardi brothers were in a group. Harold Lombardi testified at the trial that the 10 cattle belong to him and his uncle Louis; that one belonging to Louis was branded with the figure "3" on the right hip, which was Louis' brand, marked with an underbit in the left ear and a down slit in the right and was a heavy-set white-faced Hereford heifer approaching three years of age and having a short and slightly dished face and a set in the hind legs; the marks and brands were plain and clear, the animals having been clipped. On the day following, Lombardi returned with a truck to get the Lombardi cattle and two were missing. They could not be found after a search. Appellant gave it as his opinion that they must have gone north and said he would look for them when he rounded up some cattle in that direction. One of them Lombardi found on November 27th in a corral at Tuolumne City some 10 or 15 miles distant

from accomplice Rushing's ranch. He identified it by brand marks and other indicia. One Baker, who had a ranch in the neighborhood of Rushing's place, saw this animal during the summer, along with other cattle bearing Rushing's brand, on Baker's range. He saw the figure "3" brand on it. Later he saw the same animal. Rushing and two other men had a rope on her and were leading her. Rushing said they were taking her over to his place. Appellant himself testified that he was the one who was with Rushing and had roped the animal and helped Rushing load her into a truck and take her to the corral in town. Baker was with Lombardi on November 27th at the corral and saw the same animal there.

Turning to the Ghilotti cattle, appellant testified that they were on the Red House Ranch, of which he was foreman, from January 12th to May 25th, when 20 head were taken off by Ghilotti. He became quite familiar with these cattle and knew their marks and brands, had put them through a chute and sheared some at one time. The cattle were all of approximately the same age, about a year and a half old. Ghilotti later found cattle in the same Smith corral in Tuolumne City where the Lombardi heifer was found that he said looked just like those he had lost. Other men, notably Harold Lombardi, testified that 3 head of cattle, two alive and one dead, were found in or near that same corral at the same time, one of which at least bore the marks and brands of Ghilotti's missing cattle, together with the brand of Rushing, and one of which was the other missing heifer belonging to his uncle Louis.

[1] As heretofore stated, the foregoing evidence is extracted from the record without including therein any evidence of the accomplice Rushing. Of course we have not included evidence contradictory thereto produced by appellant as under the well-known rules it would be futile to do so when testing the record under a claim that the evidence is insufficient to support the judgment appealed from.

Turning now to the testimony of Rushing, the accomplice, we find him stating

that at a time before any of the cattle with which we are concerned here were missing from the Red House Ranch appellant and he entered into an agreement whereunder appellant was to bring cattle to Rushing's ranch for pasture and care and when the same were sold the two would share the proceeds; that thereafter and about mid-March appellant brought two cattle to Rushing's ranch about 11 o'clock at night; that they were white-faced heifers about two years old; that near the end of April appellant brought two more white-faced heifers about the same age to Rushing's ranch. At that time Rushing said he was employed at the Red House Ranch under appellant and assisted appellant in loading the heifers and hauling them to his ranch. Near the end of June he said appellant brought two more heifers to his ranch around 10 o'clock at night. In all, 7 cattle were brought, one a young calf. On all but two Rushing's brand was placed, appellant assisting in the branding; that these same cattle were later brought to Tuolumne City and placed in the Smith corral where they were when Lombardi and other witnesses saw them; that appellant and Rushing brought one to Tuolumne City. It was made sufficiently clear in the record that the Lombardi and Ghilotti cattle were brought to Rushing's ranch, later taken to the corral in Tuolumne City and that numbers of them, besides the brands of their owners, bore Rushing's brand. Rushing further testified that on several occasions, and in line with the original understanding between him and appellant, the appellant delivered food for the cattle at the Smith corral, consisting of cottonseed oil cake and hay.

It may be said additionally that appellant gave a different story explaining his presence at various times on the Rushing ranch, his joining in the branding of cattle there, his roping, handling and helping to truck the Lombardi heifer into the Smith corral and his furnishing of feed. Concerning the feed he said that Rushing asked him to go in with him in feeding certain cattle that were on Rushing's place so as to make them marketable; that he agreed to do so if the cattle were brought

in and corraled at Tuolumne City, explaining that feeding for market could not be properly done with cattle that were out on range; and explaining generally why he thought the deal as he said it was would be profitable to him. But the trial court chose not to believe this explanation, and we are bound to follow the trial court since conflict is involved.

[2] Considering the testimony as a whole, including that of the accomplice, it is apparent from what has been said that the judgment finds sufficient support in the evidence. Clearly, these cattle were stolen and, accepting the accomplice's testimony, appellant participated in the theft.

[3] As to the corroboration, the rules for testing its sufficiency have been recently stated by this court in *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519, 533, as follows:

"It is not necessary that the corroborative evidence prove independently either that the defendant is guilty of the offense or that he is guilty beyond a reasonable doubt. * * * If this were not true and if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occasion to offer the accomplice as a witness.

[4] "Sufficient corroboration may be furnished by the defendant's own testimony * * *, or by admissions or confessions made by him * * *, or by silence in the face of an accusatory statement. * * *

[5] "The entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration. * * *

[6] "If the corroboration is inculpatory it is not essential that it extend to all of the elements of the offense, nor to every fact and detail included in the testimony of the accomplices. * * *

"Conversely, such evidence is sufficient if it tends in some slight degree, at least, to implicate the defendant. It need not be strong. * * *

[7] "The testimony of an accomplice need not be corroborated by direct evidence, or, stated in another way: Circumstantial evidence suffices for the purpose of corroboration. * * *

[8] "It is sufficient, even though circumstantial and slight, if the connection of the defendant with the alleged crime may be reasonably inferred from the corroborative evidence. * * *

[9,10] "The corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth. * * * In the *Trujillo* case, *supra* [*People v. Trujillo*], 32 Cal.2d [105] at page 110, 194 P.2d [681] at page 684, our Supreme Court said: 'Such corroboration must create more than a suspicion of guilt, but is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration". * * *

"In *People v. Henderson*, *supra*, 34 Cal. 2d [340] at page 343, 209 P.2d [785] at page 786, the following language is used: 'The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. * * *

[11-13] In *People v. Newland*, 15 Cal. 2d 678, 681, 104 P.2d 778, 780, the Supreme Court had occasion to pass upon the rule as to the binding effect upon an appellate court of the inferences drawn by the trier of facts from circumstantial evidence which might reasonably be reconciled with innocence as well as with guilt. The court said:

"* * * The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such

facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. * * * In the Perkins case [People v. Perkins, 8 Cal.2d 502, 66 P.2d 631] this court expressly rejected the application of the statement from the Staples case [People v. Staples, 149 Cal. 405, 86 P. 886] to a situation which involved only circumstantial evidence. As pointed out by the court the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. It said: 'The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.'

Because the testimony in this case was to a large degree circumstantial we have been at pains to study the record carefully and have hereinbefore set forth in considerable detail the testimony which in our opinion supports the judgment. We have done this both from the aspect of the entire testimony, including that of the accomplice, and from that of the corroborating testimony justifying consideration of the testimony of the accomplice. We think the contention that the corroborative testimony does not measure up to the tests cannot be sustained. Take the case of the Lombardi heifer found at last in the Smith corral, where it was admittedly being fed by appellant and the accomplice. Appel-

lant had seen her in the Red House Ranch field; he knew her marks and brand and had promised to look for her. He finds her near the accomplice's ranch, ropes and handles her and joins in taking her to the corral where she is kept until found by her owner. The court could reasonably find his acts directly inculpatory notwithstanding his testimony that when he handled the heifer he could not see a brand. Lombardi could see it.

Turning next to the Ghilotti cattle, appellant had had these cattle under his direct charge and supervision for a considerable time. The entire 25 head which Ghilotti placed on the ranch under appellant's charge were to range there and did range there for a period exceeding four months, with the exception of the five which at the end of that period were not found. Appellant has, in his own words, handled cattle since he was old enough to climb on a horse. Such men are skillful in reading and remembering marks and brands. The trial court could reasonably infer that the cattle which were placed in appellant's charge and were missing when he was called upon to redeliver the bunch could not be handled by him thereafter without recognition by him. Yet in November admittedly he was engaged in feeding several of these same missing cattle in order that they might be fattened for market. These Ghilotti cattle found in the feed corral in Tuolumne City had been stolen, as is sufficiently clear from the testimony. The same must be said of the Lombardi cattle.

[14] We hold the corroborative evidence to be sufficient and the whole evidence to satisfactorily support the judgment.

The judgment is affirmed.

PEEK, J., and ADAMS, P. J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

PEOPLE v. MICELI.

Cr. 739.

District Court of Appeal, Fourth District,
California.

Jan. 9, 1951.

Rehearing Denied Jan. 23, 1951.

Hearing Denied Feb. 5, 1951.

Joe Miceli was convicted in the Superior Court of San Diego County, L. N. Turrentine, J., of murder in the second degree and from the judgment of conviction and an order denying a new trial, defendant appealed. The District Court of Appeal, Barnard, P. J., held that the record disclosed no prejudicial error in the admission and exclusion of evidence or in the giving and refusing of instructions.

Judgment and order affirmed.

1. Criminal law ⇨1170½(1)
Witnesses ⇨350

Limiting cross-examination of witness for prosecution in homicide case with respect to his motive or bias by sustaining objections to questions as to whether witness had been charged with rape and the complaint later dismissed by district attorney and as to whether statute of limitations had run against the charge, was not abuse of discretion or prejudicial to defendant.

2. Criminal law ⇨1170½(1)
Witnesses ⇨393(3)

Where witness for prosecution who testified that he had seen defendant stab victim with a knife admitted on cross-examination that at former trial he had referred to object used by defendant as a shiny metallic object and not as a knife, refusing to permit impeachment of such witness by reading from his testimony at preliminary examination was not error or prejudicial to defendant, where such testimony would have been cumulative and would have added nothing to any impeaching effect of the evidence already received.

3. Criminal law ⇨825(1), 830

Where jury had been properly instructed on the law of self defense in the language of Penal Code, defendant should have presented any amplification desired in a form that could be given and refusal

to give requested instruction on the subject which was plainly erroneous was not error. Pen.Code, § 197.

4. Homicide ⇨300(7)

Where defendant insisted that he was not the original assailant but had merely slapped victim of homicide on the back to attract his attention while saying good-night, whereupon victim had assaulted defendant, and jury was properly instructed on the law of self defense in the language of Penal Code, further instruction as to right of original assailant to kill in self defense where counterassault is so sudden and perilous that original assailant has no opportunity to decline the struggle, was unnecessary. Pen.Code, § 197.

5. Criminal law ⇨1174(1)

Where jury requested additional instructions as to definitions of malice, murder in the second degree and manslaughter, reading excerpt from Supreme Court's opinion in another case involving violation of statute making assault by a life-term prisoner with malice aforethought a capital offense and also reading a dictionary definition of malice and distinguishing it from the legal definition, while repeating several times the statutory definition of malice did not constitute prejudicial error. Pen.Code, §§ 188, 4500.

6. Criminal law ⇨829(17)

The effect upon the weight and credibility of defendant's testimony of evidence that he had previously been convicted of felony was fully covered by instructions given and refusal to give further requested instruction on the matter was not error.

7. Criminal law ⇨959

A defendant is entitled to the independent judgment of trial judge in passing on a motion for new trial.

8. Criminal law ⇨959

Trial court's remarks in denying defendant's motion for new trial disclosed that while court recognized that jury's verdict was entitled to respect and should not be lightly set aside, court had given the evidence the independent review to which defendant was entitled.

Kahn & Block and Clifford K. Fitzgerald, all of San Diego, Henry F. Walker, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of one Kenneth Dick. On a second trial, he was found guilty of murder in the second degree and he appeals from the judgment and from an order denying his motion for a new trial.

The defendant was the proprietor of the 345 Club in El Cajon. About 1:30 A. M. on November 2, 1949, he got into an argument with his bartender, a man named Quinn. A customer at the bar complained of defendant's language because women were present. The defendant became angry and rushed at the customer. The decedent grabbed and held the defendant and a deputy sheriff, Hansen, left his table and assisted in quieting the disturbance. Shortly after Hansen returned to his table he saw the defendant slap Quinn's face. Hansen went over and took the defendant into an adjoining office where he tried to calm him. They both returned to the barroom in a few minutes and Hansen went to his table. Hansen then heard a noise and saw the defendant and Dick grappling and falling over a chair. Hansen went over and saw the defendant with his head and shoulders on the floor and his feet and the lower portion of his body over the chair. Dick was on top of defendant, holding his wrists, and there was a knife in the defendant's right hand. Hansen separated the parties and took the knife, the blade of which opened with a push button. Hansen closed the blade of the knife and handed it to a bystander, telling him to take care of it before the defendant hurt somebody. Hansen did not then realize that Dick had been stabbed. Dick was taken by other parties to a service station across the street. A little later, officers took him to a hospital where he died a day or two later.

A number of witnesses who were present testified as to what they saw and heard.

Some saw one thing and some another, and it would serve no useful purpose to fully summarize all of the evidence here. When Dick got up off the floor he said he was hurt and several witnesses saw the blood. One witness saw a $\frac{3}{4}$ -inch wound near the left nipple on Dick's chest. When the defendant got up he told someone to call an ambulance, and said he would pay for it. The witness Vorce testified that after Hansen took the defendant into the office he saw the defendant come out rather fast; that the defendant moved toward Quinn yelling "I will get you Earl, you bastard"; that Dick told the defendant to "knock it off" whereupon the defendant told Dick to get out of the way and stabbed Dick with his right hand; that he saw the defendant stab Dick by thrusting his hand forward and upward toward Dick's breast; that he saw the knife blade but not the handle; that Dick grabbed the defendant with both arms around his shoulders and they fell among the tables and chairs; that as they fell Dick said "Why did you do it Joe. I am your friend"; and that Hansen came over and separated them. On cross examination he admitted that at the prior trial he had not referred to this as a knife but as a "shiny metallic looking object" in appellant's hand.

Shortly after the incident the defendant told an officer, in reply to a question as to what had happened, that a stranger had come in and wanted a drink after two o'clock and there had been trouble but did not explain what the trouble was. While being taken to the jail he said he was very worried about what had happened and that he would like to get out of El Cajon and out of California as well. The officers were unable to locate the knife which had been taken from the defendant, but one was introduced in evidence which the defendant said was exactly similar to the one he had had. There was evidence that Dick was a much larger man than the defendant. Blood was found on the floor of the barroom, on the chair over which the parties had fallen, and on the sidewalk in front of the premises. There was evidence that one of Dick's arteries had been

cut by a sharp instrument, that there had been an unusual amount of internal bleeding, and that death was caused by this wound.

The defendant testified that while he and Quinn were arguing and "cussing" each other a customer remonstrated; that he then saw a lady with the customer and went over to apologize; that Hansen stepped between them and Dick put his hand on his shoulder and asked him to have a drink; that he and Dick went back to the bar; that he saw Quinn coming out from behind the bar and after some talk he slapped Quinn; that someone grabbed him and pushed him into Hansen's arms; that Hansen took him into the office where they remained a few minutes; that he never saw Quinn again that night; that when he and Hansen came out of the office Hansen went toward his table and he went toward the check room; that he saw Dick standing near the check room talking to two ladies; that Dick's back was toward him; and that he did not see or yell at Quinn. He then testified as follows:

"As I reached Kenny, I hit or slapped him on the backside with the back of my right hand to attract his attention and said 'Good night, Kenny'. He whirled around to his left, grabbed at me and we fell into the tables and chairs with Kenny on top of me. I thought he was playing or joking. But his hands were on my neck and he began choking me hard. I reached up and tried to pull his hands away but couldn't. I was unable to breathe. I had never seen Kenny act that way before. It frightened me. He was choking hard and I was afraid he was going to kill me. When I couldn't loosen his hands from my neck, I reached into my pocket, pulled out the knife, pushed the button and opened it. I had not had it in my hands before. I swung at Kenny, intending to hit him on the arm so as to loosen his choking hands. I don't know if I hit him. I remember nothing from that time until I found myself in the office with Officer Benson."

The defendant also testified that the next morning while shaving he saw bluish marks

on his throat, that his throat hurt and that it was difficult to breathe. He produced a doctor who testified that on that day he treated the defendant for this condition.

No question is raised as to the sufficiency of the evidence. It conclusively appears that the defendant stabbed Dick with his knife and that this caused Dick's death. The evidence strongly indicates that this stab was inflicted when the defendant first approached and struck Dick, and not during the struggle on the floor. It is not surprising that the jury did not accept the defendant's story. It seems incredible that during this brief struggle, with a large man on top of him, the defendant could have reached in his pocket, taken out and opened his knife, and inflicted this wound. The whole thing happened very quickly, with six or eight persons around, and just after they fell over a chair Dick was seen holding both of defendant's wrists.

[1] It is first contended that the court erred in limiting the cross examination of the witness Vorce with respect to his motive or bias. This witness was asked in several questions whether it was not true that he had been charged with forced rape, that the complaint was later dismissed by the district attorney, and that the statute of limitations had not run. Objections to these questions were sustained and error is assigned, citing *People v. Pantages*, 212 Cal. 237, 297 P. 890 and *People v. DeMello*, 28 Cal.App.2d 281, 82 P.2d 457. In the *Pantages* case criminal proceedings were still pending, and in the *DeMello* case the conditions of an order granting probation were held material. In the instant case, the witness was allowed to answer several questions as to whether he had since the beginning of this case been in fear of the district attorney's office, or whether he was under any fear or any influence in testifying in this case, to which he answered in the negative. He was also allowed to answer the question "Are you under the impression that the District Attorney's office of this county will do something for you if you testify favorably to the prosecution?". He replied "As far as I am concerned the Dis-

strict Attorney's office will do nothing favorable or unfavorable against me regardless of which way I testify. The charge against me previous was dropped because I wasn't guilty, does that answer your question?" Defendant's counsel replied "Yes". By his equivocal answer to one question, the witness indicated that he had told defendant's counsel something to the effect that, because of the rape charge, he did not want to antagonize anybody. Some of the questions called for conclusions as to whether the statute had run against the other charge, and no attempt was made to bring out the facts in that regard by proper evidence. The purpose of showing bias would not have been aided had answers to the rejected questions been allowed, and neither abuse of discretion nor prejudice appears.

[2] It is next contended that the court erred in refusing to permit impeachment of the witness Vorce by reading from his testimony at the preliminary examination. This witness testified that he saw the defendant stab Dick with a knife and that he did not see the handle but saw the knife blade. He admitted that at the former trial he had not referred to this as a knife but as a "shiny metallic object" which he saw in defendant's hand. When asked at this trial "Now, you didn't actually see a knife or blade, did you?" he replied "To me it was a knife. In my own mind it was a knife." For impeachment purposes it was brought out that at the former trial the witness had referred to the object in the defendant's hand as a "shiny metallic object"; that in reply to a question he had stated that he could not be positive that it was actually a knife; and that when asked "Didn't you just get through saying so" he replied "Well, to me it was a knife." Counsel then desired to read a portion of his testimony at the preliminary hearing and permission was refused. This was cumulative, added nothing to any impeaching effect of the evidence already received, and neither error nor prejudice appears.

[3,4] It is next contended that the court erred in giving one instruction and refusing another on the law of self defense. The court gave a long instruction

completely covering the matter of self defense, in general, in which the applicable portions of section 197 of the Penal Code were given, and later repeated, in the language of the statute. The court refused to give an instruction asked for by the defendant purportedly based on a portion of the opinion in *People v. Hecker*, 109 Cal. 451, 42 P. 307, 30 L.R.A. 403, which would have told the jury that if it believed that the defendant was the first wrongdoer (in slapping or poking the deceased) this was merely a simple assault, and if Dick met this assault with a deadly counterattack the defendant had an absolute right to kill him, and the jury must find him not guilty. This instruction, as requested, was plainly erroneous. It is argued that the court should have given a correct instruction on its own motion to the effect that where the original assault was not felonious, and the counterassault was so sudden and perilous as to give the first assailant no opportunity to decline the struggle, he would be justified in slaying forthwith in self defense. Also, that the instruction given by the court was erroneous because it told the jury that if the defendant was the assailant and engaged in mutual combat he must in good faith have endeavored to decline any further struggle. The instruction as given included the exact language of the statute, and was broad enough to cover the basic idea contended for by the defendant. The jury having been properly instructed on the law of self defense, in the language of the code, the defendant should have proposed any amplification desired in a form that could be given. *People v. Dobbins*, 138 Cal. 694, 72 P. 339. Moreover, the situation did not require a further instruction of this nature. The defendant testified that he merely hit or slapped Dick on the back to attract his attention while saying good night. He still insists in his brief that he was not the original assailant or aggressor and that he merely gave Dick "a friendly tap in passing." We find no error in this connection.

It is next contended that the court erred in giving further instructions to the jury, at its request, concerning malice in rela-

tion to murder. In its original instructions the court had defined murder in both degrees and manslaughter and had defined malice by reading section 188 of the Penal Code. After retiring for deliberation the jury returned and asked for "any additional enlargement you can give on the definition of malice, of murder in the second degree, and of manslaughter." The court properly defined murder in the second degree, and then stated that malice, as it particularly applies to murder, is defined by the Penal Code in the language of section 188, which he again read. He then stated that the best explanation he could make was that malice is how a person feels toward another, a feeling of hatred or desire to injure another. He then explained the difference between express and implied malice as given in section 188, and said that he did not know how to explain it more fully than that. A juror then asked for the dictionary definition of malice. The court read a dictionary definition and then said that he would turn to the legal meaning of the word. He then read the first paragraph on page 338 of *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53, and the definition of malice given in 2 *Bouvier's Law Dictionary*, Rawles Third Revision p. 2067. He then inquired whether this covered all the jury had in mind, and the foreman replied that it did. The jury retired and returned shortly thereafter with a verdict.

[5] The defendant argues that the court should have confined itself to the language of section 188, and that it erred in giving further definitions and particularly in reading a portion of *People v. Wells* since the portion read included the definition of malice as given in section 7 of the Penal Code, and since that case was not concerned with the crime of murder but with the crime covered by section 4500 of the Penal Code. Section 4500 involves "malice aforethought", as does the crime of murder, and we are unable to see any error or prejudice in reading the excerpt from *People v. Wells* under these circumstances. It is further argued in this connection that the court thus erred in

instructing the jury that a malicious intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another. This was not given as a separate instruction in this case but appears only in the portion of the opinion from *People v. Wells* which was read. While a dictionary definition was read this was distinguished from the legal definition of malice, and the language of section 188 was repeated several times. No simple definition of malice aforethought has ever been formed, so far as we are aware, and in our opinion the court covered the matter about as accurately and as fully as could well be done. There is nothing to indicate that the jury was misled in any way and we are unable to see anything in the matter which indicates prejudicial error.

[6] It is next contended that the court erred in giving and refusing instructions with respect to the effect of impeachment by showing prior convictions. The defendant took the stand and it was shown that he had previously been twice convicted of felony. In referring to this evidence one of the instructions stated that it was not received as tending to prove the defendant's guilt of this offense, that it was to be considered only in weighing the credibility or weight of his testimony, and that it was not to be considered evidence of guilt in this particular case. The court refused, as covered, an instruction requested by the defendant stating that the fact that the witness had been convicted of a felony is simply one of the circumstances to be taken into consideration in weighing his testimony, and that such fact does not necessarily destroy or impair the witness' credibility and does not raise a presumption that he has testified falsely. It is argued that the instruction as given by the court is subject to the same criticism as the one given in *People v. Hardwick*, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480, where it was held that another instruction, similar to the one here requested, should have been given. The instruction condemned in the *Hardwick* case informed the jury, in no uncertain terms, that such

a witness was not entitled to the same credibility as one who had not been convicted. No such a situation here appears. Moreover, near the end of his instructions the court referred to the fact that the defendant had become a witness in his own behalf, and again instructed the jury: "It is your duty to weigh and consider his testimony in the same manner that you would weigh and consider the testimony of any other witness. You should not throw out, discard or discount it merely because he testifies, but you should take into consideration anything he has said * * * and then weigh and consider his evidence in the case as you would any other witness in the case." The matter was fully covered and no error appears.

Finally, it is contended that the court erroneously applied incorrect principles in determining the defendant's motion for a new trial. This is based upon the following language used by the court: "I don't deem it my duty to absolutely disregard the verdict of the jury. I deem it my duty to give the evidence an independent review of my own, which I have done, and unless I am convinced that the jury is wrong, I should let their verdict stand. That is the rule which I have followed, the true rule which I believe is supported by the cases. Otherwise, you wouldn't have a jury. That rule is expressed in the case of Green against Soule. Mr. Kahn has the citation, about 141 Cal.,¹ substantially as I have stated it. So I think it is my duty and I am thoroughly justified and I should deny the motion for new trial. That will be the order of the Court."

This statement was made at the conclusion of the court's remarks which take up

twelve pages of the transcript. The court had previously reviewed the crucial evidence in the case, pointing out the incredible nature of defendant's story, that the jury had a right to believe that the defendant had a knife in his hand and was starting after someone with the knife before he encountered Dick, and that it was obvious that if Dick was holding the defendant's wrists he was not choking him. He then stated that Hansen had testified that Dick was holding the defendant's wrists on the floor and that he believed Hansen's testimony. The remarks above quoted then followed.

[7, 8] Beyond question, a defendant is entitled to the independent judgment of the trial judge in passing on a motion for a new trial. *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934. While the court's remarks disclose a recognition of the fact that the verdict of a jury is entitled to respect and should not be lightly set aside, they fall far short of the contention here made, that they show that the court failed to give that second decision on the weight of the evidence to which a defendant is entitled. In the language complained of the court stated that he deemed it his duty to give the evidence and independent review of his own, and that he had done this. The other portions of his remarks demonstrate that this was true.

After a careful review of the entire cause, including the evidence, we find no error which, in our opinion, has resulted in a miscarriage of justice.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

1. *Green v. Soule*, 145 Cal. 96, 78 P. 337.

NELSON v. MAYER.

Civ. 4174.

District Court of Appeal, Fourth District,
California.

Jan. 15, 1951.

Rehearing Denied Feb. 14, 1951.

Hearing Denied March 15, 1951.

H. Frank Nelson sued Louis B. Mayer to recover brokerage commissions. The Superior Court of Riverside County, Henry G. Jorgenson, Judge Assigned, granted defendant's motion for a new trial after a verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where there was substantial opposing evidence to that produced by plaintiff, trial court did not abuse its discretion in granting a new trial.

Order affirmed.

1. Brokers Ⓒ54, 57(2)

A broker, in order to recover a commission for sale of realty, which he has authority from owner to sell, must produce a purchaser ready, willing and able to purchase at price and on terms specifically expressed in contract of employment but a change made by owner when consummating the sale, in price of realty or terms of sale from those specified in broker's contracts, cannot of itself affect or impair broker's rights to his commission.

2. Brokers Ⓒ53

In order for a broker to recover commission for sale of realty, evidence must show that his efforts were procuring cause of the sale and not merely one in a chain of causes.

3. Appeal and error Ⓒ979(2)

Where trial court concluded that verdict in plaintiff's favor was clearly against the weight of the evidence, and granted defendant's motion for a new trial, appellate court could not substitute its judgment in place of judgment of trial court.

4. New trial Ⓒ71

Where substantial opposing evidence to that produced by plaintiff, was presented by defendant, granting of defendant's motion for a new trial was not an abuse of discretion.

5. New trial Ⓒ70

Where defendant failed to produce two witnesses who resided outside of state, and their testimony was not shown to have been available to defendant at trial, and witnesses' testimony was equally available to plaintiff, if he believed their testimony would be adverse to testimony of defendant's witnesses, and their testimony, if corroborative of testimony of defendant's witnesses, would have been but cumulative, and would furnish no grounds for denying defendant's motion for a new trial, granting of new trial for defendant on ground of insufficiency of evidence was not an abuse of discretion.

Frank E. Carleton, Los Angeles, for appellant.

Neil S. McCarthy, Los Angeles, Thompson & Colegate, Riverside, for respondent.

GRIFFIN, Justice.

Defendant and respondent owned the Mayer Stock Farm in Riverside County. On September 30, 1947, one Myron S. Fox, business manager for defendant, signed and delivered to plaintiff, a licensed real estate broker, the following letter:

"Dear Frank:

"The price on the Mayer Stock Farm is \$600,000. It consists of 504-1/2 acres of irrigated land together with buildings, improvements and attendant equipment.

"We will pay you a realty commission of 5 per cent if you can *effect* a sale." (*Italics ours.*)

Plaintiff's evidence shows that he unsuccessfully endeavored to interest various persons in the purchase of the property. He testified that about October 7, 1948, plaintiff, at the Mathews ranch, told one Ben Mathews, a former client, to whom plaintiff had previously sold a ranch, that he had the Mayer Stock Farm listed for sale; that Mathews was, at the time, an attorney at law and attorney-in-fact for Ellsworth M. Statler, the ultimate purchaser of the property described; that

after some discussion about the property Mathews told plaintiff he was not interested in it; that plaintiff saw Mathews again in November, 1948, at plaintiff's home, where Mathews came in regard to some business in connection with Mathews' own ranch; that plaintiff again discussed the Mayer property with Mathews and that Mathews said he was in "too big a hurry" to view the premises; that about December 4, 1948, plaintiff was advised that the farm had been sold and that he phoned Mathews about it; that plaintiff was asked how he knew about the sale and that plaintiff informed Mathews of his source of information; that later that day plaintiff accused Mathews of buying the Mayer farm and that Mathews told him he was "100 per cent wrong"; that he was in no way interested in the purchase of it but he did have a friend who intended to buy it and he was negotiating for its purchase; that plaintiff told Mathews he had tried to interest him and Mr. Statler in taking the ranch and that if it was sold he expected his five per cent commission.

Plaintiff then testified that he conversed with Mr. Fox at the Mayer farm and told him that he understood Mr. Fox had sold the Mayer farm and that Fox said: "Well, you know how it goes; 10 deals to make one. On today, off tomorrow—we have a deal on it. It looks very good;" that he would rather not discuss the deal nor disclose the names of the principals until the deal was closed; that plaintiff said to him: "By any chance are you negotiating with Mr. Ben Mathews?" And that Fox said: "Who is Ben Mathews?"; that plaintiff told him he was "trustee" of Mr. Statler, and that he had presented the ranch to Mr. Mathews on two different occasions for "his and Statler's consideration"; that if he was negotiating with Mr. Mathews, his client, he expected his five per cent commission; and that Mr. Fox assured him he had never met Mathews.

On November 30, 1948, escrow instructions were signed by Mathews, as attorney-in-fact for Mr. Statler, and a Mrs. Harless (formerly Miss Howard) and by defendant Louis B. Mayer, and placed in escrow.

A grant deed dated January 19, 1949, was received in evidence showing Louis B. Mayer as grantor and Ellsworth M. Statler and Meredith Howard Harless, as grantees, covering the Mayer farm. The grantees executed a trust deed back to the grantor signed "Ellsworth M. Statler, by Ben B. Mathews, his attorney-in-fact." A general power of attorney from Statler to Mathews, dated December 20, 1948, was then received in evidence. A chattel mortgage on the personal property was also executed by Statler in the same form. In August, 1949, Mrs. Harless deeded her undivided one-half interest in the property to Statler.

Defendant, Mr. Mayer, testified generally that Mrs. Harless had been in his employ for a number of years; that he met her in Washington, D. C. in October, 1947; that she asked him what he was going to do with his farm; that he told her he was going to sell it; that she said she could sell it for him if he would give her a chance; that he told her if she did he would pay her five per cent of the amount and expenses in traveling to California to show it to customers; that he discussed with her the terms of sale; that she was then engaged to Mr. Harless, a congressman, and attorney for Mr. Statler; that Mr. Statler wanted to do something for Harless and that she believed Mr. Harless could sell the ranch to Statler; that he told her to "go ahead" and try; that in the fall of 1948, he met her in Perris, Riverside County, about three weeks before the escrow was opened, accompanied by a man named Mathews; that he had never met Mathews before; that Mathews told him that Statler wanted to do something for Harless so he could make some money; that Mrs. Harless returned to Washington, D. C. and that later they agreed upon terms and defendant sold the property for \$400,000; that he had never met plaintiff or ever talked to him, nor had he ever been told by plaintiff that plaintiff had ever interested any one in the sale of the property until after this action had been filed; that he paid Mrs. Harless \$20,000 for her services. Canceled checks showing such payments were received in evidence. He then testified that he had never met Mr. Statler.

Mathews testified that while he was practicing law in Arizona he was and still is attorney for Mr. Statler; that Mr. Harless became Mr. Statler's attorney in 1948; that he met with Harless in Arizona in September, 1948, and also met Miss Howard, who later became Mrs. Harless; that up until that time he did not know the Mayer Stock Farm was for sale; that Miss Howard said she was authorized to sell it; that she said she knew Mr. Mayer and could obtain a better price on it than "anybody in the world"; that the property was near Mathews' farm and that she would introduce Mayer to Mathews some day; that she asked him if Statler would be interested in the farm; and suggested that Mr. Harless could take care of it; that he said he would go and look at it; that the sale of the property was discussed by Harless with Statler in Arizona; that the first time Mathews went over the ranch was with the foreman about October, 1948; that Mrs. Harless and Mr. Mayer came out to the property about November 21, 1948; that he had never met Mr. Mayer until that time; that subsequently he had gone over the ranch with Mr. Statler and a real estate consultant; that that was the first time he ever mentioned the Mayer ranch to Mr. Statler; that he never said anything to him as to whether he should or should not purchase it; that as a result of a conversation with Mr. Statler following that time, he opened the escrow and received a power of attorney from him. He admitted having a conversation with plaintiff at his home earlier in the year in which plaintiff stated he had the Mayer Stock Farm for sale; and that he told plaintiff he was not interested. He specifically denied that Statler's name was ever mentioned in any of his conversations with plaintiff. He stated plaintiff talked with him at plaintiff's home when he approached him about a right-of-way but that he told plaintiff he was not interested in the Mayer Stock Farm; that it "was out of my class"; that Statler's name was never mentioned and he refused to view the property with plaintiff; that he never conversed with plaintiff again until plaintiff called him after the escrow instructions had been signed; that plaintiff then accused him, personally, of buying the May-

er Stock Farm and trading in some of his own acreage on the deal; that he definitely told him he had no interest in the Mayer Stock Farm; that it was not sold to him, but he then told him he had a friend who was negotiating for it.

Mrs. Harless related a conversation had with Mr. Mayer in Washington, D. C. when he was about to sell a number of his horses. She corroborated Mr. Mayer's testimony about the sale of the farm by her; and stated that he paid over \$700 of her expenses in her effort to sell it; that she discussed the contemplated sale of the property to Mr. Statler with Mr. Harless, his then attorney, in Washington, D. C. in the summer of 1948, and again in Arizona in November, 1948, when Mr. Mathews was present; that she next saw Mathews when they visited the Mayer farm in November, 1948; that at that time she discussed the price with Mr. Mayer, who agreed that it would be \$400,000; that subsequently she and Mr. Harless were married; that Mr. Harless and Mr. Statler visited the ranch and the deal was consummated. Mrs. Harless was not a licensed real estate agent and, as one of the co-owners, paid no portion of the purchase price of the property.

After argument, the jury returned a verdict in favor of plaintiff for five per cent of the sale price. A motion for new trial was made on all statutory grounds. The court granted it on insufficiency of the evidence and held that the verdict was "clearly against the weight of the evidence". Plaintiff, appealed from the order.

The issue presented to the jury, under this conflict of evidence, was mainly whether plaintiff, according to the terms of the writing signed by Myron S. Fox, the admitted agent of Mr. Mayer, "effected" the sale of defendant's farm as described in the letter.

It may be questioned whether or not the evidence produced by plaintiff, based upon the agreement in evidence, would support a verdict in his favor.

[1,2] In *Wright & Kimbrough v. DeWees*, 52 Cal.App. 42, 46, 197 P. 957, 958 (Hearing in the Supreme Court denied), quoting from *Kimmel v. Skelly*, 130 Cal. 555, 559, 62 P. 1067, it is said: "The par-

ties to a brokers' contract are at liberty to make the compensation of the broker to depend upon any lawful conditions they see fit to place therein. The single question is: What does the contract provide?"

And after discussing many cases based upon various provisions in brokers' contracts, the following principle is there laid down: that to entitle a broker to a commission for the sale of real estate, which he has been given by the owner authority to sell, he must produce before the owner a purchaser ready, willing and able to purchase at the price and on the terms specifically expressed in the contract of employment; that while a change made by the owner, when consummating the sale, in the price of the land or the terms of the sale from those specified in the broker's contract cannot of itself affect or impair in any way the right of the broker to his commission, the latter cannot claim a commission unless his efforts are the procuring or inducing cause of the sale. In order for the broker to recover, the evidence must show that his efforts were the procuring cause and not merely one in a chain of causes. See, also, *Snook v. Page*, 29 Cal.App. 246, 155 P. 107; *Dolan v. Scanlan*, 57 Cal. 261; *Ayres v. Thomas*, 116 Cal. 140, 47 P. 1013; and *Deovletian v. Whitney*, 55 Cal.App. 76, 202 P. 905, wherein the term "to effect a deal" is defined. See, also, *Sessions v. Pacific Imp. Co.*, 57 Cal.App. 1, 17, 206 P. 653, 660, wherein it is stated:

"A broker's contract presupposes that he shall be the *causa causans*, the foundation of the negotiations, but he need not be the sole cause or *causa sine qua non*."

That "To constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities."

[3] We purposely refrain from passing upon the question of whether plaintiff has established a cause of action by the evidence. This is not necessary to the solution

of the problem here presented. It is true that there is considerable of plaintiff's evidence which is directly in conflict with that produced by the defendant and defendant's evidence would support a verdict in his favor. The trial court has concluded that the verdict in favor of plaintiff "is clearly against the weight of the evidence". Under these circumstances, an appellate court is not entitled to substitute its judgment in place of that of the trial court on a hearing of a motion for new trial on the question of the insufficiency of the evidence. The rule is stated in *Perry v. Fowler*, 86 Cal.App.2d 635, 637, 195 P.2d 78, 79, as follows: (quoted from respondent's approved argument set forth therein).

"'A motion for a new trial upon the ground of insufficiency of the evidence is left to the sound discretion of the trial court. The judge is not bound by any conflict in the evidence and if, in the opinion of the judge, the verdict is against the weight of the evidence, it is his duty to set it aside. In other words, parties to an action are as much entitled to the judgment of the judge as to the sufficiency of the evidence to support the verdict as they are in the first instance to a judgment of the jury.'" See, also, *Smith v. Royer*, 181 Cal. 165, 171, 183 P. 660; *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 152, 167, 287 P. 475; *Green v. Soule*, 145 Cal. 96, 78 P. 337.

[4] Since there was substantial opposing evidence to that produced by the plaintiff, no abuse of discretion is shown and the order granting a new trial should be affirmed.

Lastly, it is argued that vital and material evidence was suppressed and withheld which, if produced, would have been adverse to defendant's claim that Mrs. Harless, and not plaintiff "effected" the sale. In this connection it is contended that defendant failed to produce as witnesses Mr. Statler and Mr. Harless, whose testimony would have shed light on the veracity of the testimony of defendant's witnesses, citing such cases as *Bone v. Hayes*, 154 Cal. 759, 99 P. 172; and *Bagley v. McMickle's Adm'rs*, 9 Cal. 430.

[5] In the first place, the evidence shows that these two witnesses reside outside of the State of California and were not within its jurisdiction. There is no evidence to show that their testimony was available to defendant at the trial. If plaintiff believed their testimony would be adverse to the testimony of defendant's witnesses, their testimony was equally available to plaintiff. If their testimony would corroborate the testimony of defendant's witnesses, it would be but cumulative and would furnish no grounds for denying a motion for new trial. Even though the trial court may have been authorized to presume that their testimony would have been adverse to defendant, the court weighed the evidence produced, together with all presumptions arising therefrom, and after exercising its independent judgment in respect thereto, concluded that a new trial should be granted. Since the trial court is given such wide discretion on the question of granting a new trial on the ground of insufficiency of the evidence, we cannot hold that its determination on that issue was an abuse of discretion.

Order granting a new trial affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



**HOCKING v. TITLE INS. &
TRUST CO. et al.**
CIV. 4175.

District Court of Appeal, Fourth District,
California.

Jan. 18, 1951.

Rehearing Denied Feb. 14, 1951.

Hearing Granted March 15, 1951.*

Dorothy L. Hocking sued Title Insurance and Trust Company, a corporation, and Riverside Title Company, a corporation, to recover damages for the alleged breach of the terms of a title insurance policy. The Superior Court, Riverside County, John G. Gabbert, J., rendered judgment for defendants

on the pleadings, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the complaint failed to state a cause of action.

Affirmed.

1. Deeds ⇨109

In suit on title insurance policy, where it appeared that deed to insured had conveyed all of grantors' title and interest, it would be assumed, in absence of contrary allegation, that good fee-simple title was so conveyed, since fee-simple title is presumed to be intended to pass by grant of real property unless it appears from grant that lessor estate was intended. Civ.Code, § 1105.

2. Property ⇨7

"Title to land" is means whereby owner has just possession of his property.

See publication Words and Phrases,
for other judicial constructions and definitions of "Title to Land".

3. Property ⇨7

Word "title" commonly means complete ownership, in sense of all rights, privileges, powers and immunities an owner may have with respect to land.

See publication Words and Phrases,
for other judicial constructions and definitions of "Title".

4. Vendor and purchaser ⇨130(2)

A "marketable title" is one free from reasonable doubt and such that reasonably prudent person with full knowledge of facts and their legal bearings and willing and anxious to perform his contract would, in exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and such a title must be free from encumbrances and so far free from defects as to enable holder not only to retain land, but to possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value.

See publication Words and Phrases,
for other judicial constructions and definitions of "Marketable Title".

5. Insurance ⇨635

Complaint alleging that insured had not received marketable title to insured lot because of nonexistence of bond-supported

* Subsequent opinion 234 P.2d 625.

agreement for street improvement required by city ordinance and further alleging that because of ordinance violation city council would not issue building permit or permit for grading and paving of streets did not state cause of action for breach of title insurance contract. Business and Professional Code, § 11626.

6. Insurance ⇐426½

Title insurance contract insuring against loss by reason of unmarketability of title, subject to certain exceptions, was not breached by nonexistence of bond-supported agreement for street improvements in subdivision wherein insured's property was located or by city council's refusal to issue building permits because of the violation of the ordinance requiring such bond-supported agreement.

7. Deeds ⇐40

Where subdivision map was recorded and deed referred to recorded map, deed sufficiently described property conveyed.

Wing, Wing & Brown, Banning, for appellant.

Lawrence L. Otis, Gilbert E. Harris and James F. Healey, Jr., all of Los Angeles, Sarau, Adams, Neblett & Sarau, Riverside, for respondents.

MUSSELL, Justice.

Action on policy of title insurance.

Plaintiff appeals from a judgment on the pleadings rendered against her in an action for damages for alleged breach of the terms of a title insurance policy. The sole issue here is whether a cause of action is stated in the complaint.

It is alleged that plaintiff purchased, and obtained a grant deed for, two unimproved lots in a subdivision described as "Vista del Cielo No. 3" in the city of Palm Springs; that the defendant, Title Insurance and Trust Company, through its affiliate, defendant Riverside Title Company, executed and delivered to plaintiff a policy of title insurance, insuring plaintiff against loss or damage which she might

sustain by reason of the title to said lots not being vested in plaintiff in fee simple; by reason of the unmarketability of plaintiff's title subject to certain exceptions; and by reason of any defect in, or lien or encumbrance on said title not shown in the policy. Plaintiff further alleges that she did not receive a marketable title to said lots in that the Palm Springs city council, in violation of a city ordinance, approved and accepted a subdivision map of the property involved without first obtaining from the owners, agreements and bonds providing for the grading and paving of the streets in said subdivision as required by the ordinance; that the county recorder of the county of Riverside, in violation of the terms of the Subdivision Map Act and of the provisions of section 11626 of the Business and Professions Code, purportedly accepted, recorded and filed the subdivision map of record; that the city refused to issue building permits on any of the lots in said subdivision for the reason that the city council approved the subdivision map in violation of a city ordinance and that plaintiff has not had a marketable title to said lots by reason thereof.

It is plaintiff's contention that the policy of title insurance was breached by the nonexistence of a bond supported agreement for street improvements as required by the Palm Springs ordinance; that on the date of the issuance of the policy she was not vested with fee simple estate in the lots and that the title thereto was defective because of the refusal of the city to issue building permits.

[1] The policy of title insurance insured plaintiff against loss or damage by reason of the title to said lots being vested otherwise than in plaintiff's name. The two lots were sold and deeded to plaintiff by Evelyn R. Bank and Elliott M. Bank, and a grant deed therefor was executed and delivered to plaintiff by said grantors. There is no allegation that the grantors did not have a fee simple title to convey nor that the grantors' title was unmarketable or defective. The grant deed conveyed, and plaintiff succeeded to the title

and interest of the grantors, and, in the absence of a contrary allegation, we must assume that a good fee simple title was so conveyed. A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lessor estate was intended. Civil Code, section 1105. There is no allegation that the deed included the right to have the streets paved and graded and there is no language in the title insurance policy which insured that the streets were to be so improved. The conveyance of the title to the property is in no wise dependent upon the condition of the streets, or the claimed irregularities in the subdivision proceedings.

[2,3] Title to land has been defined as the means whereby the owner has the just possession of his property. 25 Cal.Jur. 626, sec. 125. The word "title" commonly means complete ownership, in the sense of all the rights, privileges, powers and immunities an owner may have with respect to land, *Smith v. Bank of America, etc.*, Ass'n, 14 Cal.App.2d 78, 85, 57 P.2d 1363, and, as used in the insurance contract before us, does not include a guaranty that the city of Palm Springs would issue building permits or would permit the grading and paving of streets. Moreover, the title insurance policy (Schedule B) provides that the company does not, by the policy, insure against loss by reason of:

"1. Easements or liens which are not shown by the public records (a) of the District Court of the Federal District, (b) of the county, or (c) of the city, in which the land or any part thereof is situated;

"2. Rights or claims of persons in possession of said land which are not shown by those public records which impart constructive notice;

"3. Any facts, rights, interests or claims which are not shown by those public records which impart constructive notice, but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by a correct survey;

"4. Mining claims, reservations in patents, water rights, claims or title to water;

"5. Any governmental acts or regulations restricting, regulating, or prohibiting the occupancy or use of said land or any building or structure thereon."

[4] Plaintiff's argument that she did not receive a "marketable" title is without merit. A marketable title has been defined generally as one free from reasonable doubt, and as was said in *Mertens v. Berendsen*, 213 Cal. 111, 113, 1 P.2d 440, 441: "Such a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. It must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value."

[5,6] A title to be good and marketable must be free from encumbrances. 25 Cal.Jur., p. 634, sec. 132. Plaintiff claims that she has not had a marketable title to the lots involved because of the failure of the city council to obtain from the subdividers a bond supported agreement for street improvements. However, the title insurance policy, with respect to the marketability of the property, is qualified, and insures against loss "by reason of unmarketability of the title of any vestee to said land, at the date hereof, unless such unmarketability exists because of defects, liens, encumbrances, or other matters shown in Schedule "B" of the policy."

[7] The Subdivision map was recorded and plaintiff's deed referring to the recorded map contained a sufficient description of the property conveyed.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

KESSLOFF v. PEARSON et al.

Civ. 17742.

District Court of Appeal, Second District,
Division 1, California.

Jan. 19, 1951.

Hearing Granted March 15, 1951.*

Action by Alex Kessloff against Edward F. Pearson and others, for declaratory judgment. The Superior Court of Los Angeles County, David Coleman, J., entered judgment dismissing complaint and plaintiff appealed. The District Court of Appeal, Hanson, J., held that where the only issue remaining in the case for determination, when it was called for trial, was a fact question calling for an accounting by defendants, trial court properly ruled that there was no cause of action for declaratory judgment.

Affirmed.

1. Declaratory judgment Ⓒ5

A trial court could and should consider in any case where it is called upon to exercise its discretionary power whether plaintiff by framing his cause of action for declaratory judgment rather than a simple action did so to attain priority in trial calendar.

2. Action Ⓒ6

Courts are not permitted to entertain and decide moot issues or cases.

3. Declaratory judgment Ⓒ145

Where only issue remaining for determination in a declaratory judgment case, when it was called for trial, was a fact question whether defendants had charged to gross profits certain salaries or gifts so as to defraud plaintiff under his employment contract, trial court properly determined that case involved no declaration as to legal rights or duties of the parties, and did not abuse its discretion in holding complaint insufficient to proceed to a declaratory judgment. Code Civ.Proc. § 1060 et seq.

4. Declaratory judgment Ⓒ5

A litigant does not have an absolute right to a declaratory judgment even though he has in first instance stated a good cause of action for a declaratory relief.

* Subsequent opinion 233 P.2d 899.

5. Declaratory judgment Ⓒ384

Where plaintiff states a cause of action for an accounting and demands declaratory relief, trial court is not compelled to render a declaratory judgment simple because plaintiff is entitled to some relief under the cause of action stated other than for declaratory relief. Code Civ.Proc. § 1061.

6. Declaratory judgment Ⓒ389

Even if complaint stated sufficient facts for the remedy of an accounting or any other conventional remedy, where plaintiff failed to move that case be entertained for purpose of showing that he was entitled to an accounting and he insisted that he was entitled to a declaratory judgment, trial court had no alternative except to dismiss the case, since plaintiff failed to preserve any right to an accounting.

Aaron Sapiro and Hyman O. Danoff,
Los Angeles, for appellant.

Louis Licht, San Francisco, Mitchell,
Silberberg & Knupp and Arthur Groman,
all of Los Angeles, for respondents.

HANSON, Justice pro tem.

The question to be determined is whether the trial court exercised its discretion erroneously in holding the complaint insufficient to require it to proceed to a declaratory judgment.

As the case was heard upon the complaint and a verified amended answer the facts upon which decision must rest are those set forth in the complaint and admitted or not denied by the amended answer and those affirmatively set up therein.

The following facts alleged in the complaint are admitted by the amended answer of the respondents: Respondent Edward F. Pearson in 1944 entered into a written contract whereby he agreed to employ appellant as a candy maker for the Pearson Candy Co., one of the respondents, agreeing to pay appellant a stipulated weekly wage and annually in addition a stated percentage of the net profits of respondent Pearson Candy Co.'s business as long as the contract continued in force.

The parties operated under the terms of the contract until its expiration on July 1, 1948. Thereafter and until the appellant quit the employ of respondent in 1949 the appellant was employed upon somewhat different terms and conditions. Appellant was paid annually the stated percentages due on the net profits of the Pearson Candy Co. *as they were computed* by the respondent Edward F. Pearson. Under the terms of the written contract appellant was employed merely to make and supervise the making of candy and should "have nothing to do with the purchasing, selling, management, control, [or] control of employees; that is to say hiring and firing of employees, [or] financing and [or] expending funds of the Pearson Candy Co."

As to other minor facts, the state of the pleadings may be briefly summarized. The complaint asserts: The respondent Edward F. Pearson, when he made the annual percentage payments to appellant, represented they were correct and appellant was not entitled to any explanation thereof; that respondent never permitted appellant to examine the company's books so as to enable him to determine the facts; that appellant believed and trusted respondent during the entire term of the written contract and did not believe respondent would deliberately make improper charges to expenses and thereby fail to pay over to him what was justly due; that when appellant quit his employment he made a demand in writing for a full and complete accounting of any and all profits earned by the business during the term of the contract including a statement of the salaries and drawings paid out by the business to respondent Edward F. Pearson and all other persons and that this demand for an accounting was refused.

The appellant then goes on to allege in his complaint that respondent Edward F. Pearson incorrectly computed the net profits in that he charged to the expenses of the business not only certain gifts to relatives and employees, but certain salaries which were either not earned or grossly exorbitant and thereby the net profits used by respondent Edward F. Pearson in computing appellant's percentages were greatly

and improperly reduced; that under the terms of the contract the respondent Edward F. Pearson was not entitled to reduce the net profits in the manner indicated even though he claims he was entitled to do so. Accordingly he seeks a declaration as to whether or not the items mentioned were properly used to reduce the net profits upon which his annual percentages were based; that if the court should declare the items were not so chargeable, it then declared that respondent be required to make a full and complete accounting; that the court having declared from the accounting the amount due appellant, it ordered the respondent to pay the same.

In the amended answer respondents expressly deny that Edward F. Pearson in computing the percentage based on the net profits charged against gross profits any gifts or unearned or exorbitant salaries. Respondents further *admit* that under the terms of the contract such items could not properly be charged and expressly disclaim that they have ever contended otherwise and aver they do not now so contend. Other defenses set up by the answer are not here material, except it should perhaps be stated that respondents deny Edward F. Pearson was the sole proprietor of the Pearson Candy Co. and aver it was a copartnership consisting of him and certain other persons named as defendants below and as respondents here.

The case then as it stood when it was called for trial required, by reason of the concession in the amended answer, no declaration as to the meaning of the terms of the contract. Shorn of this necessity the complaint presented simply the question whether the net profits of the business upon which appellant's percentage computations were to be based had actually been reduced by any gifts or salary charges of the character enumerated in the complaint. This involved only a question of fact and no declaration whatever as to legal rights or duties of the parties.

At the opening of the trial the respondents objected to the introduction of any evidence on the ground that plaintiff's complaint did not state a cause of action *for declaratory relief*. The court sustained

the objection and thereupon dismissed the case. In ruling on the motion the court expressed the view that the case as it then stood before him called for no declarations on the court's part and in its essence presented merely a case for an accounting. In then observed that the cause of action was actually merely one for damages which had accrued before the action was filed, and that the traditional remedies were entirely adequate and just as efficient as the declaratory relief remedy sought. Hence, in view of the discretion confided to it, by the statute, to dismiss a declaratory relief action where a declaration is not necessary or proper under the circumstances it should exercise that discretion. Before doing so the trial court inquired of counsel for appellant what further he had to say to the proposed ruling. In substance the only answer of appellant was that he was entitled to declaratory relief. If, as appellant now contends, he was entitled to some other equitable relief, which we do not decide, he failed to so advise the court. Accordingly, we are of the opinion that the trial judge did not erroneously exercise his discretion and much less did not abuse it.

In contending to the contrary appellant appears to be of the view (1) that if the complaint alleges an actual controversy between a plaintiff and defendant the courts are bound by the allegation and so may not refuse to grant a declaration or dismiss the action; (2) that if the complaint disclosed facts which if proved would entitle the plaintiff to some relief declaratory or otherwise the court may not refuse to make a declaration and thereupon dismiss the action.

Before discussing these contentions we think it important to review briefly the legislative history and the language of our Declaratory Judgment Act. Code Civ. Proc. § 1060 et seq. The Act enacted by our legislature in 1921 is not only very broad in its terms, but was intended as a cumulative remedy to the existing traditional and statutory remedies. Rather than limit the sweep of the statute by detailed restrictions upon its use, the legisla-

ture chose instead to invest the judiciary with the power to refuse to entertain, hear or adjudge a declaratory relief cause if it presented no "actual controversy relating to the legal rights and duties of the respective parties" or if the court was of the view that "its declaration or determination is not necessary or proper at the time under all the circumstances." The legislature having restricted, as indicated, the right of litigants to make use of the Act, added the following provision in 1927: "Actions brought under the provisions of this chapter shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character and matters to which special precedence may be given by law." Code Civ.Proc. sec. 1062a. It seems quite evident that this addition to the statute would not have been enacted, had it not been contemplated by the legislature that the courts should and would properly exercise the discretion confided to them by the statute. Plainly the legislature did not intend that a litigant should be granted priority on the trial court's calendar through the mere device of filing a declaratory relief action rather than a traditional or statutory action. To avoid any such improper result the legislature left the power of control to the trial court.

[1-3] Turning to the case at hand we are at once struck with the fact that appellant by framing his cause of action for a declaratory judgment rather than a simple action for an accounting was enabled, if he so chose, to attain priority over such cases. This factor it is plain is one that a trial court could and should consider in any case where it is called upon to exercise its discretionary power. *Simpson v. Security First Nat. Bank*, 71 Cal.App.2d 154, 162 P.2d 494. Whether in the instant case the trial judge regarded the issues tendered to sustain the case for declaratory relief as being fictitious is not clear from his comments, but that he regarded them as being moot is plain. That the question as to a controversy as to legal rights and duties became moot by the concessions made in the amended answer appears to

us to be entirely obvious and accordingly merited no declaratory judgment. Courts are not permitted to entertain and decide moot issues or cases. Borchard, *Declaratory Judgments*, p. 46; Anderson, *Declaratory Judgments*, sec. 102, p. 275. The only issue remaining in the case for determination when it was called for trial was a fact question, i. e., whether respondent Edward F. Pearson in computing the "net profits" had charged to gross profits any improper salaries or gifts, and if so, the amount thereof. As the trial judge rightly observed this involved no declaration as to the legal rights or duties of the parties.

[4] From what has so far been said it is crystal clear that a litigant does not have an absolute right to a declaratory judgment even though he has in the first instance stated a good cause of action for declaratory relief. *City of Alturas v. Glosster*, 16 Cal.2d 46, 104 P.2d 810; *Monahan v. Dept. of Water & Power*, 48 Cal.App. 2d 746, 120 P.2d 730; *Simpson v. Security First Nat. Bank*, *supra*.

There remains for consideration the further contention of appellant that his complaint stated a cause of action for some equitable relief, i. e., accounting, and hence the court erred in dismissing the action. Appellant cites *Lord v. Garland*, 27 Cal. 2d 840, 168 P.2d 5, 12, as so holding and subsequent cases which quote or refer to it. We do not understand that the Supreme Court by the language it used in the *Lord* case intended to hold that a trial court could not dismiss an action if it stated or presented no cause for *declaratory relief* even though it stated a cause for some other relief. We here quote the language of the court, interpolating therein in brackets the word "declaratory" as sufficiently indicating the interpretation we place upon it: "However, it is equally true that section 1061 of the Code of Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some [declaratory] relief in connection with the matter which occasioned the controversy. *Henderson v. Oroville-Wyandotte Irr.*

Dist., 207 Cal. 215, 277 P. 487; *Phelps v. Loop*, 53 Cal.App.2d 541, 128 P.2d 63; *Zimmer v. Gorelnik*, 42 Cal.App.2d 440, 109 P.2d 34."

[5] From the last-quoted paragraph, it is clear that where a plaintiff, as in the *Lord* case, has a good cause of action for declaratory relief and is entitled to some *declaratory relief* in connection with the matter which occasioned the controversy, it is an abuse of discretion of the trial court to sustain a general demurrer to the complaint upon the ground that the remedy was not necessary or proper. But where a plaintiff states a cause of action for breach of contract or for an accounting or for any other like action, and demands declaratory relief, the court is not compelled to render a declaratory judgment simply because plaintiff is entitled to *some relief* under the cause of action stated other than for declaratory relief. If appellant's interpretation of the *Lord* case is correct, then Section 1061 of the Code of Civil Procedure has no meaning because the discretionary power of the court could be taken from it by the simple expedient of casting a cause of action of the conventional type in the form of an action for declaratory relief.

We pause to comment but briefly on the three cases mentioned in the above quotation. In none of these cases is it suggested that any relief other than declaratory relief may be granted. In the *Henderson* case, which was an action for declaratory relief, the trial court dismissed it on the ground it had no jurisdiction of the subject matter of the case. On appeal the Supreme Court reversed, holding that the lower court had jurisdiction, pointing out that even if the trial court had not had jurisdiction to interpret one of the documents involved (order of the Railroad Commission) it clearly had jurisdiction to interpret the others and so should have done so as a good cause of action for declaratory relief was stated as to those documents.

In the *Zimmer* case the plaintiff sued for declaratory relief as to the respective rights of himself and the defendant, con-

cerning a division of profits in connection with the business operations of the two on the theory they were operating as partners or joint adventurers. The plaintiff's case rested in part on the terms of a written contract and in part on an oral contract. The trial court declined to receive evidence which would have supported the oral contract on the erroneous theory that the Declaratory Judgment Act did not permit of it. At the close of all the evidence the trial court ruled the written contract was void for uncertainty and accordingly denied the plaintiff any relief whatsoever. In reversing on both grounds the court said: "For the reasons given the court erred when it denied plaintiff the right to prove the oral contract, and when it dismissed the action without giving plaintiff the relief which the facts disclosed he was entitled to. We do not discuss the other points raised except to add that this is not a case for the application of section 1061, Code of Civil Procedure, authorizing the trial court to refuse to exercise the powers where a declaration is not necessary or proper. *Because the admitted facts are that the plaintiff was entitled to some relief over which the parties are in controversy* a declaration was both necessary and proper. Hence, the case comes squarely within the rule of *Henderson v. Oroville-Wyandotte Irr. Dist.*, 207 Cal. 215, 277 P. 487 [42 Cal.App.2d 440, 109 P.2d 38]." (Italics supplied.)

In the *Phelps* case (a decision by this court), the plaintiff likewise sought declaratory relief. In that case *Phelps*, who had levied an execution against a lot and building owned by *Loop*, sought a declaration that *Loop's* homestead declaration with respect thereto was invalid. After hearing the evidence for the plaintiff the trial court granted a nonsuit on the theory that the evidence failed to show that the homestead declaration was invalid. On appeal to this court *Phelps* not only contended that his evidence was sufficient as against the motion for a nonsuit, but also that a nonsuit could not be granted in a declaratory relief action. In deciding that case we were of the opinion that not only did the

complaint state a cause of action for declaratory relief but that the evidence was sufficient to overcome the motion for a nonsuit. Additionally we expressed the view that a nonsuit could not be granted in a declaratory relief action where the allegations, as in that case, stated a cause of action for declaratory relief. In short, we held that under those circumstances the trial court, regardless of the insufficiency of the evidence at the close of plaintiff's case, was under a duty to deny a motion for a nonsuit and was obligated at the close of the case to make his declaration on the issues tendered. The case was decided about ten years ago. Since then the trend of the decisions, among them those of our Supreme Court and indeed those of our own court, make it indubitably clear that the views we then expressed were erroneous and must now be disavowed by us, which we do. cf. *Moss v. Moss*, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422; *Adams v. Cook*, 15 Cal.2d 352, 101 P.2d 484; *Merkley v. Merkley*, 12 Cal. 2d 543, 86 P.2d 89; *Simpson v. Security First Nat. Bank*, supra; *Ingrao v. Karsten*, 94 Cal.App.2d 517, 211 P.2d 41; *Borchard, Declaratory Judgments*, p. 432; *Anderson, Declaratory Judgments*, sec. 188, p. 564.

In his ruling the trial judge in the case at bar adverted to the fact that the appellant's cause of action had fully accrued before the instant action was filed and hence that the traditional actions such as breach of contract or for an accounting were adequate. This was a factor to be taken into account by him even though as appellant correctly contends it in and of itself is not a decisive factor. In the instant case it was only one of several factors upon which the trial court based its ruling.

[6] If, as appellant contends, the complaint stated sufficient facts for the remedy of an accounting or any other conventional remedy, he nevertheless failed to preserve any such right. When the court announced he would not entertain the case for a declaratory judgment, appellant was certainly under a duty to move that the case be entertained for the purpose of showing he was entitled to an accounting.

As the appellant was adamant in his insistence that he was entitled to a declaratory judgment, the court in view of its ruling and for want of any further motion on appellant's part had no alternative except to dismiss the case.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



101 Cal.App.2d 790

CLARY v. MILLER et al.

Civ. 17663.

District Court of Appeal, Second District,
Division 3, California.

Jan. 19, 1951.

Action by Philip V. Clary against E. H. Rupert, and another, to recover the balance of money lent and interest due. Jean R. Miller, administratrix, was substituted for the named defendant. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered a judgment for the plaintiff, and the administratrix appealed. The District Court of Appeal, Parker Wood, J., held that it was proper for plaintiff to file a supplemental complaint substituting the administratrix of the original defendant, but that costs incurred after death in connection with attachments should not be allowed against the administratrix.

Judgment modified, and, as modified, affirmed.

1. Abatement and revival ⇨75(2)

Where lender began action for balance of money lent and interest due, and borrower died before action was tried supplemental complaint substituting administratrix as party defendant and alleging presentation of creditor's claim to her stated a cause of action against the administratrix.

2. Money lent ⇨7(3)

In action for balance of money lent and interest due under agreement providing

that borrower was to pay lender stated sum in monthly installments on demand wherein defense was asserted that money was not due, evidence supported judgment for plaintiff.

3. Executors and administrators ⇨456(1)

In action for balance of money lent and interest due wherein administratrix was substituted as party in place of original defendant costs if any, incurred after death of original defendant in connection with attachment could not be allowed against administratrix. Code Civ.Proc. § 1032.

4. Attachment ⇨183

In action for balance of money lent and interest due, lien of attachment was destroyed by death of defendant pending trial.

Victor A. Berry, Culver City, for appellant.

Morgan W. Gordon, Beverly Hills, for respondent.

PARKER WOOD, Justice.

On October 11, 1947, plaintiff commenced an action against E. H. Rupert to recover \$7,000 and interest due for money lent. Said defendant filed an answer. In February, 1948, before the action was tried, the defendant died. In March, 1948, Jean R. Miller (daughter of said defendant) was appointed administratrix of the estate of E. H. Rupert, deceased. On April 6, 1948, plaintiff presented a creditor's claim for said \$7,000 and interest to the administratrix. Pursuant to an order granting plaintiff's motion to amend the complaint, a first amended complaint, wherein Mrs. E. H. Rupert was also named a party defendant, was filed. Thereafter a second amended complaint, wherein Mrs. E. H. Rupert was also named a party defendant, was filed. The administratrix did not allow the creditor's claim. On June 23, 1948, the plaintiff, after having elected to deem the claim rejected, served and filed a notice of motion to revive and continue the action against the administratrix of said estate, and for leave to file a supplemental complaint naming said administratrix as a party defendant. Said motion was granted

on July 14, 1948, and the court also ordered that a summons be issued upon the supplemental complaint and that such summons and supplemental complaint be served on the administratrix. A supplemental complaint, wherein the administratrix and Mrs. E. H. Rupert were defendants, was filed. On October 5, 1948 (after a demurrer to the supplemental complaint had been sustained with leave to amend), plaintiff filed a first amended supplemental complaint wherein the administratrix and Mrs. E. H. Rupert were named as defendants. Prior to the trial the action was dismissed as to Mrs. Rupert.

The court instructed the jury to return a verdict for plaintiff. The verdict was for plaintiff against the administratrix for \$7,000. Judgment was entered, upon the verdict, for plaintiff for \$7,000, with interest thereon at 7% per annum from the date of judgment, and for costs in the sum of \$101.30.

Defendant administratrix appeals from the judgment. She contends that (1) the first amended supplemental complaint did not state a cause of action against the administratrix; (2) the evidence was insufficient to support the judgment; and (3) costs should not have been awarded to plaintiff.

In the first amended supplemental complaint it was alleged, among other things, that on October 11, 1947, plaintiff filed an action against E. H. Rupert for \$7,000 and interest due plaintiff for money lent to E. H. Rupert; that E. H. Rupert died on February 5 1948, and Jean R. Miller was the duly qualified and acting administratrix of his estate; on April 6, 1948, plaintiff had duly presented to said administratrix a claim for the payment of the indebtedness described in the complaint on file herein which is the basis of the present action; a copy of said claim was attached to the first amended supplemental complaint, marked "Exhibit B," and made a part thereof. Said claim was in the usual form of a proper creditor's claim and it recited as follows: "The sum of \$7,000.00 is the balance due Philip V. Clary on loans made to Ellis H. Rupert by Philip V. Clary, as evidenced by a photostatic copy of the

written acknowledgment of indebtedness. There is interest due on said \$7,000.00 at the rate of 3% per annum from November 1, 1947. (A photostatic copy of the written acknowledgment of said indebtedness was attached to this claim.) (See Exhibit 'A' herein) \$7,000.00." It was alleged further in said first amended supplemental complaint that a copy of said second amended complaint herein was attached to the first amended supplemental complaint, marked "Exhibit C," and made a part thereof as though it were fully set forth therein. It was alleged in the first cause of action of said second amended complaint, so referred to and made a part of said first amended supplemental complaint, that on September 22, 1945, E. H. Rupert was indebted to plaintiff in the sum of \$8,000 for money lent before that time by plaintiff to him; he had agreed to pay interest at the rate of 3% per annum; a copy of said evidence of indebtedness and agreement was annexed to said second amended complaint, marked "Exhibit A," and made a part thereof. The said agreement was as follows:

"September 22, 1945.

Received of Philip V. Clary, \$8,000 E. H.R., same to be used by E. H. Rupert in business at 1130 Santa Monica Blvd., Santa Monica, California. Mr. Clary is to receive Three per cent (3%) per annum on this investment, payable monthly.

Mr. Clary is to receive Four Per Cent (4%) of net profit on all sales in the above mentioned business, payable monthly.

Mr. E. H. Rupert agrees to pay Mr. Clary the above mentioned investment when Mr. Clary desires same, in monthly installments, beginning on demand.

Mr. E. H. Rupert hereby agrees to give Mr. Clary first option on business when same is for sale at a price to be agreed upon by all parties concerned, Mr. Clary's salary is to be mutually agreed upon.

E. H. Rupert

E. H. Rupert

Philip V. Clary

Philip V. Clary."

It was alleged further in said first cause of action of the second amended complaint that on November 1, 1945, plaintiff de-

manded payment of said \$8,000; that no part thereof had been paid except \$1,000. In said second amended complaint there were other causes of action as follows: An account stated as of September 22, 1945, for \$7,000; an account stated as of November 1, 1945, for \$7,000; and an open book account for \$7,000.

[1] Appellant's contention that the first amended supplemental complaint did not state a cause of action against the administratrix is not sustainable. It was proper to file a supplemental complaint substituting the administratrix as a party defendant and alleging the presentation of a creditor's claim to the administratrix. See *Thomas v. Fursman*, 39 Cal.App. 278, 286, 178 P. 870—opinion of Supreme Court denying petition for hearing; and *Crawford v. Meadows*, 55 Cal.App. 4, 9, 203 P. 428.

[2] The evidence was sufficient to support the judgment. E. H. Rupert had answered the complaint and admitted the execution of the agreement dated September 22, 1945, upon which the action was based. His alleged defense was that the money was not due. Mrs. Clary, the wife of plaintiff, testified that plaintiff had the amount of \$8,000 when she and plaintiff were married in 1943; that she does not make any claim to that money; that, in her presence, plaintiff made many demands upon E. H. Rupert for payment of "these funds"; that about a week before the action was filed E. H. Rupert said he was not going to pay plaintiff. No evidence was offered by defendant administratrix.

[3, 4] Appellant's contention that costs should not have been allowed is not sustainable. The administratrix was substituted as a party in place of the decedent E. H. Rupert, and the judgment was in favor of plaintiff. Section 1032 of the Code of Civil Procedure provides in part that costs are allowed of course to a plaintiff upon a judgment in his favor in an action to recover money. The memorandum of costs herein states in part: "Marshal's fees, James S. Markey, Santa Monica, Fees cover Writ of Attachment of October 29, 1947 only. \$88.80." Defendant made a motion to strike said item of costs from the

memorandum on the ground "that it is not properly chargeable against this defendant." The motion was denied. Since the lien of the attachment herein was destroyed by the death of E. H. Rupert, *Clary v. Rupert*, 93 Cal.App.2d 844, 210 P.2d 44, the costs, if any incurred after the death in connection with the attachment should not be allowed. The record, however, does not show that any such costs were allowed.

The judgment is modified by adding, at the end thereof, the following words: "payable in due course of administration." As so modified, the judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



101 Cal.App.2d 788

PEOPLE v. MENDIETTA.

Cr. 2697.

District Court of Appeal, First District,
Division 2, California.

Jan. 19, 1951.

August Mendietta was convicted in the Superior Court in and for the City and County of San Francisco, Albert C. Wollenberg, J., for robbery in the first degree, and he appealed. The District Court of Appeal, Dooling, J., held that a complaint charging that defendant in commission of robbery was armed with deadly weapon consisting of revolver charged commission of first degree robbery, and defendant pleading guilty to the charge pleaded guilty to first degree robbery, and hence court was not required to resort to evidence to fix the degree.

Judgment affirmed.

1. Criminal law — 273

A plea of guilty admits all of the elements of the crime as charged.

2. Criminal law — 980(2)

A complaint charging that defendant in commission of robbery was armed with deadly weapon consisting of revolver charged commission of first degree rob-

bery, and defendant pleading guilty to the charge pleaded guilty to first degree robbery, and hence court was not required to resort to evidence to fix the degree. Pen.Code, §§ 211a, 859a, 1192.

Jerome L. Schiller, Henry M. Jonas, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was arraigned before the committing magistrate upon a complaint charging him and two others with the crime of robbery. The complaint included the allegations "said defendant(s) at the time of the commission of the said offense being armed with a deadly weapon, towit: a revolver." Appellant pleaded guilty before the magistrate as permitted by section 859a Penal Code and the matter was certified to the superior court. The judge of the superior court determined the robbery to be in the first degree and imposed sentence.

The sole issue raised on the appeal is that the judge in fixing the degree of the crime failed to take evidence as required by law. Pen. C. sec. 1192; *People v. Bellon*, 180 Cal. 706, 182 P. 420; *People v. Stratton*, 133 Cal.App. 309, 24 P.2d 174; *People v. Paraskevopolis*, 42 Cal.App. 325, 183 P. 585.

[1] Since robbery while armed with a deadly weapon is robbery in the first degree, Pen. C. sec. 211a, and since the complaint alleged that the defendants in the commission of the robbery were "armed with a deadly weapon, towit: a revolver", it is plain that the complaint charged the defendants with the commission of robbery in the first degree. The plea of guilty admitted all of the elements of the crime as charged. *People v. Brown*, 140 Cal.App. 616, 619, 36 P.2d 194; *People v. Hall*, 87 Cal.App. 634, 636, 262 P. 50.

In *People v. Paraskevopolis*, supra, a case relied on by appellant, the court said at page 330 of 42 Cal.App., at page 587 of

183 P.: "We are not, however, to be understood as holding that the voluntary admission by the defendant, whether in the form of a mere statement or in that of a plea to the charge, that he is guilty of a particular degree of a crime divided into degrees, will not constitute a sufficient evidentiary predicate for the determination by the court of the question of degree, notwithstanding that such statement may not be, or such plea is not, given under oath. To the contrary, we think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree."

Similarly in *Ex parte Haase*, 5 Cal.App. 541 at page 543, 90 P. 946 at page 947, we read: "But what objection could be urged against an information charging burglary in the nighttime? The effect would be simply to confine the plea or the trial to the crime of burglary in the first degree. *People v. Smith*, 136 Cal. [207] 208, 68 P. 702. But if the defendant were arraigned upon such an information and should plead guilty of 'burglary in the first degree,' and were sentenced to eight years in the penitentiary, it could not be said that the judgment was void or even voidable. In such a case the plea would be equivalent to that 'of guilty of the offense charged' and it would be a substantial compliance with the requirement of the statute."

See also *People v. Martin*, 78 Cal.App.2d 340, 343, 177 P.2d 813, 815, holding that "a plea of guilty to the particular degree of the crime charged and a determination by the court of the degree were sufficient."

People v. Mendez, 27 Cal.2d 20, 161 P.2d 929, cited by appellant, charged murder in the language of Pen. C. § 187 and the plea did not for that reason admit the degree of the crime. In any event even in the case of a plea of guilty to murder in the first degree the court must still take evidence to fix the penalty. Pen. C. § 190.

[2] Where the defendant pleads guilty to a charge which from the allegations of the complaint, indictment or information can only be robbery in the first degree he pleads guilty to robbery in the first degree,

and no reason appears why the court should resort to evidence to fix the degree which he has already admitted by his plea.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.



MYERS v. ALTA CONST. CO. et al.
Civ. 4063.

District Court of Appeal, Fourth District,
California.

Jan. 12, 1951.

Hearing Granted March 12, 1951.*

Robert F. Myers brought action against the Alta Construction Company and the Standard Accident Insurance Company on bond providing that the Standard Accident Insurance Company agreed to pay all just claims of "laborers" of the Alta Construction Company. The Superior Court of Kern County, W. L. Bradshaw, J., rendered a judgment for the plaintiff, and the Standard Accident Insurance Company appealed. The District Court of Appeal, Mussell, J., held that plaintiff, who was a surveyor and civil engineer, was not a "laborer" within meaning of the bond, and therefore could not recover thereon.

Judgment reversed.

Mechanics' Liens ☞ 315

A surveyor and civil engineer, who rendered services in connection with construction of warehouse, but who filed no claim of mechanic's lien within time provided by statute, and who made no written demand on surety which issued bond providing that surety agreed to pay all just claims of "laborer" against contractor, was not a "laborer" within meaning of the bond and could not recover thereon from surety for services rendered. Code Civ.Proc. § 1183; Civ.Code § 1644.

See publication Words and Phrases, for other judicial constructions and definitions of "Laborer".

* Subsequent opinion 235 P.2d 1.

Thomas E. Davis, San Francisco, for appellant.

West, Vizzard, Howden & Baker and Gordon L. Howden, all of Bakersfield, for respondent.

MUSSELL, Justice.

Action on a bond.

Defendant Standard Accident Insurance Company appeals from an adverse judgment in an action by plaintiff to recover for personal services rendered as a surveyor and civil engineer in connection with the construction of a warehouse in the county of Kern. The services were performed for and at the instance and request of defendant Alta Construction Company, which was under contract to construct the building.

The defendant Standard Accident Insurance Company, for the purpose of complying with the provisions of section 1183 of the Code of Civil Procedure, executed a bond inuring to the benefit of any and all persons performing labor upon or furnishing materials to be used in the performance of the work. In addition to the required provisions, the bond contained the following language: "The Principal and Surety further agree to pay all just claims of *laborers* (italics ours) arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same. * * *"

It was stipulated that the bond was properly recorded; that no claim of mechanic's lien was filed by plaintiff within the time provided by the code and that no written demand was made upon the Standard Accident Insurance Company under the provisions of section 1183 of the Code of Civil Procedure.

The sole question here involved is whether plaintiff is a "laborer" within the meaning of the quoted provision of the bond. This question must be answered in the negative.

Plaintiff classifies himself in his complaint as a "surveyor and civil engineer", suing for the value of "professional services rendered."

In *Waara v. Golden Turkey Mining Co.*, 60 Ariz. 252, 135 P.2d 149, 149 A.L.R. 677, it was held that a civil mining engineer was not a laborer within the meaning of the lien laws of that state. The court said, 135 P.2d at page 151: "A civil and mining engineer is employed, we assume, because of his educational training to do certain kinds of technical or skilled work and usually is not required or expected to take directions or instructions from his employer except as to the final result, and accordingly is paid for his services, not for the physical effort in accomplishing a result but for his skill and knowledge. The manual labor he performs is not the reason for his employment but is an incident to his work; it does not necessarily transform him into a laborer or miner, as those words are used in the lien law of the state. He is employed to render a service very different from that of the miner or laborer."

In the case of *Universal Pictures Corp. v. Superior Court*, 9 Cal.App.2d 490, at page 493, 50 P.2d 500, at page 501, the plaintiff was employed as an actor or artist by the defendant, and in considering the question of whether the actor was to be regarded as a laborer, the court said: "However, with but few exceptions, it seems to be generally conceded, that individuals whose principal efforts are directed to the accomplishment of some mental task, such as those of ministers of the gospel (*Church of Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226); lawyers (*Latta v. Lonsdale*, 8 Cir., 107 F. 585, 52 L.R.A. 479; *Gay v. Hudson River E.P. Co.*, C.C., 178 F. 499); doctors (*Weymouth v. Sanborn*, 43 N.H. 171, 80 Am.Dec. 144); teachers (*School District v. Gautier*, 13 Okl. 194, 73 P. 954; *Tatsukichi Kuwabara v. United States*, 9 Cir., 260 F. 104; *Lesuer's Case*, 227 Mass. 44, 116 N.E. 483, L.R.A. 1918F, 197); or actors (*Wirth v. Calhoun*, 64 Neb. 316, 89 N.W. 785; *In re Ho King*, D.C., 14 F. 724); or those persons generally known and recognized as professional men or women, even though in its broad sense perform 'labor,' are not to be, nor should be, classified as 'laborer.'"

In *Morley v. McCaskey*, 134 Okl. 50, 270 P. 1107, 1110, it is said: "A laborer or-

dinarily is a person without particular training and who is employed at manual labor under a contract terminable at will. We are of the opinion that the words 'laborers who perform work and labor,' used in section 7468, supra, are intended to designate ordinary laborers who perform actual physical toil; common laborers and those who are required to use their hands or muscles in actual work. Such words do not apply to those who furnish both labor and material under a contract to perform a designated portion of an entire contract. The purpose of the statute is to protect a class of persons rarely able to protect themselves, and who, from the laborious nature of their occupations and the necessity of earning their daily bread by daily toil, have not time, opportunity, or training sufficient to inform themselves as to the financial responsibility of the parties for whom they work."

In 51 C.J.S., *Labor or Labour*, pp. 475-476-477-478, it is said: "In determining whether a particular person is really a 'laborer,' in the strict and popular sense of the word, the character of the work must be taken into consideration; he must be classified not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him. The test for determining who is a laborer in such case is whether the work of the particular person involves mental skill, business capacity, involving the exercise of the intellectual faculties, or whether the work depends on mere physical power and manual labor. * * *

"When used in its ordinary and usual acceptance, 'laborer' carries with it the idea of actual physical and manual exertion or toil, implying personal service and the work of the individual. As commonly and customarily used and understood, the term applies only to one engaged in some form of manual, or physical labor, such persons as gain their livelihood by manual toil. It is not applicable to anyone who does not earn his living by the work of his hands, and it excludes anyone whose employment is associated with mental labor and skill; and such is the primary or specific lexical meaning uniformly assigned to the word.

"In its restricted sense, the term signifies one who performs manual, menial, or physical exertion, labor, or toil, not requiring special accuracy, knowledge, skill or training, under the direction of his employer, master, or superior, and hence distinguished from an artisan, professional man, or skilled workman. * * *

"Ordinarily the word 'laborer' does not embrace persons engaged in the learned professions, or individuals whose principal efforts are directed to the accomplishment of some mental task."

It is apparent from the record before us that the plaintiff did not himself perform any manual labor in connection with the services rendered. It was not contemplated that he should be paid for physical efforts in the performance of the services, but rather for his skill and knowledge. As a professional man, he was not a "laborer" as herein defined.

Section 1644 of the Civil Code provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Section 1183 of the Code of Civil Procedure provides in part: "Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, * * * shall have a lien * * *."

The language used in the quoted portion of the section indicates that there are several classes of persons who are entitled to liens other than "laborers". The provision of the bond with which we are here concerned evidences an intent on the part of the parties to waive the benefits of the statute requiring lien claimants either to file a mechanic's lien or to give written notice to the surety as to laborers only, and to give the word "laborers" its popular and

ordinary meaning. To give any other meaning to the word "laborers", as used in the bond, would be to extend the waiver to classes of persons not included therein.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 700

BURGER v. EMPLOYEES' RETIREMENT SYSTEM et al.

Civ. 14585.

District Court of Appeal, First District,
Division 2, California.

Jan. 15, 1951.

Hearing Denied March 15, 1951.

Action by Thomas J. Burger against Employees' Retirement System, and others, for declaratory relief. The Superior Court in and for the City and County of San Francisco, Franklin A. Griffin, J., rendered a judgment for the plaintiff, and the plaintiff appealed. The District Court of Appeal, Dooling, J., held that under San Francisco charter amendment suspending during World War II and for six months after its termination, the operation of a provision reducing monthly pension payments to certain retired employees during gainful employment, the war terminated on December 31, 1946, with the President's official declaration of cessation of hostilities.

Judgment affirmed.

1. Statutes § 174, 212

Generally, courts will interpret measure adopted by vote of the people in such manner as to give effect to intent of voters adopting it, and it must be held that voters judged of amendment they were adopting by meaning apparent on its face according to general use of words employed.

2. Evidence § 11

Court would judicially notice manpower shortage caused by waging of active

warfare on many fronts during prosecution of hostilities in World War II.

3. Municipal corporations ⇨220(6)

Purpose of San Francisco charter amendment suspending, during World War II and for six months after its termination, the operation of charter provision reducing monthly pension payments to certain retired employees during gainful employment, was to furnish inducement to city and county pensioners under the age of 62 to engage in gainful employment during period of labor shortage caused by active prosecution of the war.

4. Municipal corporations ⇨220(6)

Under San Francisco charter amendment suspending, during World War II and for six months after its "termination", the operation of charter provision reducing monthly pension payments to certain retired employees during gainful employment, "termination" of war was meant in popular, not technical sense, and hence occurred on December 31, 1946, with President's official declaration of cessation of hostilities.

See publication Words and Phrases, for other judicial constructions and definitions of "Termination".

John J. Dailey, Charles F. Rockwell, San Francisco, for appellant.

Dion R. Holm, City Atty. of City and County of San Francisco, Norman Sanford Wolff, Deputy City Atty., Clayton W. Horn, Deputy City Atty., San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment in an action for declaratory relief. Plaintiff is a retired member of the fire department of the City and County of San Francisco engaged in gainful employment. He was retired, not because of disability, on a pension on November 14, 1944 and at all times involved in this action he was under the age of 62 years.

The San Francisco charter prior to January 16, 1945 in section 163 thereof con-

tained the following provision: "Should any retired person, except persons retired for service prior to January 8, 1932, and persons retired because of disability * * * engage in a gainful occupation prior to attaining the age of sixty-two, the retirement board shall reduce that part of his monthly pension * * * which is provided by contributions of the city and county, to an amount which, when added to the amount earned monthly by him in such occupation, shall not exceed the compensation on the basis of which his pension * * * was determined."

On January 16, 1945 the legislature approved an amendment to this charter section which had been ratified by the voters at the election of November 7, 1944. By this amendment the language above quoted was cast into a paragraph designated "(b)" and the following language was added to the section: "The provisions of paragraph (b) of this section shall be inoperative during the existing war between the United States and the Axis powers and for six (6) months after the termination of said war."

The question presented is whether the "termination of said war", as that language is used in the amendment quoted, occurred on December 31, 1946 with the president's official declaration of the cessation of hostilities, thereby making paragraph (b), section 163 of the charter again operative six months thereafter. The trial court by its judgment so determined and further adjudged that after June 30, 1947 (six months after December 31, 1946) paragraph (b) of section 163 became again operative and "the deduction * * * from the monthly pension * * * of Thomas J. Burger for the month of July, 1947 (the month put in issue) as a result of Thomas J. Burger's earnings from outside gainful occupation during said month, was, and is, proper under the provisions of section 163 of the Charter * * *."

Plaintiff points out that in the presidential proclamation of December 31, 1946 the president stated: "*Although a state of war still exists*, it is at this time possible to declare * * * that *hostilities have terminated*." (Emphasis ours.)

That a technical state of war continued to exist after this presidential proclamation, and still exists, is unquestionable. If the decision of this appeal depended necessarily on the termination of the war in a technical sense the judgment herein could not stand. But many decisions recognize that in a popular sense a war is terminated with the surrender or capitulation of the enemy and that in that sense the termination of all hostilities is the termination of the war. *Kaiser v. Hopkins*, 6 Cal.2d 537, 58 P.2d 1278; *State v. Listman*, 157 Wash. 229; 288 P. 913; *Hoover v. Sandifur*, 25 Wash.2d 791, 171 P.2d 1009; *Darnall v. Day*, 240 Iowa 665, 37 N.W.2d 277; *Scott v. Commissioner of Civil Service*, 272 Mass. 237, 172 N.E. 218; *Lefevre v. Healy*, 92 N.H. 162, 26 A.2d 681; *Zinno v. Marsh*, Sup., 36 N.Y.S.2d 866; *Michael Tuck Foundation v. Hazeltorn*, 187 Misc. 954, 65 N.Y.S.2d 387; *Di Lello v. Carozza*, 188 Misc. 819, 70 N.Y.S.2d 256.

[1] Where a statute or constitutional provision has been adopted by vote of the electors (as in the case of the charter amendment here) courts have recognized the probability that the voters would understand and intend such an expression in the popular rather than in the technical sense. In *Kaiser v. Hopkins*, supra, our supreme court in construing a constitutional amendment said, 6 Cal.2d at pages 538-539, 58 P.2d at pages 1279:

"It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. *Cooley on Constitutional Limitations* (5th Ed.) § 66. It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed.

* * *

"Application of the rules above set forth to the present situation leads to the inevitable conclusion that the voters used the words in question in their 'ordinary and common acceptance,' and that they in-

tended to exempt those only who had served during the period of actual conflict."

In applying the same rule to an amendment to a city charter the Supreme Court of Washington said in *State v. Listman*, supra 288 P. at page 915: "What did the people of Seattle mean by this language they used in amending their charter? The words must be read in a sense which harmonizes with the subject-matter and the general purpose and object of the amendment, consistent of course with the language itself. The words must be understood, not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment. They are to be understood in the common popular way, and, in the absence of some strong and convincing reason to the contrary, not found here, they are not entitled to be considered in a technical sense inconsistent with their popular meaning."

[2-4] We can take judicial notice of the man-power shortage caused by the waging of active warfare on many fronts during the prosecution of hostilities in World War II. It seems readily apparent that the purpose of the charter amendment in issue was to furnish an inducement to city and county pensioners under the age of 62 to engage in gainful employment during the period of the labor shortage caused by the active prosecution of the war. With the end of active hostilities and the lapse of six months thereafter the voters could anticipate, what in fact actually occurred, that the man-power shortage in private and public employment would no longer exist. With these facts in view it seems clear that the trial court correctly decided that in adopting this amendment the voters intended the "termination of said war" in the popular and not the technical sense.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.

101 Cal.App.2d 772

Cite as 226 P.2d 41

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. WALTERS et al.**In re WALTERS ESTATE.****Civ. 17719.****District Court of Appeal, Second District,
Division 1, California.****Jan. 17, 1951.**

Action by the Security-First National Bank of Los Angeles, a national banking association, against Bertha F. Walters, and Helen A. Walters, as executrix of the estate of William R. Walters, deceased, for declaratory relief, involving an alleged wrongful act of the bank in permitting access to a safe deposit box. The Superior Court, Los Angeles County, Joseph W. Vickers, J., held that Bertha F. Walters, decedent's wife, had suffered no damage because the bank allowed her husband to enter and remove community funds from safe deposit box when she subsequently compromised with executrix for a larger amount of money than was taken.

Judgment affirmed.

1. Appeal and error ☞1008(1)

Although a different result might have been reached by another judge of court hearing a particular case, such fact, does not justify appellate interference with judgment rendered.

2. Appeal and error ☞1008(1)

In an action by bank for declaratory relief involving an alleged wrongful act of the bank in permitting husband's access to a safe deposit box, rented by husband and wife, whether wife suffered damage from bank's conduct was question of fact presented for trial court's decision.

3. Declaratory judgment ☞345

In action by bank for declaratory relief involving an alleged wrongful act of the bank in permitting husband's access to a safe deposit box, rented by husband and wife, evidence was sufficient to support finding that wife suffered no damage from bank's conduct.

Milton A. Krug, Los Angeles, for appellant Bertha F. Walters.

William Ellis Lady, Los Angeles, for appellant Helen A. Walters, Executrix.

DORAN, Justice.

The judgment herein appealed from by the various parties thereto, was entered in an action for declaratory relief instituted by the Security-First National Bank, and involved an alleged wrongful act of the bank in permitting access to a safe deposit box rented by Bertha F. Walters and William R. Walters, husband and wife. William R. Walters died on July 11, 1946 and Helen A. Walters, divorced wife of decedent, was appointed executrix of the estate.

On April 11, 1942, the Security Bank rented to Bertha F. Walters a safe deposit box at its Highland Park Branch, a rental receipt and one key being then issued. Thereafter, on April 13, 1942, a co-renters' agreement in reference to said box was signed by Bertha F. Walters and William R. Walters and a key issued to the husband. Among other things the co-renters' agreement provided that "Right of access to said box shall be had and surrender of same may be made by either of us without consent of or notice to the other". The safe deposit manual of the bank instructed its employees that if one party wrote or stated that the other co-renter was not to be allowed access to the box, the box would be automatically sealed.

On or after September 27, 1945 Bertha F. Walters placed in the safe-deposit box six cashier's checks in the total amount of \$9,000, issued by the Security Bank on that date, and payable to the order of Bertha F. or W. R. Walters. The funds made use of in payment for these cashier's checks were derived from the Bank of America in the amount of \$5,000, and from the Security Bank as to the remaining \$4,000. The trial court found that these funds "came from the business and operations of the Radiance Products Co. were * * * the community property of Bertha F. Walters and William R. Walters".

Roane Thorpe, Los Angeles, for appellant Security-First National Bank.

At the time the cashier's checks were placed in the safe deposit box, and apparently furnishing an explanation for such action, Helen Walters, divorced wife of William R. Walters, had instituted an action against William R. and Bertha F. Walters for rescission of an agreement whereby William R. Walters purchased the partnership interest of Helen Walters in Radiance Products Company. This action came on for trial on October 1, 1945; Mr. Walters was then ill, and the litigation was finally settled by a payment of \$2,000 to Helen Walters.

The trial court found that "on or about January 4, 1946 Bertha F. Walters orally instructed Security-First National Bank * * * not to let William R. Walters into said safe-deposit box No. 184 without her being present". On February 4, 1946 William R. Walters in writing instructed the bank not to permit anyone to have access to the box; it was found that "said Bank orally agreed not to let either of said parties into said box without the consent of the other but that no consideration was received by it for such agreement".

On January 30, 1946, Bertha F. Walters was adjudicated incompetent and the Bank of America appointed as guardian. The guardian notified the Security Bank of the appointment on March 1, 1946, stating that the guardian was informed of the instructions in reference to not opening the box and that "it assumed that said instructions would hold" as to the guardian bank.

The trial court further found that, notwithstanding such instructions the Security Bank did "allow William R. Walters access to said safe-deposit box on or about May 28, 1946, and did allow him to remove therefrom said Cashier's checks in the amount of \$9,000". It was found, however, that Mr. Walters did not "dissipate and give away, * * * the whole or any part of the proceeds of said Cashier's checks; but that * * * the proceeds thereof went back into the business of Radiance Products Co."

William R. Walters died on July 11, 1946, and on August 2, 1946 Bertha F. Walters was duly restored to competency.

Thereafter, and on September 26, 1946 an agreement of compromise was entered into between Helen A. Walters, Special Administratrix of the estate of William R. Walters, and Bertha F. Walters, the latter having filed a contest to the probate of Mr. Walters' will and various other petitions. It was therein stated that Bertha F. Walters claimed that decedent had wrongfully obtained the \$9,000 which was in the safe-deposit box.

By this compromise agreement Helen A. Walters was to pay to Bertha F. Walters the sum of \$14,000, and to deliver the key to said box to the latter. Certain other provisions were included which do not bear upon the present controversy. Expressly reserved to Bertha F. Walters, however, were "any claims * * * against the Security-First National Bank"; but with a covenant not to sue Helen A. Walters or the William R. Walters estate "with reference to the sum of \$9,000 claimed to have been removed from the safety deposit box".

It was concluded by the trial court that although the Security Bank "breached the co-renters' agreement * * * when it permitted William R. Walters access to said safe-deposit box * * * and he took therefrom the Cashier's checks", since such checks were community property in the possession and control of William R. Walters, "his removal (thereof) * * * did not limit, infringe upon, or affect in any way the community rights therein or thereto or to the proceeds thereof then held by Bertha F. Walters, his wife; and that such rights * * * continued until she executed the Agreement of Compromise" hereinbefore mentioned.

The trial court further held that any right of the wife to recover against the Security Bank "was limited to the amount of damages she might prove she had suffered", and that "Bertha F. Walters has never suffered any damage by the breach of said co-renters' agreement in any sum whatsoever". The conclusions of law also state that if the Security Bank "were liable to Bertha F. Walters * * * the Estate of William R. Walters, Deceased,

would be, in turn, liable to Plaintiff (Security) Bank, for the same amount"; that such liability would be for conversion of the cashier's checks as to the Security Bank, but that the Bank had suffered no damage by reason of such conversion. It was therefore adjudged that the Security Bank recover nothing as against either defendant, and that Bertha F. Walters, and Helen A. Walters as executrix of the Estate of William R. Walters, Deceased, take nothing.

It is the contention of appellant Bertha F. Walters that the trial court erred "in its conclusion that Bertha F. Walters was not damaged by the conduct of the Security-First National Bank"; that the cashier's checks were held by Mr. and Mrs. Walters in joint tenancy or in trust for Bertha F. Walters as to one-half thereof; that certain conclusions of law are not supported by the evidence or the findings; that in any event in such an equitable proceeding as the present declaratory relief action, the court should not absolve the bailee bank from liability.

The brief of Helen A. Walters, Executrix, complains that the judgment as it affects the estate, "is conditional as well as speculative", and without support in the findings or evidence, and asks that the judgment should be reversed or modified by striking out "that portion which provides that if plaintiff bank 'were liable to Bertha F. Walters for damages in any sum whatsoever, the Estate of William R. Walters, Deceased, would be liable to Bertha F. Walters'".

The Security Bank appeals from that portion of the judgment which holds that the Bank breached the co-renters' agreement in permitting William R. Walters to have access to the box. It is argued that "The rights of the parties are governed solely by the co-renters' Agreement of April 13, 1942", that the receipt of April 11, signed only by the wife, was not admissible in evidence; and that "The fact that the bank orally represented to Bertha F. Walters that they would not permit access to the box to W. R. Walters does not create an estoppel against the bank".

[1] A survey of the record herein and of the various points of objection raised in the briefs of the several parties, none of whom find satisfaction in the decision of the trial court, discloses no prejudicial error and no cause for reversal. It cannot be said that the findings and judgment which purport to declare "the rights, duties and obligations of plaintiff (Security Bank) and defendants with respect to the proceeds of said cashiers checks", are without support in the evidence. Although it may be true that, based upon other items of evidence, a different result might have been reached by another judge or court hearing the case, such fact, under the usual rules of review, does not justify appellate interference with the judgment rendered. Nor have any citations been offered which furnish ground for reversal under the existent facts.

That the Security Bank, by its own rules, should have kept the box sealed against entry by either party in the absence of the co-renter, pursuant to the instructions given by both Mr. and Mrs. Walters, seems clear. Mr. Tilton, manager of the bank, had, indeed, sealed the box, and as stated by the trial court, "Neither (party) attempted to violate it until the 28th of May when, undoubtedly solely due to the absence of Mr. Tilton and either the inexperience or lack of knowledge of Mr. Haigh (an employee), that modification was violated". At that time Mr. Walters removed and cashed the cashier's checks which could legally be negotiated by either of the parties whose names were thereon.

[2] As indicated in the findings, the bank's dereliction in reference to the safe deposit box, standing alone, is not necessarily determinative of the present controversy. Unless Bertha F. Walters has suffered some damage from the bank's conduct, there could be no cause for complaint. And this matter, like other questions of fact involved in the case was one presented for the trial court's decision.

The record discloses evidence from which the court might draw the reasonable conclusion that the cashier's checks placed

in the box by Bertha F. Walters, were community property; that the money represented by such checks was derived from operation of the Radiance Products Company, and that after William R. Walters had withdrawn and cashed the checks, the proceeds therefrom was returned to its original source, the Radiance Products Company. This company and its assets formed a part of the estate of William F. Walters, and are mentioned in the agreement of compromise which purported to settle the difficulties existing between the parties, reserving only the alleged cause of action against the Security Bank.

[3] The trial court's findings leading to the decision that none of the parties should recover anything from the other and that Bertha F. Walters had suffered no damage, cannot be said to be unsupported by the evidence nor in any manner contrary to law.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



101 Cal.App.2d 801

STOBER v. HALSEY.

Civ. 4130.

District Court of Appeal
Fourth District, California.

Jan. 19, 1951.

Emily Stober brought action against Helen Halsey to recover for injuries sustained when defendant's automobile driven by a third party left the highway. A judgment for plaintiff was entered in the Superior Court of Orange County, Robert Gardner, J., and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that instruction given at defendant's request which contained a general definition of agency in the language of statute and informed jury that fact of agency between the defendant and driver of her automobile at time

of accident could be inferred from evidence that at time of the accident the automobile was owned by defendant, that driver was driving with her permission, and that defendant was present as a passenger in the automobile.

Judgment affirmed.

1. Trial ⇐252(8)

In action for injuries sustained by guest in automobile which ran off highway when being driven by one other than owner at time when owner was also present, brought against owner, where there was no evidence of any master and servant or employer and employee relationship between owner and driver, defendant's requested instructions defining master and servant and employer and employee in language of statute were properly refused. Labor Code, §§ 2750, 3000.

2. Trial ⇐252(8)

In action for injuries sustained by guest in automobile which ran off highway when being driven by one other than owner at time when owner was also present, brought against owner, defendant's requested instruction that jury, in determining whether driver was agent, servant or employee of owner should take into consideration whether there was a right to control details of the operation by owner was properly refused, in absence of any evidence offered or received tending to contradict presumption of agency. Civ. Code, § 2295.

3. Automobiles ⇐246(42)

In action for injuries sustained by guest in automobile which ran off highway when being driven by one other than owner at time when owner was also present, brought against owner, instruction given at defendant's request which contained general definition of agency in language of statute and informed jury that fact of agency could be inferred from evidence at time of accident automobile was owned by defendant, that driver was driving with her permission, and that defendant was present as a passenger in automobile, sufficiently covered matter of control, in absence of any evidence that defendant did not have a right of control. Civ. Code, § 2295.

Forgy, Reinhaus & Forgy, Santa Ana, for appellant.

Thompson, Bradley & Bowman, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile collision. A jury returned a verdict in favor of the plaintiff, and the defendant appeals from the judgment.

At the time of the accident the plaintiff was riding as a guest in a car owned by the defendant and being driven by one Johnson. The defendant was also riding in the car, and Johnson was driving at her request. There is evidence that Johnson was intoxicated at the time.

The facts are more fully stated on a prior appeal. *Stober v. Halsey*, 88 Cal. App.2d 660, 199 P.2d 318, 322. It was there held that an owner, who is also riding in a car, is liable for injuries sustained by a guest where the driver is guilty of wilful misconduct or intoxication, provided that a relation of master and servant, employer and employee, or principal and agent exists at the time between the driver and the owner; and that where an owner of a car permits another to drive it, and the owner is a passenger in the car being so driven, an inference arises that the operator is driving the car for the benefit of the owner and as his agent. The judgment was reversed because it could not be told upon which of two theories the jury acted, and because "the question of the relationship or the existence of any agency between the owner and the driver was a material question for the jury to determine under proper instructions."

On a retrial of the case, the evidence being the same, the court gave four instructions relating to this matter of agency. The first of these told the jury that if it found that the plaintiff did not assume the danger of the ride and was not guilty of contributory negligence, and that the relationship of principal and agent or of servant and employee existed between the driver and the defendant, and that the defendant was also a passenger in the car at the time of the accident, then the defend-

ant is answerable for injuries sustained by the plaintiff if the driver was guilty of wilful misconduct or intoxication. The second told the jury that the plaintiff claimed that Johnson was the agent or servant or employee of the defendant, and that if it should find that such an agency or relationship then existed it must hold the defendant liable if it further found that the driver was guilty of wilful misconduct or intoxication or both, unless the plaintiff is barred from relief by contributory negligence, if any, or the assumption of risk, if any. The third told the jury that if it should find from the evidence that at the time of the accident the car then being driven by Johnson was owned by the defendant, and that Johnson was driving with the defendant's permission, and that the defendant was present as a passenger in the car, it might infer from such evidence that Johnson was then acting as the agent or servant or employee of the defendant and within the scope of his authority. The instruction further told the jury that it was not compelled to draw that inference, and that it must weigh the inference and such evidence as favors it against all contrary evidence, and then determine which, if either, preponderates. The fourth instruction, which was offered by the defendant, defined agency in the language of section 2295 of the Civil Code.

The defendant does not question the first two of these instructions and concedes that the third is a correct statement of the law. It is argued, however, that agency was not sufficiently defined by the instructions given and that the various tests which the law applies in order to determine whether or not an agency relationship exists should have been explained to the jury. The sole assignment of error is that the court erred in refusing to give three instructions offered by the defendant. The first of these defined master and servant in the language of section 3000 of the Labor Code. The second defined employer and employee in the language of section 2750 of that code. The third told the jury that in determining whether Johnson was an agent, servant or employee of the defendant it might take into consideration (1) the

existence of a contract or agreement; (2) the independent nature of the work to be performed; (3) whether there was a right to control the details of the operation by Helen Halsey; (4) whether the work was part of the regular business carried on by Ed Johnson; and (5) the right to hire and fire.

[1,2] There was no evidence here of any master and servant or employer and employee relationship and it was not error to refuse to give the first two of these instructions. The tests outlined in the third refused instruction are those which usually have a bearing in cases involving the distinction between an independent contractor on the one hand, and an agent and employee on the other. The only one of these which could have had any bearing here was the third, as to the existence of a right of control. Not only was the court justified in refusing the instruction as offered but with respect to its material element, the right of control, no evidence was offered or received tending to contradict the presumption of agency.

[3] At the defendant's request the court gave a general definition of agency in the language of the statute, and instructed the jury that the fact of agency might be inferred from evidence that at the time of the accident the car which was being driven by Johnson was owned by the defendant, that he was driving with her permission, and that she was present as a passenger in the car. This sufficiently covered the matter of control in the absence of any evidence that the defendant did not have a right of control. There was no evidence having an effect contrary to the inference, and no further definition of agency, or test to be used in determining whether or not such a relationship existed, was necessary or required under the circumstances. If the instruction had been given and the jury told that a right of control by the defendant was a test or factor to be considered in determining whether or not an agency relationship existed, there was no evidence upon which a different conclusion could have been based. The only evidence before the jury was that such a right did exist, by

reason of the inference, and no harm or prejudice appears. If any error be assumed it could not have affected the result.

The question of an agency relationship between the driver of the car and the defendant was adequately covered by the instructions, in view of the evidence before the jury, and no prejudicial or reversible error appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



101 Cal.App.2d 727

In re COUGHLIN'S GUARDIANSHIP et al.

COUGHLIN v. COUGHLIN.

Civ. 4148.

District Court of Appeal
Fourth District, California.

Jan. 15, 1951.

Rehearing Denied Feb. 14, 1951.

Hearing Denied March 15, 1951.

Proceedings in the matter of the guardianship of the persons of Mary Dianne Coughlin and Michael John Coughlin, minors, wherein John H. Coughlin filed a petition for his appointment as guardian of such minors. Thelma Ruth Coughlin filed an action for divorce and asked for a citation and order to show cause why she should not have temporary custody of minor girl, during trial of action, filed objections to petition of John H. Coughlin and by cross-petition asked that she be appointed guardian of both children. The Superior Court, San Bernardino County, Elmer W. Heald, Judge Assigned, entered an order denying application of cross-petitioner in divorce action, granted letters of guardianship to petitioner and denied cross-petitioner's prayer, and from order entered in guardianship proceeding, cross-petitioner appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to justify finding that general welfare of two children might be better served under guardianship of petitioner.

Orders affirmed.

1. Parent and child ☞2(3)

The controlling force in directing custody of minor children includes conduct of parties, morals of parents, parents' financial condition, age of children, and devotion of either parent to children's best interests and good. Civ.Code, § 138; Probate Code, §§ 1406-1408.

2. Infants ☞19

Court's legal discretion in directing custody of minor children, will not be disturbed upon appeal unless it clearly appears that its discretion has been abused.

3. Guardian and ward ☞13(7)

Guardianship itself is not concluded by appointment of guardian, but jurisdiction of court is a continuing one, and if circumstances subsequent to an original order appointing a guardian make it desirable and conducive to comfort and well being of children in question, a modification thereof may be made. Civ.Code, § 138; Probate Code, §§ 1406-1408.

4. Guardian and ward ☞13(4)

On adoptive father's petition for his appointment as guardian of two minor children, evidence was sufficient to justify finding that general welfare of two children would be better served under his guardianship. Civ.Code, § 138; Probate Code, §§ 1406-1408.

5. Guardian and ward ☞13(8)

In adoptive father's action for appointment as guardian of his legally adopted minor daughter, and minor son, for whom adoption proceedings were pending, there was no prejudicial error in ruling of court allowing mother to answer questions asked of her on cross-examination concerning relatives of adoptive father calling on mother and telling her that they were incensed over her behavior and manner in which she was caring for children. Civ.Code, § 138; Probate Code, §§ 1406-1408.

6. Guardian and ward ☞10

Trial court could properly appoint adoptive father as guardian of nine year old legally adopted daughter and six year old son, for whom adoption proceedings were pending, notwithstanding that a divorce action, instituted by mother against father was

pending involving custody of minor daughter, when mother was denied temporary custody of daughter under divorce proceedings. Civ.Code, §§ 138, 214; Code Civ. Proc. § 1747; Probate Code, § 1408.

Joseph W. Pierce, Los Angeles, David Lynn, Wm. F. Kistler, Inglewood, for appellant.

Wilson & Wilson, San Bernardino, for respondent.

GRIFFIN, Justice.

Petitioner and respondent John H. Coughlin obtained an order appointing him guardian of two minor children, Mary Dianne, aged 9 years (legally adopted daughter) and Michael John, aged 6 years (for whom adoption proceedings are pending). Cross-petitioner and appellant Thelma Ruth Coughlin was, by order of court, denied her claimed right to such appointment. She appeals from these orders.

The parties were married in 1936. Matrimonial differences arose. About April, 1948, petitioner, who lived with his wife in an apartment over petitioner's place of business, went to a hotel to reside. The children were left with his wife, who brought into the home a 19-year old girl named Beverly, who occupied the apartment with the wife and children and assisted in caring for them. Mrs. Coughlin decided she no longer desired to live in the apartment but preferred a home away from her husband's place of business. After conferences with the attorneys for the respective parties Dr. Coughlin, about August 1, 1948, purchased a "temporary separate abode" for his wife and the children in Redlands, and furnished considerable support money for their care. The parties then executed a written agreement in respect to their property, the care and support of the wife and children, and for a definite arrangement as to the custody of the children and respondent's right of visitation with them. The agreement recites that it is executed with "the express hope that the separation would be only temporary."

Petitioner had custody of the children during August, 1948, under the agreement,

and they were never returned to appellant by him. During that month Mrs. Coughlin rented a cottage at Malibu Beach, which she and Beverly occupied. Considerable evidence was produced at the hearing pertaining to the activities of Beverly and Mrs. Coughlin in respect to men associating with them and staying at the cottage at intervals during that month. Petitioner hired investigators to observe the actions of his wife and the activities carried on by her. A recitation of the facts related by the investigators occupies several hundred pages of the reporter's transcript. If we accept their version of her conduct and the deductions allowable, it could be said that her conduct was at least somewhat unbecoming.

There was a culmination of the vacation at the beach when the petitioner, accompanied by three investigators, broke into the unlighted cottage at three o'clock one morning and found Mrs. Coughlin seated on the lap of a strange man. A picture of her was taken in that position as well as a picture of the disturbed condition of a near-by couch and covers. Her explanation of this was somewhat fanciful although she claims that the circumstances shown do not reflect any indiscretion on her part because the man involved was a friend of Beverly, and if such acts did show indiscretion, it should not affect the judgment of the court in awarding the custody of the children to Dr. Coughlin because any such acts that might have there taken place were out of the presence of the children and that since she and Dr. Coughlin were separated she was entitled to be relieved of her lonesomeness by having adults in her home.

Petitioner immediately filed a petition for his appointment as guardian of the two children. On September 4, 1948, Mrs. Coughlin filed an action for divorce, alleged extreme cruelty, made some serious charges of misconduct on the part of her husband, and asked for a citation and order to show cause why she should not have the temporary custody of the girl until the trial of the action. On September 25, she filed objections to the petition of Dr. Coughlin and by cross-petition asked that she be appointed guardian of both children.

The citation order in the divorce action and the petition for appointment of guardian were consolidated for hearing. Eight days of trial ensued. After some delay the judge signed an order denying the application of the wife in the divorce action, granted petitioner letters of guardianship for the two children, and denied cross-petitioner's prayer. She appealed from the order entered in the guardianship proceeding.

Her first claim is that the trial court erred in deciding the case upon the "old-fashioned" prejudice of our pioneer Puritan, Quaker, and Catholic fathers and mothers, instead of upon the modern and more equitable principles of law. This contention is based upon the remarks of the trial judge in summarizing the evidence. He announced that possibly modern civilization had a lot of ideas about individual conduct, which may be all right, but that he was probably old-fashioned and still liked to apply some of the ideas promoted by the pioneer Quakers, Puritans, and Catholics, and that all those things should be considered in deciding what is for the best interests of the children involved. The argument of counsel for appellant appears to be more fanciful than real. It might be well argued that now and then the modern generation could, without too much strain, take a leaf out of the books of our pioneer forefathers, and more or less use it as a guide for our present-day thinking and example of living. However, the ultimate question, as pointed out by the court, was the welfare of the children and whether the wife or the husband was more adequately and morally equipped to furnish them with the required care, training, and attention. In addition to the facts related, there was also evidence that the wife, while residing in the Redlands home, was entertaining men at late and unusual hours; that while living in the apartment over the doctor's office, she became acquainted with a Syrian bartender whom she had met while visiting a bar in Los Angeles with Beverly. Mrs. Coughlin's testimony is that this bartender also made ladies' hats; that she had him make several hats for her; that it was necessary to go to Los Angeles on many occasions to have

her hats fitted by him at his home at nights, and also that she was learning the business of making hats; that sometimes she remained over night, leaving the children with Mexican or Negress baby sitters in the Negro or Mexican section of town; that the children were left all night in charge of Beverly on many occasions. She testified that this business relationship with the hat maker later developed into a social relationship and that the two of them went out to various night clubs to dinner and danced, and that she later became very interested in him "as a man".

There was some evidence that the children, under Mrs. Coughlin's care, did not receive all the attention that might be expected. On the other hand, there was evidence that she was a good mother to them.

[1, 2] It is true, as pointed out by counsel for appellant, that the legislature has prescribed certain guides under which the courts should act in awarding custody of minor children. Sec. 138, Civ.Code; Secs. 1406-1408, Probate Code. In this connection counsel cites several cases in support of his argument, such as *In re Green*, 192 Cal. 714, 221 P. 903; *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96; and *Juri v. Juri*, 69 Cal.App.2d 773, 160 P.2d 73. The true rule in this respect is set forth in *Crater v. Crater*, 135 Cal. 633, 635, 67 P. 1049. It is there stated that the controlling force in directing the custody of minor children includes the conduct of the parties, the morals of the parents, their financial condition, the age of the children, and the devotion of either parent to the children's best interests and good, and that the court's legal discretion in exercising such power, and the conclusion reached by it, will not be disturbed upon appeal unless it clearly appears that its discretion has been abused.

[3] In *Guardianship of Reynolds*, 60 Cal.App.2d 669, 141 P.2d 498, it was held that the guardianship itself is not concluded by the appointment of the guardian; that jurisdiction of the court in this respect is a continuing one; that if circumstances subsequent to an original order appointing a guardian make it desirable and conducive to the comfort and well being of the chil-

dren in question, a modification thereof may be made.

[4] Without further discussion of all the evidence bearing on the general subjects here involved, it is sufficient to say that the court was justified, under the evidence, in finding that the general welfare of the two children might be better served under the guardianship of petitioner. No abuse of discretion appears.

[5] It is next contended that certain objectionable questions were asked of Mrs. Coughlin on cross-examination concerning relatives of Dr. Coughlin calling Mrs. Coughlin and telling her that they were "incensed" over her behavior and the manner in which she was caring for the children. She admitted such a conversation. No prejudicial error appears to have resulted in the ruling of the court in allowing her to answer the questions.

[6] Finally, it is argued that the trial court had no power to appoint a guardian when a divorce action was pending involving the custody of the minor daughter. Appellant states that no reported case has been found which allows or disallows such procedure, but argues that the statute forbids it, and cites secs. 138 and 214 of the Civil Code. This contention is untenable. Mrs. Coughlin was denied the temporary custody of the daughter under the divorce proceedings then pending. So far as the record is concerned that order became final. There is no conflict between the order here involved and that order in respect to the custody of the two children. It cannot be said that the trial court had no jurisdiction to, or lacked the power to act in the guardianship proceeding. *Guardianship of Burket*, 58 Cal.App.2d 726, 137 P.2d 475; *In re Lundberg*, 143 Cal.402, 77 P. 156; Sec. 1747 C.C.P.; *Ex parte Miller*, 109 Cal. 643, 42 P. 428; 13 Cal.Jur. p. 151, sec. 12; *Evans v. Evans*, 154 Cal. 644, 98 P. 1044; Sec. 1408, Probate Code.

Orders affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

101 Cal.App.2d 638

RICE v. SCHUBERT et al.

Civ. 4176.

District Court of Appeal
Fourth District, California.

Jan. 9, 1951.

Hearing Denied March 8, 1951.

Action by Lois Rice against Frank H. Schubert, and others, to set aside a conveyance of real property as being in fraud of creditors. Defendants filed a notice of motion for change of venue to San Joaquin County, wherein two defendants resided. The Superior Court, Riverside County, O. K. Morton, J., entered an order denying change of venue, and defendants appealed. The District Court of Appeal, Mussell, J., held that the action was local and the proper place for trial was in Riverside County, and that judge had not abused his discretion in refusing to transfer the action.

Order affirmed.

1. Venue ⇨4

In order to determine whether action is local or transitory for purposes of venue, it is necessary to ascertain true character of action as disclosed by complaint, and character of judgment which might be rendered upon a default. Code Civ.Proc., § 395(1).

2. Venue ⇨5(1)

Nature of action is local, and must be tried in county where land is situated, where it turns on title to property as distinct from personal obligation, and decree operates ex proprio vigore on title. Code Civ.Proc. §§ 392(1), 395(1).

3. Fraudulent conveyances ⇨241(2)

It is not necessary that claim be first reduced to judgment before a fraudulent conveyance can be attacked. Civ. Code, § 3439.09.

4. Venue ⇨5(3)

Constitution requirement that all actions for recovery of possession of real estate shall be commenced in county in which real estate is situated is jurisdictional and cannot be waived. Const. art. 6, § 5.

5. Venue ⇨5(4)

Action to set aside a conveyance of real property as being in fraud of creditors,

was a "local action" turning on title to property as distinct from any personal obligation and was maintainable in county in which land was located. Code Civ.Proc. § 392(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Local Action".

6. Venue ⇨49(1), 50, 51, 52(1)

Action to set aside conveyance of real property located in county of original venue would be transferred to county of defendants' residence only upon showing that impartial trial could not be had in county where action was instituted, or that convenience of witnesses and ends of justice would be promoted by change, or that from any cause there was no judge of court qualified to act. Const. art. 6, § 5; Code Civ. Proc. §§ 392, 392(1), 395(1); Civ. Code, § 3439.09.

7. Venue ⇨52(1)

Whether venue of action should be transferred for convenience of witnesses is matter within discretion of trial court. Code Civ.Proc. § 396b.

8. Appeal and error ⇨946

Ruling of trial court on matter within its discretion will be upset on appeal only upon showing that trial court abused its discretion as matter of law.

9. Venue ⇨70

On defendants' motion for change of venue wherein plaintiff filed affidavit for retention of venue on account of convenience of witnesses, evidence was insufficient to disclose any abuse of court's discretion in refusing to transfer action. Code Civ.Proc. §§ 392(1), 396b.

Ben Koenig, Hollywood, and Aaron B. Rosenthal, Los Angeles, for appellants.

Best, Best & Krieger, Riverside, for respondent.

MUSSELL, Justice.

Plaintiff commenced an action in the Superior Court in Riverside county to set aside a conveyance of real property located therein as being in fraud of credi-

tors. Defendants answered with a general denial and filed a notice of motion for change of venue to San Joaquin county, where two of the defendants resided. The motion was made on the grounds that the action was improperly commenced in Riverside county; that it was transitory, not local, and therefore, the county where the defendants resided was the proper county for trial. On the return day of the motion, plaintiff filed an affidavit for retention of venue on account of the convenience of witnesses under section 396b of the Code of Civil Procedure. The motion for change of venue was denied and the defendants appeal from the order of denial.

The determinative question before us is whether the action is local, Code Civ.Proc. 392, subd. 1, or transitory, Code Civ.Proc. 395, subd. 1. If it is local, the order of the trial court must be affirmed. If it is transitory, the defendants are entitled to have the action tried in San Joaquin county.

The venue of an action is determined by subdivision 1 of section 395 of the Code of Civil Procedure, which provides for the trial of an action in the county of the defendants' residence upon their demand unless the action falls within some exception to that general rule.

Section 392 of the Code of Civil Procedure, subdivision 1, as far as material here, reads as follows:

"Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

"(a) For the recovery of real property, or of an estate or interest therein, or for the determination on any form, of such right or interest, and for injuries to real property".

[1] If the present action falls within the foregoing exception to the general rule, it is local and Riverside county is the proper place for trial. *Kaluzok v. Brisson*, 27 Cal. 2d 760, 764, 167 P.2d 481, 163 A.L.R. 1308. In order to determine whether the action is local or transitory it is necessary to ascer-

tain the true character of the action as disclosed by the complaint, and the character of the judgment which might be rendered upon a default. *Eckstrand v. Wilshusen*, 217 Cal. 380, 381, 18 P.2d 931. If the defendants had defaulted, the only relief which could have been granted would have been a cancellation of the conveyance under attack and the title to the real property involved would necessarily be affected.

[2] As was said in *Neet v. Holmes*, 19 Cal.2d 605, 611-612, 122 P.2d 557, 560: "The nature of the action is local, and must be tried in the county where the land is situated, where it turns on the title to property as distinct from the personal obligation, and the decree operates *ex proprio vigore* on the title. *State v. Royal Consolidated Mining Co.*, 187 Cal. 343, 351, 202 P. 133."

[3] It seems quite clear to us that the instant action "turns on the title to property" as distinct from any personal obligation and that a judgment on the complaint would "result in a determination in any form" of an interest in real property within the meaning of subdivision 1(a), section 392 of the Code of Civil Procedure.

Our attention has not been directed to any California decision holding directly that a creditor's suit to set aside a conveyance of real property is a local or transitory action. However, in *Gem City Acetylene Generator Company v. Coblenz*, 86 Ohio St. 199, 99 N.E. 302, 304, an action by a creditor to set aside a fraudulent conveyance was held to be local and for the "recovery of real property, or of an estate or interest therein" within the meaning of a statute requiring such actions to be tried where the land is situated.

In *Sloss v. De Toro*, 77 Cal. 129, 19 P. 233, an action was brought to set aside a fraudulent sale of land by an administrator in the county where the land was situated and a motion for change of venue to the county of defendant's residence was denied. In holding that the action was properly within the scope of section 392 of the Code of Civil Procedure relating to venue, the court said, 77 Cal. at page 132, 19 P. at page 234:

"The question then is, did this action require the determination, in any form, of a right or interest in real property?"

"It seems to us that it did. The main purpose of the action evidently was to have an alleged fraudulent sale of land set aside and the title revested in its former owners.
* * *

An action to cancel a deed allegedly obtained from the plaintiff by fraud was held to be local and within the meaning of section 392 of the Code of Civil Procedure in the case of *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931. In that case the defendant's motion to have the venue transferred from the county where the real property was situated to the county of defendant's residence was denied and the order affirmed on appeal.

The argument is advanced that the plaintiff has no "interest" in the real property which is the subject of this action and that because the plaintiff has no interest therein, there can be no determination of an "estate or interest" within the meaning of section 392 of the Code of Civil Procedure. However, the plaintiff was authorized to bring the action under section 3439.09 of the Civil Code, which provides, in part, that

"Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser or encumbrancer for fair consideration * *;

"(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim".

[4] It is not necessary that the claim be first reduced to judgment before a fraudulent conveyance can be attacked. *Hefferman v. Bennett & Armour*, 63 Cal.App.2d 178, 183, 146 P.2d 482. The "interest" in the property that is being determined in the instant action is not that of the plaintiff but that of the Schuberts. The effect of a judgment would be to revest the title to the property involved in the debtor. The statute provides for the "determination in any form" of a right or interest in real property.

[5] Article VI, section 5 of the Constitution of the State of California provides

"that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." The distinction between this provision and section 392 of the Code of Civil Procedure relating to venue is that the constitutional provision requires that an action be "commenced" in the county where the land is situated. This requirement is jurisdictional and cannot be waived. *Waters v. Pool*, 130 Cal. 136, 137, 62 P. 385; *Cohen v. Hellman Commercial T. & S. Bk.*, 133 Cal.App. 758, 765, 24 P.2d 960.

[6] The present action was commenced in the county in which the land is situated and there is no issue here as to jurisdiction. Under either the constitutional provision or the Code of Civil Procedure, the action is local and the proper place for trial is in Riverside county. It could be transferred to San Joaquin county as defendants request only upon a showing: (1) That an impartial trial could not be had in Riverside county; (2) That the convenience of witnesses and the ends of justice would be promoted by the change; or (3) That from any cause there is no judge of the court qualified to act.

[7-9] The trial court considered the question of the convenience of witnesses in passing upon the motion to retain the action in Riverside county and refused to transfer the action. The ruling as to convenience of witnesses is largely within the discretion of the trial court and its discretion will be upset on appeal only upon a showing that as a matter of law the trial court abused its discretion. *Wrin v. Ohlndt*, 213 Cal. 158, 159, 1 P.2d 991; *Scott v. Stuart*, 190 Cal. 526, 213 P. 947. A review of the affidavits presented by both plaintiff and defendants fails to disclose an abuse of such discretion.

The order denying the motion for change of venue is affirmed.

BARNARD, P. J. and GRIFFIN, J., concur.

101 Cal.App.2d 665

PEOPLE v. DARCY.

Cr. 4474.

District Court of Appeal, Second District,
Division 1, California.

Jan. 11, 1951.

Hearing Denied Feb. 8, 1951.

Gordon K. Darcy was convicted in the Superior Court, Los Angeles County, George Francis, J., on one count of kidnapping with violence and four counts of robbery, and he appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the convictions, but that defendant could not be punished for robbery as well as for kidnapping with violence.

Judgment of conviction of kidnapping affirmed, two judgments of conviction of robbery reversed, and remaining judgments of conviction of robbery affirmed.

1. Kidnapping ⇨5

Evidence supported conviction of kidnapping with violence. Pen. Code, § 209.

2. Robbery ⇨24(1)

Evidence supported conviction of robbery.

3. Criminal law ⇨731

In criminal prosecution, function of jury is to believe or disbelieve defendant's testimony and to declare truth in domain of questionable facts.

4. Witnesses ⇨337(5), 350

In criminal case, when defendant offers himself as witness, he may be impeached on cross-examination by asking him if he has been convicted of a felony, or by showing fact, if it exists, by the record of the judgment, but examination should not go beyond this. Code Civ.Proc. § 2051.

5. Witnesses ⇨350

Where defendant took witness stand and prosecution read to jury the records of three prior convictions which defendant had admittedly suffered, further reading of defendant's record in the penitentiary, and showing his prison photographs and fingerprints was improper. Code Civ.Proc. § 2051.

6. Criminal law ⇨1186(4)

Where defendant took witness stand, and counsel, in addition to reading records

of three prior convictions which defendant admittedly suffered, improperly disclosed his record in the penitentiary and showed his prison photographs and fingerprints, but evidence of guilt was overwhelming, error did not result in miscarriage of justice and hence did not require a reversal. Code Civ.Proc. § 2051; Const. art. 6, § 4½.

7. Criminal law ⇨1186(4)

Under constitutional provision that error shall not be ground for reversal unless it results in miscarriage of justice, district attorneys and trial judges should conduct trial of criminal cases exactly as if provision did not exist. Const. art. 6, § 4½.

8. Criminal law ⇨755½

In prosecution for kidnapping with violence, instruction that to strike another person in head with revolver or pistol in hostile and intentional manner with sufficient force to lacerate scalp and cause bleeding is infliction of bodily harm was an abstract statement of fact, and was not objectionable as instruction as to facts and invasion of jury's province. Pen. Code, § 209.

9. Criminal law ⇨200(1)

Where defendant's conviction for kidnapping with violence arose out of transaction in which restaurant owner and friend were forcibly made to go into back room of restaurant, and owner was forcibly made to go to upstairs office room in furtherance of robbery, only one crime was committed, and defendant could be subjected to punishment for kidnapping, but not for robbery. Pen. Code, § 209.

Eugene V. McPherson, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

George Speropoulos was an old man. He owned the Belmont restaurant in San Pedro. It was a small restaurant, with a bar

along one side of the room, and a few open booths opposite the bar.

Mr. Speropoulos did most of the work himself. He cooked at one end of the bar; he waited on customers, and served them beer or wine if ordered. Occasionally, when business was good, he hired waitresses to help him.

About midnight of July 11, 1949 he was working alone. Three ladies came in. Mr. Speropoulos had invited them to a chicken dinner which he planned to cook at that time. The ladies seated themselves on stools at the bar. Also at the bar was an old friend of Mr. Speropoulos, Arnfin Simonsen, and a Mexican.

A little after twelve the defendant and a companion named Henry Thwaits staged a hold-up. They had guns—automatics—in their hands. In fact, during all the time they were in the restaurant the men held their guns in their hands.

Thwaits was at the bar; defendant was at the foot of a flight of stairs leading to an upstairs office room. Defendant had a handkerchief tied over part of his face. Thwaits was a big man, about six feet tall, weighing about 200 pounds; defendant was smaller.

Thwaits made Mr. Speropoulos, Mr. Simonsen, and the Mexican lie face down on the floor. Then he herded them into the men's restroom. He told them, "If you don't do what I tell you to do I'll kill you." The door of the restroom opened into the restaurant room. Thwaits struck all three men on the head with the barrel of his gun, with such force as to draw quantities of blood.

Defendant, still standing on the stair landing, told the ladies to go into the men's restroom too.

"We can't go in there," said one of the ladies; "that's the men's room."

"Get in there, you dope," said the other lady, "this is a stick-up."

"That's right, ladies," said the defendant, "get in there."

The third lady had gone to the ladies' room, and was not seen during the action which followed.

Thwaits went into the restroom with the men and women, and told them to keep their faces to the wall. Defendant came to the door of the restroom and said to Thwaits, "There is no money upstairs."

Thwaits said to Mr. Speropoulos, "Come with me." He took the old man upstairs, bleeding from the wound on his head. Defendant remained in the restroom, guarding the people there.

Upstairs Thwaits three times told Mr. Speropoulos, "Listen, I know you have got some money here. If you don't give me the money I am going to kill you." The third time he violently threw the old man against a davenport, so that his glasses flew off. Shoving the muzzle of his automatic against the old man's chest Thwaits said, "Say yes or no." Mr. Speropoulos gave him \$800 which he had hidden behind his mother's picture. Still holding the gun on him, Thwaits brought him back to the restroom.

Other money was taken from the person of Mr. Speropoulos, and from his cash register. Money was taken from the person of Mr. Simonsen. Purses with money, checks, and odds and ends peculiar to women, were taken from the two ladies.

When Mr. Speropoulos was brought back to the restroom, Mr. Simonsen looked around, and Thwaits again hit Mr. Simonsen with his pistol barrel, again drawing blood in copious quantities.

The two robbers left with the loot. A few minutes later the ladies and the men cautiously came out from the restroom.

Leaving the restaurant, the two robbers started running. Each of them had his car parked nearby.

Then fate took a hand. A preacher was passing by in an automobile. He saw two men running, one tall and heavy set, the other shorter and slighter. The smaller man had a ladies purse with its straps dangling from his hands. The preacher saw an automobile start with its lights off, followed it, took its number, went to the San Pedro police station, and gave the police the license number.

An all-units radio alarm was immediately broadcast to radio cars in the vicinity. One

of these radio cars saw an automobile, going about 25 miles an hour. Following closely behind it, check was made by radio with the police department, to make sure of the wanted number. It was. The car belonged to defendant, and the license number was his license number.

The officers in the radio car turned on the red light and siren. Instead of stopping, defendant started off at about 70 miles an hour, followed by the radio car. In turning a corner, another radio car, joining in the chase, cut in ahead of the first radio car. And so the three cars went careening through the night, one behind the other.

A police officer in the radio car closest to defendant's car shot at it twice with a shotgun loaded with buckshot. The car swerved off the street, across lawns, and struck the front porch of a house. Defendant emerged, ran between two houses, hid himself in a lath-house in a back yard, and was finally captured by other patrolmen. He landed in jail between 12:45 and 1:00 a. m.

Later, other officers, following the path of the fleeing car, found in the street a purse taken from one of the women in the restaurant. Between the two houses where the defendant fled, ten \$5 bills and twenty \$1 bills were found. On the lawn in front of the house was a \$1 bill.

Defendant was searched at the police station, and the officers found in his possession a roll of 5-cent pieces wrapped in paper. Such a roll of nickels had been taken from the restaurant. Talking with police officers afterwards, defendant said that he wished Thwaits would be picked up, that he did not want "to ride this beef alone."

Every one of the victims—the restaurant man, his friend, and the two women—identified the defendant as one of the men who robbed them.

Defendant was charged with one count of kidnapping with violence, four counts of robbery, and three prior felony convictions. He admitted the prior convictions, and was convicted on all five counts, as charged. The jury determined the punishment for

kidnapping to be life imprisonment without parole, and each of the robbery counts to be of the first degree. On the kidnapping count defendant was sentenced to the penitentiary for life, without possibility of parole. On each of the robbery counts he was sentenced for the term prescribed by law. All counts to run concurrently.

From these judgments he appeals.

Defendant urges: (a) that the evidence is insufficient to support the convictions; (b) error in admission of evidence; (c) error in instructions given; and (d) that sentences were imposed for kidnapping and for robbery, whereas but one criminal offense was committed, for which but one sentence could have been imposed. These will be considered in order.

[1,2] The objection that the evidence is insufficient may be summarily disposed of. The record has been read, and supports beyond all reasonable doubt the findings of the jury.

Defendant took the witness stand; denied having any part in the crimes; said that he was driving his automobile when he saw Thwaits, who hailed him and got in his car; that he drank whiskey which Thwaits gave him, on top of beer which he had been drinking; that Thwaits suggested they rob a place and that he declined to have any part in it; that he became sick from the liquor he had consumed; that two men got into the rear seat of the car, and something was said about holding up an old man in San Pedro; that at that time he passed out "from the effect of the liquor or something;" and that he knew nothing more until his automobile crashed and he ran from it and hid in a chicken coop.

[3] It is elementary law that it was the function of the jury to believe or to disbelieve defendant's testimony; it was their sole province in the domain of questionable facts to declare the truth. By their verdicts they found the truth of the People's case. This court is in complete accord with that finding. The only thing that may possibly be said for defendant is that Thwaits wielded the gun in the assaults upon the two men, and brutally manhandled the old man in the upstairs room.

At the close of direct examination of defendant, counsel for the People read to the jury records of three prior convictions which defendant admitted he had suffered. This was for impeachment under sec. 2051, Code Civ.Proc. One of these records showed that defendant was on parole at the time of the commission of the crimes charged.

The documents consisted of (1) the certification of Clinton T. Duffy, Warden of San Quentin Prison, as to his official position, that he has in his custody records pertaining to defendant, when defendant was received at San Quentin, under commitment from what court and for what offenses, the date his terms were fixed and what they were, the date he was paroled and discharged from parole, that the copies of the commitment and fingerprints attached are true and correct copies of originals in his custody; (2) fingerprint card with defendant's signature; (3) photograph of defendant under prison number; (4) copy of judgment in Superior Court action number 70634, Los Angeles County; (5) copy of judgment in same case, another count; (6) copy of judgment in same case, another count; (7) copy of judgment in Superior Court action number 73421 before same judge; (8) the certification of Richard A. McGee, Director of the Department of Corrections, as to his official position, that he has in his custody records pertaining to defendant, when defendant was received at San Quentin, under commitment from what court, for what offense, the date his term was fixed and for how long, the date he was released on parole, that the copies of the commitment and fingerprints attached are true and correct copies of originals in his custody; (9) copy of judgment in a Santa Clara Superior Court proceeding; (10) order to Sheriff to take prisoner; (11) fingerprint card bearing defendant's signature; (12) photograph bearing prison number.

Objection was made and overruled, that the foregoing records from San Quentin and Folsom were indecipherable; but no objection was made to this method of procedure, and no motion to strike was made. The District Attorney did not read all of

the documents, but from parts only of some of them.

[4] When a defendant in a criminal case offers himself as a witness he may be impeached on cross-examination by asking him if he has been convicted of a felony, or by showing the fact, if it exists, by *the record of the judgment*. (Italics added.) Code Civ.Proc. sec. 2051; *People v. Williams*, 27 Cal.2d 220, 163 P.2d 692; *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924; *People v. Craig*, 196 Cal. 19, 235 P. 721; *People v. Sears*, 119 Cal. 267, 51 P. 325; *People v. Brancato*, 83 Cal.App.2d 734, 189 P.2d 504. But beyond this the examination should not go. *People v. Chin Hane*, 108 Cal. 597, 41 P. 697.

[5,6] There should be no difficulty about what the Code means when it says the "record of the judgment." Defendant's record in the penitentiary, his prison photographs and fingerprints, should not have been read to the jury. However, after examination of the entire case this Court is not of the opinion that the error resulted in a miscarriage of justice. Const. art. VI, sec. 4½.

It is true that from a reading of the entire record in this case we are unable to say that the errors just set forth may have turned the scale in favor of the prosecution, because the evidence of appellant's guilt was overwhelming. Therefore, it must be held that, in spite of palpable error in the admission of the criticized portion of appellant's criminal record, there was no miscarriage of justice.

However, we cannot refrain from administering a deserved rebuke for the offer of and receipt in evidence of appellant's record in the penitentiary, his prison photographs and fingerprints. It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the introduction of the just mentioned records to be improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of appellant. Such conduct tends only to prevent the accused from having that fair and impartial trial to which, whether innocent or guilty, he is entitled. Moreover, it may defeat the punish-

ment of crime by jeopardizing a conviction when a defendant is clearly guilty. It is obvious that the questioned portions of appellant's prison record were injected into the case for the manifest purpose of prejudicing the jury against him. It is only because we are unable to say that the conviction herein might have resulted from the foregoing disregard of appellant's essential rights, that we are not compelled to reverse the judgments.

[7] Pertinent indeed to the situation with which we are here confronted are the remarks of the court in *People v. Black*, 73 Cal.App. 13, 43, 238 P. 374, 387, wherein it was said: "* * * we feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see *People v. Tomsky*, 20 Cal.App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

[8] The trial judge instructed the jury relative to the crime of kidnapping with violence and the punishment therefor, generally following the language of the Code. Defendant complains of the following language in one of these instructions: "To

strike another person in the head with a revolver or pistol in a hostile and intentional manner, with sufficient force to lacerate the scalp, causing bleeding therefrom, is the infliction of bodily harm as herein defined." Defendant asserts that this was an instruction as to facts and an invasion of the province of the jury.

The language complained of was an abstract statement of fact, and was not objectionable. *People v. Flannelly*, 128 Cal. 83, 60 P. 670; 8 Cal.Jur. 298.

Finally we come to defendant's last specification of error: that he was sentenced for three crimes instead of one.

[9] The recent case of *People v. Knowles*, 35 Cal.2d 175, 217 P.2d 1, would indicate that in this respect defendant is right. The judgment for kidnapping the restaurant man and his friend should be affirmed; the judgments for robbery of them should be reversed. The judgments for robbery of the two women should stand. See cases collected in *People v. Knowles*, supra.

In passing, it may be said that the evidence in this case of the crime of kidnapping denounced in Penal Code, sec. 209, and of the asportation, is stronger than in the *Knowles* case. In this case it may be inferred that defendant and his companion knew of the money in the upstairs office, and agreed before entering the restaurant to take the old man upstairs, and to torture him, as Thwait's did. These facts to some extent resemble the facts in *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324.

The judgment imposed upon the defendant for kidnapping for the purpose of robbery, while armed, and with violence, as charged in Count 1 of the information, defendant to be punished by imprisonment in the State prison for the term of his natural life, without possibility of parole, is affirmed; the judgment of conviction for robbery of George B. Speropoulos, as charged in Count 2 of the information, is reversed; the judgment of conviction for robbery of Ada M. Fox, as charged in Count 3 of the information, is affirmed; the judgment of conviction for robbery of Mary

Bigler, as charged in Count 4 of the information, is affirmed; and the judgment of conviction for robbery of Arnfin Simonsen, as charged in Count 5 of the information, is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



101 Cal.App.2d 674

PEOPLE v. THWAITS.

Cr. 4498.

District Court of Appeal, Second District,
Division 1, California.
Jan. 11, 1951.

Rehearing Denied Jan. 22, 1951.

Hearing Denied Feb. 8, 1951.

Henry J. Thwaits was convicted in the Superior Court, Los Angeles County, Mildred L. Lillie, J., on one count of kidnapping and on five counts of robbery, and he appealed from the judgment conviction of kidnapping and of robbery, and from orders denying motions for new trial. The District Court, of Appeal, Drapeau, J., held that the evidence supported the convictions, but that defendant could not be sentenced both for kidnapping and for robbery.

Judgment of conviction of kidnapping affirmed, two judgments of conviction of robbery affirmed, two judgments of conviction of robbery reversed, and orders denying motion for new trial affirmed.

1. Criminal law ⇨338(2)

In prosecutions for kidnapping and robbery, where defendant admitted that he owned a cream-colored Buick, evidence that cream-colored Buick was cruising about scene of capture of defendant's companion and passed his home was pertinent and hence admissible. Pen.Code, § 209.

2. Kidnapping ⇨1

Where defendant in course of robbery took three men and two women from one room to another and assaulted at least two of the men and took one man out of that room and upstairs in restaurant, defendant was guilty of kidnapping. Pen.Code, § 209.

3. Criminal law ⇨566

In prosecution for kidnapping, wherein defendant claimed identification was insufficient, evidence supported conviction. Pen.Code, § 209.

4. Robbery ⇨24(3)

In robbery prosecutions wherein defendant claimed identification as insufficient, evidence supported convictions.

5. Indictment and Information ⇨3

In prosecutions for kidnapping and for robbery, charge could properly be presented by information rather than by indictment. Pen.Code, § 209.

6. Constitutional law ⇨265

Due process of law does not require grand jury indictment. Pen.Code, §§ 682, 888.

7. Criminal law ⇨200(1)

Where defendant took restaurant owner, his friend, another man and two women from one room to another and assaulted at least two of the men with barrel of his gun and took restaurant man out of that room and upstairs for purpose of discovering where he hid his money, defendant could be punished only for the kidnapping, and armed robbery conviction would be reversed. Pen.Code, § 209.

Clifton A. Hix, San Pedro, for appellant.

Fred N. Howser, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

This is a companion case to *People v. Darcy*, Cal.App., 226 P.2d 53. Henry J. Thwaits, the defendant in this case, was Darcy's companion in the kidnapping and robbery of the proprietor and patrons of the Belmont Cafe. For a more complete recital of the facts of that occurrence reference is made to the opinion in the *Darcy* case.

This defendant, Thwaits, ran from the cafe with Darcy. He was seen by the preacher who gave Darcy's automobile license number to the police.

Thwaitts owned a cream-colored Buick automobile, with prominent air horns on each fender. This car was seen cruising around when Darcy was captured, with a man and a woman in the front seat. Later an officer who was standing in the shadows near Darcy's home saw the same car drive slowly by, again with a man and a woman in the front seat.

Thwaitts disappeared and was not seen or heard of until October 8, 1949, when he, with two other men, robbed the Don Hotel in Wilmington. On this occasion he took no pains to conceal his identity, and was recognized by a bellman, a porter, and the night clerk. He had lived at that hotel for a number of months, and knew all of these men.

He intimidated the night clerk with an automatic; made him lie down on his face, and then had him open the safe. He took several hundred dollars in cash, and valuables of guests.

He was captured by agents of the FBI in Omaha November 16, 1949, and returned to Los Angeles for trial. Darcy was tried alone, and was convicted shortly after Thwaitts was brought back.

The District Attorney charged Thwaitts with six counts: First, kidnapping of the restaurant man and his friend, Mr. Simonsen; second, robbery of the restaurant man; third, robbery of Mr. Simonsen; fourth, robbery of Ada M. Fox; fifth, robbery of Mary Bigler; and sixth, robbery of Shelby Reed, clerk of the Don Hotel.

He was convicted on all six counts, the robberies fixed at first degree; sentenced to the penitentiary for life, without parole, on the kidnapping charge; and for the terms prescribed by law on the other counts, all to run concurrently.

From the first five of these judgments, and from an order denying a new trial, defendant appeals. No appeal was taken from the judgment on the sixth count, robbery of the hotel clerk.

Before taking up the grounds of appeal, similarities and differences in the proof in this and in the Darcy trial should be noted.

Thwaitts had no felony record.

The restaurant man died before Thwaitts was brought to trial. So, in this case, his testimony was not before the jury. Therefore, the evidence of asportation and torture of the old man was not as complete as in the Darcy case.

The evidence in this case was that Thwaitts first hit the old man with his automatic. Later he took him, bleeding, out of the restroom, and after five or six minutes, brought him back. Witnesses heard someone walking around upstairs, but were unable to say what Thwaitts did to the old man while he had him out of the restroom.

In this case, Mr. Simonsen and the two ladies whose purses were taken identified Thwaitts and told of his brutality in striking Mr. Simonsen and the restaurant man.

[1] Thwaitts admitted he owned the cream-colored Buick. So the evidence of its cruising about the scene of Darcy's capture and past his home was pertinent.

Thwaitts admitted that he fled Los Angeles county, abandoned his automobile, and hid from the authorities until he was captured in Omaha.

He admitted ownership of an automatic pistol which was found in his car in Omaha, and that he had owned the same gun when the crimes for which he was tried were committed.

He denied being present at all in the Belmont Cafe. He just said he wasn't there.

He admitted the robbery of the Don Hotel, but denied that he was armed. He said he left his automatic home for that occasion.

[2] Counsel for defendant (who was appointed by the court and served without compensation for weeks) urges most strongly that Penal Code, sec. 209, does not apply to the facts in this case. In his brief he quotes at length from the dissenting opinion of Mr. Justice Edmonds of our Supreme Court in the case of *People v. Knowles*, 35 Cal.2d 175, 217 P.2d 1.

However, the decision in the *Knowles* case is binding upon this Court. Any reconsideration of the rules set forth in that case must be by the Supreme Court.

In *People v. Knowles* defendants took the men whom they robbed from one room to another, and inflicted bodily harm upon one of them. In this case defendant took three men and two women from one room to another, and assaulted at least two of the men. Also he took the restaurant man out of the restroom and upstairs.

Counsel for defendant suggests that the identification of Thwaites was insufficient; and that, this being a capital case, the charge should have been presented by indictment, rather than by information.

[3, 4] The record in this case has been carefully read, as in the *Darcy* case, and amply supports the verdicts of the jury.

[5, 6] In the prosecution of criminal cases information is an alternate remedy. Due process of law does not require grand jury indictment. Penal Code, secs. 682, 888; *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232; *Gaines v. State of Washington*, 277 U.S. 81, 48 S.Ct. 468, 72 L.Ed. 793; *People v. Raffington*, 98 Cal.App.2d 455, 220 P.2d 967.

[7] Of course, the rule in the *Knowles* case as to judgments will be followed, and the judgments as to counts two and three reversed.

The judgment imposed upon the defendant for kidnapping for the purpose of robbery, while armed, and with violence, as charged in Count 1 of the information, defendant to be punished by imprisonment in the State Prison for the term of his natural life, without possibility of parole, is affirmed; the judgment of conviction for robbery of George B. Speropoulos, as charged in Count 2 of the information, is reversed; the judgment of conviction for robbery of Arnfin Simonsen, as charged in Count 3 of the information, is reversed; the judgment of conviction for robbery of Ada M. Fox, as charged in Count 4 of the information, is affirmed; the judgment of conviction for robbery of Mary Bigler, as charged in Count 5 of the information, is affirmed. The orders denying motions for new trial are affirmed.

WHITE, P.J., and DORAN, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

VENZA v. VENZA et al.

Civ. 7804.

District Court of Appeal, Third District,
California.

Jan. 11, 1951.

Madeline P. Venza sued Joseph J. Venza and others to set aside a property settlement agreement and to establish a community property interest in a cannery operated by her former husband, Joseph J. Venza, and the other defendants. A receiver was appointed to preserve and protect the disputed property. After making findings favorable to the defendants, the Superior Court, Merced County, R. R. Sischo, J., entered an order assessing the costs of the receiver and his attorneys against defendants in the sum of \$1,050.00 and \$1,000.00 respectively, and the defendants appealed from that order. The District Court of Appeal, Peek, J., held that there was no such clear showing of abuse of discretion by the trial court as would justify the appellate court in interfering with the trial court's order.

Affirmed.

1. Receivers ⇐191, 194, 198(2)

Compensation to be allowed receivers and their attorneys is primarily within sound discretion of trial court, and in absence of clear showing of abuse of discretion by trial court, appellate court would not be justified in interfering therewith.

2. Receivers ⇐194, 198(2)

In action by divorced wife to set aside property settlement agreement and to establish community property interest in cannery operated by her former husband and others, trial court did not abuse its discretion in awarding \$2,750.00 as compensation to receiver and his attorneys for services rendered in preserving and protecting disputed property pending litigation.

3. Receivers ⇐200

In action by divorced wife to set aside property settlement agreement and to establish community property interest in cannery operated by her former husband and others, where there was no question as to legality and propriety of trial court's appointment of receiver for purpose of preserving and protecting property pending

litigation, trial court did not err in assessing costs of receiver and his attorneys against defendants, notwithstanding fact that judgment had been rendered for defendants.

Preston, Braucht & George and Howard C. George, Merced, for appellants.

C. Ray Robinson and Herbert F. Hawkins, Merced, for respondent.

PEEK, Justice.

This is an appeal from an order fixing the fees of the receiver and his attorneys, and assessing such costs against defendants. On September 21, 1949, plaintiff, the divorced wife of defendant Joseph J. Venza, instituted this action to set aside a property settlement agreement which had been ratified by the court and made a part of an interlocutory decree of divorce rendered some eighteen months earlier, and to establish a community property interest in a cannery operated by defendants and for an accounting. The complaint alleged that plaintiff and defendant Joseph J. Venza lived together for several years under an agreement to share equally in their gains; that thereafter they married; that they acquired property consisting of a substantial cannery business; that through their joint earnings they accumulated a relatively large estate; that said defendant concealed the amounts of income and the wealth of the business, and that but for the representations of said defendant, plaintiff would not have entered into the property settlement agreement.

Upon the affidavit of Herbert F. Hawkins, one of the attorneys for plaintiff, the court, on October 2, 1948, issued an order to show cause and a temporary restraining order, restraining defendants from selling or encumbering the products of the cannery during the 1948 season. On October 7, 1948, defendants moved the court to dissolve the restraining order, or that plaintiff furnish an undertaking as a condition of keeping it in force. On October 8, 1948, the court appointed a receiver to take over the cannery business. The appointment of

the receiver was upheld by this court in *Venza v. Venza*, 94 Cal.App.2d 878, 211 P.2d 913. The opinion shows that the trial court suggested the appointment in order to keep the business going. The attorneys for plaintiff concurred in the appointment. The attorneys for defendants stated they would not stipulate to the appointment but "as a practical matter that would work out all right."

After the trial of plaintiff's cause of action to establish a community property interest in the cannery, the court adopted findings favorable to said defendant. The court found that the parties did not agree to pool their resources and share equally in the fruits of their labor; that the cannery did not increase in value as alleged in the complaint; that plaintiff did not rely upon any representations made by said defendant nor was she induced thereby to enter into the property settlement agreement; that said defendant did not conceal any community assets, and that it is not true that plaintiff has been deprived of great sums of money, but on the contrary, it is true that the said property settlement was and is in all respects fair and equitable.

Upon hearing of the motion to tax costs, the court adopted findings and ordered the costs of the receiver and his attorneys assessed against defendants in the sum of \$1,750.00 and \$1,000.00 respectively. The court found that the divorced wife, plaintiff herein, brought the action in good faith; that the receiver was appointed on the court's own motion; that the appointment was justified; that the receiver was appointed for the purpose of preserving and protecting the property, and that a substantial portion of the receiver's services consisted of aiding defendants in the business and resulted in a benefit to them.

Defendants first contend that the compensation allowed the receiver and his attorneys was excessive and disproportionate to the time devoted and care necessary to the preservation of the assets of the corporation. They do not dispute the report of the receiver nor do they attempt to minimize the services performed, but only attack the amount of compensation allowed

which they contend is excessive under the circumstances.

[1, 2] The rule is well established that the compensation to be allowed receivers and their attorneys is primarily within the sound discretion of the trial court. This is necessarily so, for, as the court stated in *Kan v. Tsang*, 90 Cal.App.2d 538, 203 P.2d 86, the trial court is "in a better position to know the necessity for the services performed by the receiver and his attorney and to assess their reasonable value," 90 Cal.App.2d at page 541, 203 P.2d at page 88, than is a reviewing court. Thus, it follows that in the absence of a clear showing of an abuse of discretion by the trial court this court would not be justified in interfering therewith. *Adams v. Woods*, 8 Cal. 306, 322. We conclude that the record does not disclose such a showing by defendants.

Defendants' second contention is that where the basis of a receiver's appointment is the allegations contained in plaintiff's verified complaint, which allegations are found to be untrue, it is error to impose the cost thereof upon defendants. Their supporting argument is substantially that as the trial court found the allegations of plaintiff's complaint to be untrue, therefore the cost of the receivership should be charged against plaintiff as was the case in *Baldwin v. Baldwin*, 82 Cal.App.2d 851, 187 P.2d 429. In that case the trial court found the receivership to have been "unnecessary, improvident, wrongful and inequitable." In the present case the trial court, as previously stated, found directly to the contrary, that plaintiff (the divorced wife of defendant Joseph J. Venza) instituted her action in good faith; that the appointment of a receiver upon the court's own motion was justified; that the receiver was appointed for the purpose of preserving and protecting the property and that a substantial portion of the services performed by the receiver consisted of aiding defendants in their business and resulted in a benefit to them. Furthermore, in the former appeal, *Venza v. Venza*, 94 Cal. App.2d 878, 211 P.2d 913, this court approved the action of the trial court in appointing the receiver.

[3] We are thus confronted with a question similar to that contained in defendants' first contention, that is, since it has been determined that the trial court invoked its jurisdiction in a proper manner, was there such an abuse of its discretion in the assessment of costs against defendants' property as would warrant intervention by this court? As stated in 68 A.L.R. 878: "Where there is no question as to the legality of propriety of the appointment of a receiver, it is generally held that the receiver's expenses are payable from the receivership fund, and are not taxable against the party who procured the appointment." See also 22 Cal.Jur. 539.

We are convinced that the general rule as above stated likewise should apply to the present proceeding.

The order is affirmed.

ADAMS, P. J., and VAN DYKE, J.,
concur.



101 Cal.App.2d 770

**DYNAMIC AIR ENGINEERING, Inc. v.
WESTERN DESIGN & MFG.
CORP. et al.**
Civ. 17634.

District Court of Appeal, Second District,
Division 1, California.
Jan. 17, 1951.

Rehearing Denied Feb. 5, 1951.

Action by the Dynamic Air Engineering Inc., a corporation, against the Western Design and Manufacturing Corporation, and others for using plaintiff's trade secrets in manufacturing blowers in competition with plaintiff, which secrets were acquired while defendants were employed by plaintiff. The Superior Court of Los Angeles County, Clarke E. Stephens, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the evidence was sufficient to sustain finding of trial court that defendants were not using

plaintiff's trade secrets in manufacturing blowers in competition with plaintiff.

Affirmed.

1. Trade-marks and trade-names and unfair competition $\hookrightarrow$ 93(3)

Evidence sustained findings of trial court that defendants had not been using plaintiff's trade secrets in manufacturing blowers in competition with plaintiff.

2. Appeal and error $\hookrightarrow$ 1011(1)

A finding of trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports judgment.

3. Trial $\hookrightarrow$ 60(1)

In action by plaintiff against defendants for using plaintiff's trade secrets acquired while defendants were employed by plaintiff, where there was no prior evidence of plaintiff's designing methods, and one of plaintiff's witnesses was asked questions concerning designing methods, trial court properly sustained objection on the ground that there was a lack of essential foundational proof.

John Flam and Stephen G. Valensi, Los Angeles, for appellant.

Leonard Comegys and James G. Scarborough, by Leonard Comegys, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff's complaint alleges that for six years plaintiff has been developing, manufacturing, and selling axial flow blowers; that defendants while employed by plaintiff secured engineering secrets relative to such blowers; and that defendants have been and are using plaintiff's trade secrets in manufacturing blowers in competition with plaintiff.

Defendants deny that they obtained, or are using, any of plaintiff's trade secrets, and allege that in their manufacture of axial flow blowers they are using engineering principles and data common to all and not the exclusive property of plaintiff.

Axial flow blowers circulate air under pressure. Housed in pipes, they are used for warmth and for ventilation in airplanes. Plaintiff's blower is a single unit: motor, fan blades, vanes, and assembly, enclosed within a pipe, and designed to deliver a continuous stream of moving air in a defined channel.

[1] One thousand thirty-eight pages of testimony have been read. The evidence would support either the allegations of plaintiff or the allegations and denials of defendants. The trial court found for defendants, and there is substantial evidence to support that finding.

[2] A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment. *Fewel & Dawes, Inc., v. Pratt*, 17 Cal.2d 85, 109 P.2d 650; 2 Cal.Jur. 921; *McK.Dig., Appeal and Error*, § 1280.

Plaintiff's claim of error in the exclusion of evidence on rebuttal is without merit. The following question was asked of a witness for plaintiff: "Could the propeller shown on Defendants' Exhibit K have been designed by the use of the Dynamic Air designing methods?"

Answer to this question was stricken out and objection sustained because of no foundation, in that there was no evidence of plaintiff's methods called for by the question.

Later on the following colloquy occurred between the trial court and counsel for plaintiff:

"Mr. Cusack: Do I understand I will not be permitted to lay any further foundation as to his qualifications or knowledge?"

"The Court: There is no question in my mind but what Mr. Sharpe is very ably qualified to testify in all the matters pertaining to the plaintiff's blowers as well as any other blower. However, that is not the necessary foundation, as I see it. The necessary foundation is the system used by the plaintiff to arrive at its deductions or results. Otherwise there

would be no means of cross examining this witness on his calculations."

[3] The court's ruling was based upon lack of essential foundational proof, and was proper.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



PEOPLE v. PERKINS et al.
Cr. 4552.

District Court of Appeal, Second District,
Division 1, California.

Jan. 15, 1951.

Rehearing Denied Jan. 29, 1951.

Hearing Granted Feb. 8, 1951.*

Charles Davis Perkins and others were charged with armed robbery. The named defendant, who pleaded guilty to the offense of robbery but denied being armed, applied for probation. The Superior Court of Los Angeles County, Harry J. Bordé, J., entered an order denying probation, and Charles Davis Perkins appealed. The District Court of Appeal, Doran, J., held that the word "himself" in Pen.Code, § 1203, prohibiting granting of probation to any defendant convicted of robbery who at time of robbery was "himself" armed with deadly weapon means that at least one of the defendants must actually be armed with a deadly weapon, and hence defendant committing robbery in which gun was used was not entitled to probation.

Order affirmed.

Criminal law ¶982

The word "himself" in statute prohibiting granting of probation to any defendant convicted of robbery who at time of robbery was "himself" armed with deadly weapon means that at least one of the defendants must actually be armed with a deadly weapon, and hence defendant committing robbery in which gun was used was not entitled to probation, even though codefendants may have had the gun instead

of defendant. Civ.Code, § 13; Pen.Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Himself".

Richard L. Rykoff, Hollywood, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal "from the order of the court denying probation and its refusal to consider appellant's application for probation".

Appellant together with two other defendants were charged with "armed robbery". Appellant pleaded guilty to the offense of robbery but denied being armed. Upon the hearing of appellant's application for probation, appellant's attorney, "pointed out to the court that the record showed that appellant 'never had the gun in his possession at any time,' and that the record showed 'a passage of the gun as between the other two co-defendants.' The Court's reply to this was as follows:

"The Court: I don't see, under the law, how the court can make any distinction. The law is very well settled that if one defendant is armed with a deadly weapon at the time of the commission of the offense, under the law they are all regarded as being armed. Here, there is absolutely no evidence to contradict—well, the statement of the defendants themselves is that they went to the home of this man Jimmy and secured the gun, which was a Luger, and then went to the scene of the holdup where they used the gun and committed the robbery. Now, which defendant had the gun is immaterial. They were all three involved and they are all equally guilty."

"The Court thereupon refused to consider appellant's application for probation and judgment was rendered imprisoning appellant in the State prison for the term prescribed by law."

It is contended on appeal that in the light of the 1949 amendment to section

* Subsequent opinion 230 P.2d 353.

1203 of the Penal Code the position of the court was error. Before 1949 the section read, "probation shall not be granted to any defendant who shall have been convicted of robbery * * * and who at the time of the perpetration of said crime * * * was armed with a deadly weapon". St.1947, p. 2660. In 1949 the word "himself" was added so that the section now reads that "* * * probation shall not be granted to any defendant * * * who at the time of the perpetration of said crime or any of them or at the time of his arrest was himself armed with a deadly weapon * * *". The foregoing quotation is a small portion of a long sentence in section 1203.

It is conceded by appellant that before the amendment of the section "It was generally held that if any *one* of a group of co-defendants was so armed, probation could not be granted to any of the group, regardless of whether such person had personal possession of the weapon, and all were equally guilty of the same offense." However, it is argued by appellant that the amendment "changed this prohibition against the granting of probation and limited it only to a person who 'was *himself* armed with a deadly weapon.' Thus it was the clear intent of this amendment that a person convicted of the crime of armed robbery may be granted probation providing that he, *himself*, was not armed with a deadly weapon.

"The Trial Judge mistakenly assumed that with respect to the issue of probation it was immaterial whether or not appellant actually had possession of the deadly weapon. On the basis of this mistaken assumption, the Trial Judge refused to consider appellant's application for probation."

Appellant's contention cannot be upheld. Section 13 of the Civil Code provides that "Words and phrases are construed according to the context and the approved usage of the language * * *". The "self" words such as myself, himself, yourself, etc., are words of emphasis only and the use of the word "himself" in the above provision merely means that at least one of the defendants must actually be armed with

a deadly weapon. The sentence wherein it appears in section 1203 is long and involved, and is the only use of the word in the section.

Such language in the light of the decisions cannot be held to convey the meaning and interpretation contended for by appellant.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



101 Cal.App.2d 699

PACIFIC ELECTRICAL & MECHANICAL CO., Inc. v. HARDIMAN et al.

Civ. 14553.

District Court of Appeal, First District,
Division 2, California.

Jan. 15, 1951.

The Pacific Electrical & Mechanical Co., Inc., a corporation, brought an action against J. L. Hardiman, and others. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., dissolved an attachment levied on property of the named defendant and the named defendant appealed. The District Court of Appeal, Dooling, J., held that the question of liability of named defendant sufficiently pleaded could not be inquired into on a motion to discharge attachment but was required to be determined in trial of the action on its merits.

Order reversed.

Attachment ☞248

Question of a defendant's liability sufficiently pleaded was required to be determined in trial of action on its merits and could not be inquired into on a motion to discharge attachment.

Sullivan, Roche, Johnson & Farragher, San Francisco, for appellant.

John A. Cost, San Mateo, for respondent.

DOOLING, Justice.

Plaintiff appeals from an order dissolving an attachment levied on property of the individual defendant, J. L. Hardiman. The sole ground of the motion was that the debt sued upon was contracted by the corporate defendant and that the moving defendant never at any time individually contracted any indebtedness to plaintiff, all of which was sworn to in the affidavit of the movant in support of his motion.

Respondent's attorney filed no brief and did not appear at the oral argument. This may be because he was satisfied, as we are, that the order must be reversed. The question of a defendant's liability sufficiently pleaded cannot be inquired into on a motion to discharge an attachment but must be determined in the trial of the action on its merits. *Republic Truck Sales Corp. v. Peak*, 194 Cal. 492, 503-504, 229 P. 331; *Lori, Ltd., Inc. v. Wolfe*, 80 Cal.App.2d 557, 561, 180 P.2d 21; *Asamen v. Thompson*, 55 Cal.App.2d 657, 661, 131 P.2d 839; *Corum v. Superior Court*, 114 Cal.App. 741, 746, 300 P. 837.

Order reversed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.



101 Cal.App.2d 716

KALER et al. v. BROWN et al.

Civ. 17710.

District Court of Appeal, Second District,
Division 3, California.

Jan. 15, 1951.

Maybelle D. Kaler and Alfred M. Kaler, Jr., brought action against Harold Brown and Alma Brown for injunction to restrain defendants from interfering with the use by plaintiffs of a driveway located on property of defendants over which plaintiffs claimed to have a right of way, and for damages. A judgment for defendants was

entered in the Superior Court of Los Angeles County, Clarke E. Stephens, Judge assigned, and the plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that evidence failed to establish that plaintiffs had acquired an easement by prescription over defendants' property.

Judgment affirmed.

1. Licenses ⇨58(4)

Where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in execution of license, the license becomes irrevocable, and licensee will have a right of entry upon lands of licensor for purpose of maintaining his structures, or, in general, his rights under the license, and the license will continue for so long a time as the nature of it calls for.

2. Licenses ⇨58(5)

Evidence failed to establish that plaintiffs' right to use driveway located on defendants' adjoining property for ingress and egress from garage located on plaintiffs' lot was under oral license executed by defendants' predecessors to plaintiffs' predecessors which has become irrevocable because of labor and material extended by plaintiffs' predecessors in improving the driveway.

3. Easements ⇨36(1)

Open, notorious, and continuous use of a driveway for statutory period raises a presumption that the use was under a claim of right and adverse, and party alleging that use had been by virtue of a license or permission has burden of proving that fact.

4. Easements ⇨36(3)

Evidence supported finding that use by plaintiffs and their predecessors of driveway located on defendants' adjoining property for ingress and egress from garage located on plaintiffs' lot for statutory period was permissive, so that no easement by adverse possession was established.

5. Easements ⇨5, 8(2)

Prescriptive rights are established only when enjoyment thereof is adverse, continuous and under legal right, and not by consent, permission or mere indulgence of owner of alleged servient estate.

Halverson & Halverson, Los Angeles, for appellant.

Warner, Peracca & Cowan, Los Angeles, for respondent.

SHINN, Presiding Justice.

This action was brought by Alfred H. Kaler, Jr. and wife against Harold Brown and wife for an injunction to restrain defendants from interfering with the use by plaintiffs of a driveway located on the property of defendants over which plaintiffs claim to have a right-of-way for ingress and egress to and from a garage located on their lot. Plaintiffs also sought damages. Judgment was for defendants and plaintiffs appeal.

In 1913 Alfred M. Kaler, Sr. owned lot 62 in the Segno Tract in Los Angeles and constructed a dwelling thereon. Lot 63 adjoining was owned by a Mr. and Mrs. Stevens and in 1915 or 1916 they constructed a residence on their lot and occupied it as a home. The two residences faced toward the west, the Stevens' home being the northerly of the two. Along the southerly side of the Stevens' house a narrow cement walk extended from the front to the rear of the building, a distance of about 40 feet. There was room for a driveway on the Stevens' property but only 3 or 4 feet on the Kaler property between their house and the north line of their lot. At the southeast corner of the Stevens' property there was a small garage and the Kalers built a small garage on the northeast corner of their lot. In 1917 Kaler, Sr. had a conversation with Mrs. Stevens which he related on the stand as follows: "I asked Mrs. Stevens if she would object to my placing the two strips in there on her property such as was required. She said, 'Go ahead and put it in' and that's all there was to it." Kaler, Sr. then constructed a driveway consisting of two cement strips about 1 1/2 feet wide using therein the cement walk which extended along the south side of the Stevens' house. The work took parts of two Sundays. Some friends assisted in the work gratuitously and there was a small expenditure for materials, the amount of which was not given in evidence. Neither the Stevens nor the Kalers had an

automobile at that time. Kaler, Sr. bought a car in 1919 and made use of the driveway up to a point in the rear of the buildings where he veered off from the Stevens' lot onto his own. No objection was made to his using the driveway in this manner. In 1934 Kaler moved to San Francisco, where he remained until 1944, returning to Los Angeles on from two to four occasions a year, during which brief visits he would sometimes put his car in the Kaler garage, and sometimes leave it on the street. In 1944 the Kaler property was conveyed to the defendant Kaler, Jr. and his wife, and they occupied the premises from that time on. In the meantime the Stevens' property had been sold to Mr. and Mrs. Gracey, who moved into the premises with their daughter, Jessie Howard, and her husband. They lived there from 1930 to 1938. In 1932 the property was conveyed to the Howards. Sometime thereafter, and after Kaler, Sr. had moved to San Francisco, Mrs. Howard and Mrs. Kaler had a disagreement. Mrs. Kaler had allowed some young men who lived across the street to put their car in her garage; Mrs. Howard objected and they had words. Kaler, Sr., returning to the scene, placed his car in his garage and, according to the testimony of Mrs. Howard, came to the Howard home, conversed with the Howards, said he was sorry that the women had had trouble over the driveway, that he had just come down from the north with some things and hoped it would be all right for him to drive into his garage. Mr. Howard said that he could use it; that he had permission to use it, and Mr. Kaler on his infrequent trips did make use of the driveway to reach his garage. In 1945 or 1946 he had a trailer stored in the garage. Defendants Brown had acquired the adjoining property in 1938. During their ownership little use was made of the driveway by the Kalers. After Kaler, Jr. got a car, in 1946, he put it in his garage on a few occasions, but usually parked it in the street in front of the house. In September, 1948 Mr. Brown left his car parked in the driveway during the evening; Kaler, Jr. went to the Brown house and registered an objection; shortly thereafter young Kaler left his car parked in the driveway,

which precipitated a vigorous remonstrance on the part of Brown. The parties then decided to go to law.

In the Kalers' original complaint they claimed a right-of-way by prescription, and they also alleged that with the knowledge, acquiescence and consent of the then owner of lot 63 the right-of-way was graded, laid out and cemented by plaintiffs and their predecessors at great expense, and had been used for more than twenty-five years. After a demurrer was sustained to the complaint an amended complaint was filed alleging a prescriptive right-of-way, and also alleging that plaintiffs and their predecessor had laid out, graded and cemented the driveway at great expense and that the same had been used for more than twenty-five years under a claim of right. Thus, in the original complaint, plaintiffs claimed an easement derived from open, notorious, and adverse use, and also claimed an irrevocable license founded upon their having incurred great expense in preparing the driveway for use with the consent of the owner of lot 63. In their amended complaint they omitted the allegations under which they might claim an irrevocable license and claimed only an easement through adverse use. The court found that plaintiffs or their predecessors had not used the strip of land under a claim of right or adversely to defendants or their predecessors. It was found that the strip was laid out with permission of defendants' predecessors in interest but that it was not laid out, graded or cemented at great expense; also that the use by plaintiffs and their predecessors of the strip had been with permission of the defendants and their predecessors in interest.

[1,2] Appellants' first argument is "The evidence showed an executed oral license which was and is irrevocable." They rely upon the rule stated in *Stoner v. Zucker*, 148 Cal. 516, 520, 83 P. 808, 810: "The recognized principle, therefore, is that where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon

the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for." Plaintiffs, in their amended complaint, did not allege facts which would establish the existence of an irrevocable license. Neither did they prove facts which would have estopped defendants from revoking the license which their predecessors had given. There was no evidence as to the value of the labor and material that went into the cement strips, and it is quite obvious that the expense was trivial. The small improvement was one which accommodated the Stevens family as well as the Kalers; it did not call for an expenditure which would have justified the former in giving the Kalers permission to use the driveway permanently. From the undisputed evidence the permission appeared to be merely a neighborly accommodation to both parties without any agreement or understanding that it was to continue for any definite time. A reasonable inference is that the parties understood it to be an arrangement terminable at the pleasure of Mr. and Mrs. Stevens. Mr. Kaler requested nothing more than this. His small expenditure was more commensurate with a temporary than a permanent right to use the driveway. Plaintiffs and their predecessors have been amply repaid for the original cost of the driveway. Revocation of permission to use it longer works no injustice to them. They were fortunate to have had twenty-five years use of it before dissension arose.

[3-5] Appellants next proposition is that the open, notorious, and continuous use of the driveway for the statutory period raised a presumption that the use was under a claim of right and adverse to defendants and their predecessors; that the burden was upon defendants to overcome the presumption by proof that the use was permissive, and that they failed to do so. It is a familiar rule. See *Wallace v. Whitemore*, 47 Cal.App.2d 369, 117 P.2d 926. The answer of defendants is that they did prove the origin of the use, that it was initiated under permission given by Mr. and

Mrs. Stevens, and so continued without question until shortly before the institution of the present action, after the parties had fallen into disagreement. As stated in *Peck v. Howard*, 73 Cal.App.2d 308, 328, 167 P.2d 753, 765: "Prescriptive rights are established only when the enjoyment thereof is adverse, continuous and under claim of legal right, and not by consent, permission or mere indulgence of the owner of the alleged servient estate."

There are no other points urged by appellants which require discussion. The case was fully and fairly tried and the findings and judgment have ample support in the record.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



favorable to respondent and was required to resolve all conflicts of evidence in support of findings and judgment if reasonably possible.

2. Agriculture ¶9

In action to recover amount due for commercial insecticides supplied by plaintiff to defendant farming copartnership for dusting a crop of beans by use of an airplane, wherein defendant cross-complained claiming insecticides had destroyed crop, evidence justified judgment for plaintiff on ground that insecticides used were not harmful to crop and were not negligently used, and that crop destruction was due to lack of moisture in soil and to heavy infestations of thrips prior to dusting of crop, with contributing effect of a red spider attack.

Leo C. Dunnell, William H. Herbert, and Adey May Dunnell, Fairfield (Sheldon Rutherford, Napa, of counsel), for appellants.

Francis H. Frisch, Napa, for respondent.

VAN DYKE, Justice.

Plaintiff and respondent, George Meilink, having supplied to appellants, Pollard and Goncalves, a farming copartnership, certain insecticides for crop dusting brought this action to recover the amount due therefor. The insecticides were used in an attempt to control thrips and red spider infesting a crop of beans which appellants were growing by dry farming methods. Appellants cross-complained, seeking damages, claiming the dust used had destroyed the crops. They alleged that respondent, a distributor of insecticides manufactured for the market by others, had agreed to furnish a suitable insecticide and to properly apply it; that he did furnish two varieties of insecticides and applied the same, using an airplane for the purpose, but was negligent in that the materials were harmful to the crops, and were applied in excessive quantities and unskilfully; that as a result the crops were destroyed. These claims being controverted, the cause was tried; the court made findings generally favorable to respondent; gave judgment

101 Cal.App.2d 795

MEILINK v. POLLARD et al.

Civ. 7811.

District Court of Appeal
Third District, California.

Jan. 19, 1951.

George Meilink brought an action against A. C. Pollard, sued as A. E. Pollard, and Eddie Goncalves, sued as John Doe Goncalves, to recover amount due for commercial insecticides supplied by plaintiff to defendant farming copartnership for crop dusting, and defendants cross-complained, claiming the insecticides had destroyed the crops. The Superior Court, Napa County, Mervin C. Lernhart, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Van Dyke, J., held that evidence justified judgment for plaintiff.

Judgment affirmed.

1. Appeal and error ¶931(1)

District Court of Appeal on appeal was required to view evidence and permissible inferences therefrom in light most

for respondent in the amount he sued for and adjudged appellants take nothing by their cross-complaint.

[1] Appellants, in support of their appeal, contend generally that the evidence does not support the findings of the court upon which the judgment against them is based. This contention brings into operation the familiar rule that we must view the evidence and the permissible inferences that may be drawn therefrom in a light most favorable to respondent and must resolve all conflicts of evidence in support of the findings and judgment if reasonably possible. Responsive to that rule, we shall state the evidence which does in our opinion support these findings, but before doing so will say that from a careful reading of the voluminous record presented here it is apparent that a strong factual showing was made by appellants in support of their pleaded claims of liability. Yet we are bound by the rule above stated to affirm the judgment of the trial court if it is supported by substantial evidence in all essential matters. We think that it is.

Respondent testified that he was engaged in the business of selling insecticides, handling the products of a number of companies manufacturing such materials; that about July 1, 1948, he talked with Pollard, one of the appellants, about dusting the bean crops and at his request quoted prices of insecticides, including the cost of applying the materials used to the crops; that he told Pollard he would use a suitable dusting material; that Pollard replied, "Go ahead, if you fellows can do the job"; that he then got in touch with a firm doing crop dusting work and engaged it; that he delivered two types of insecticides to the airport out of which the dusting firm operated its planes; that though Pollard asked for a certain brand of insecticide which he desired, Meilink told him that he was unable to obtain that particular brand, but could get a similar material and Pollard told him to go ahead and that that was the extent of the conversation; that on the following day he examined the several fields in which the bean crops were growing, with a view to determining problems of applying the

dust by plane; that he determined the dosage per acre by charts put out by the manufacturing company and from that source recommended to Pollard that 25 pounds per acre be used, which was done. The crop dusters testified generally that the plane dusted the various fields, using 25 pounds per acre of insecticide, applied uniformly. It appeared that a Mr. Storm, an entomologist, representing an insecticide manufacturer other than the one who put out the dust actually used, had, with an eye to business, been watching the progress of the bean crops and about one month before the dusting was done had discovered the beginning of infestation by thrips, followed shortly thereafter by the beginning of red spider attack. He informed the appellants of his findings and recommended dusting. He testified that about two weeks before the dusting was done he noticed the leaves of the plants were starting to discolor and warned Pollard that damage was starting to show and would spread, as the thrips multiplied very rapidly. Ten days before the dusting, Storm again visited the fields and found the thrips were hatching out in large numbers and estimated that damage to the plants had progressed to between ten and fifteen per cent by that day. He told Pollard of this and also that due to a strike in his employer's factory he could not supply their spray material and recommended that material be obtained from respondent. He visited the fields again a few days before the crops were dusted and found the number of thrips had increased and that damage to the leaves had become progressively worse and the leaves were browning, bleaching, curling and getting dry.

After the dusting had been completed and within a short time, appellants, noting deterioration in the bean plants, took some specimen plants to Dr. Stanley F. Bailey, concededly an expert on insect pests and their control, employed by the University of California at Davis, for examination. He found evidence of injury by thrips on the lower side of the leaves and confined to approximately the lower third of the plants examined. He designated it as flower thrips and testified it was still possibly sus-

ceptible to control. He said the plants showed evidence of damage which he could not attribute to thrips and which had the appearance of being scalds or burns arising from a cause he could not ascertain except to say that his microscopic examination and dissection convinced him that this particular damage was not insect damage. He said the pests were capable of killing a whole field if allowed to go unchecked and, further, that since the crops in question were being raised without irrigation that factor would add to the damaging effect of activities by thrips as compared to damage from such cause in the case of irrigated crops. He explained that the thrips scar the underside of leaves and feed upon the exuded juices, thus drying up the plants and interfering with the normal work of the leaves in plant life. He stated the sort of infestation he found would cause leaves to dry and drop off, depriving the growing pods of beneficial shade from direct sunlight and that when the infestation was aggravated enough the insects would feed upon the pods themselves. He said the damage that had been done by thrips to the plants exhibited to him was enough to reduce the crop, but he could not say how much. He stated that one of the insecticides used was accepted and used quite widely in the control of thrips on bean crops and that the dosage used was within the recognized permissible limits; he said he had never seen injury sufficient to destroy a crop from application of 20 to 25 pounds per acre of that insecticide. As to the other insecticide used he stated he did not know very much about it. The question of the amount of moisture available for the crops was the subject of conflict, but Dr. Bailey stated that insufficient moisture would stunt the plants, causing the leaves to turn yellow and the plants to have a tendency to mature prematurely and make a poor crop; further that if, in addition to lack of moisture, a crop was subject to red spider or thrips attack often no crop would be made. There was testimony on the subject of moisture, all the way from a witness who declared he found within root depth sufficient moisture for the plants to make a crop to a witness who

testified that the supply of moisture was quite inadequate.

The suitability of the soil for the growing of beans was also the subject of conflict, although it appears that had other conditions been favorable a considerable crop might have been produced on that soil. One of appellants' witnesses testified that the fields were quite weedy when he saw them after the dusting had been done, the foul growth consisting of morning glory, wild radish and mustard, all of which were plants tending to deplete the moisture available for the cultivated crops. This same witness said that lack of moisture would cause the plants to turn yellow, that thrips and red spider would likewise contribute to this condition, along with poor soil conditions and that there were plants whereon the infestations were sufficient to kill the plant completely. Respondent's witnesses testified that as early as about three weeks before the dusting the leaves appeared to be damaged by thrips and the lower leaves were wilting and drooping. Mr. Storm, who had watched the crops closely, ascribed the primary cause of the crop failure to injury by thrips, with later on a build-up of red spiders; he said thrips had a lot to do with the damage to start with, the red spiders contributing in the latter stages, and while he did not examine the soil for moisture he said the plants looked dry and desiccated. He testified the dosage used was not excessive.

Paul Mazzetti, who was a chemistry graduate from the University of Turin in Italy and had had wide experience in California in the sale and use of insecticides, testified for respondent that from his examination of the bean plants in appellants' fields the crop failure was due to infestation by thrips and lack of moisture. Another witness for respondent made a casual inspection of the soil and declared he found it hard, and as to the vines found that the lower half was affected by thrips. Still another entomologist called by respondent found that just after the dusting the basal leaves had dropped off the plants and other leaves were quite dry and withered, which effect he said revealed severe

injury by thrips, combined with lack of moisture. He said loss of the leaves would reduce the ability of the plant to convert raw foods into organic foods and reduce the availability of food for further development of the plant itself.

As we said before, there was much testimony introduced by appellants supporting their cause. Outstanding in their testimony was proof that a one-half acre plot of beans dry farmed on land comparable to at least part of the land on which the field crops were planted produced at the rate of 12 sacks per acre under conditions similar in most material respects to the conditions affecting the field crops, save only that the half acre plot had not been dusted with respondent's insecticides. This plot, too, had been infested by thrips, but the infestation had not prevented a fair crop. A test was made on this small plot by dusting small parts with each of the two insecticides and damage followed. Appellants rely strongly on this demonstrative evidence and upon the opinion of their expert witnesses that they must conclude therefrom that the failure of the field crops to produce was because of the damaging effect of the insecticides. Of this evidence it must in fairness be said that it was most persuasive, but it cannot be said that it was conclusive on the issue of crop failure.

The trial court, after hearing testimony that fills 500 pages of the reporter's transcript, found that the insecticides used were not harmful to the crops and did not damage them; that on the contrary the crop failure was due to lack of moisture and the heavy infestation of thrips; that prior to the application of the insecticides the crops had been substantially damaged by thrips and red spider and that the application of the insecticides had been made too late to control the pests; that the insecticides used were reasonably fit for the purpose intended and that the application was in reasonable amounts and pursuant to standards generally recognized by bean growers; that respondent did not represent that he personally was skilled in the use of dusts and sprays, but on the contrary told appellants that he would use a dust recom-

mended by manufacturers; that he did not tell them the dust would prevent pests from destroying the crops, but said that he would apply a recommended insecticide and made no other representations; that the insecticides were not negligently applied nor was the mixture too strong or applied in excessive quantities, but that the application was in the ordinary and customary manner and that respondent used due care in both application and selection of insecticides, proper for the control of thrips and was not responsible for loss or damage to the crops, which damage, as hereinbefore stated, the court expressly attributed in its findings to the lack of moisture in the soil and the prior heavy infestations of thrips with the contributing effect of the red spider attack.

[2] We think it apparent that in this case the trial court was confronted with a question of fact difficult of solution. Appellants' cause depended upon proof that the insecticides were harmful and were negligently used and that either or both of these factors caused the damage. On the other hand, respondents attributed the crop failure to insects and drought and poor soil. That there was a crop failure was admitted. Clearly, the insects and the lack of moisture could have caused the failure. It may be conceded also that chemical insecticides, if wrongly selected and carelessly used, could do the same. Under the evidence the court could have found either for or against the conflicting theories. If found upon substantial evidence that pests and drought caused the failure. Negating appellants' allegations, the court also found that the insecticides were properly selected and used. For this, too, there was evidentiary support. As to one, many witnesses testified it was well known and widely used. As to the other, not so much was known—but both were shown to be very similar and though both were used on separate areas the failure was uniform over all, so that the court was justified in concluding that both had the same effect and for the purpose of resolving this case should not be differentiated. In any event, the court's finding

the failure was caused by insects and drought necessarily negatived the existence of other causes and completely disposed of the litigated issues.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 681

FOGE v. SCHMIDT et al.

Civ. 14465.

District Court of Appeal, First District,
Division 2, California.

Jan. 15, 1951.

Hearing Denied March 15, 1951.

Frank J. Foge brought action against Walter J. Schmidt and another to set aside a sale of plaintiff's property to defendant at a trustee's sale to satisfy indebtedness under a third deed of trust. A judgment for plaintiff was entered in the Superior Court in and for the City and County of San Francisco, Herbert C. Kaufman, J., and the defendants appealed. The District Court of Appeal, Dooling, J., held that evidence failed to establish that trial court abused its discretion in vacating the sale and ordering a new one to be held.

Judgment affirmed.

1. Mortgages ⇨369(3, 7)

Mere inadequacy of price, standing alone, will not justify setting aside a trustee's sale to satisfy indebtedness under deed of trust, but gross inadequacy of price coupled with even slight additional evidence of unfairness is sufficient to authorize setting the sale aside.

2. Mortgages ⇨369(2)

Whether particular facts justify setting aside a trustee's sale to satisfy indebtedness under deed of trust rests very largely in trial court's discretion.

3. Mortgages ⇨369(7)

Evidence failed to establish that trial court abused its discretion in setting aside a trustee's sale of plaintiff's property to

satisfy indebtedness under third deed of trust, where evidence showed that sale price was grossly disproportionate to the value of property, and further that plaintiff's agent had made a higher bid for the property which auctioneer refused because agent did not have cash in hand and that auctioneer refused to grant a continuance of 10 or 15 minutes to permit plaintiff's agent to secure the cash.

4. Mortgages ⇨369(4)

An offer to pay indebtedness is a prerequisite to judgment vacating a trustee's sale to satisfy indebtedness under a deed of trust.

5. Mortgages ⇨369(7)

Where plaintiff, in his complaint seeking to set aside a trustee's sale of plaintiff's property to satisfy indebtedness under third deed of trust, offered to pay indebtedness secured by the third deed of trust, and such offer was refused by defendant's election to stand on the sale and to contest plaintiff's right to have it set aside, and decree merely vacated the sale and ordered a new one to be held, defendant could not be heard to assert on appeal that plaintiff refused to do equity.

William Steinberg, San Francisco, for appellant.

Mancuso, Herron & Winn, San Francisco, for respondents.

DOOLING, Justice.

Defendants appeal from a judgment setting aside a sale of plaintiff's property to them at a trustee's sale to satisfy an indebtedness under a third deed of trust. The court found that the property was worth at least \$11,000 and that the total indebtedness secured by it did not exceed \$6,600. The property was bought by the trustee for slightly under \$700 for which, on the court's finding, he secured property having a clear equity of at least \$4,400. The facts thus support the finding that the sale price was grossly disproportionate to the value of the property. The court found that the plaintiff's mother and a real estate agent who, the evidence showed, was acting for

plaintiff, each made a bid of \$750 for the property. Neither had the cash in hand and each asked for not over 10 or 15 minutes to go to a bank to secure it which the auctioneer refused. The agent had brought a blank check executed by his firm and the court found that there are many banks in the vicinity of the place of sale (in downtown San Francisco) which were then open for business and that the agent could have obtained the cash to support his bid if his request had been granted. On these facts the court found that the sale was unfairly conducted.

[1] While mere inadequacy of price, standing alone, will not justify setting aside such a sale, *Stevens v. Plumas Eureka Annex Mining Co.*, 2 Cal.2d 493, 41 P.2d 927, gross inadequacy of price coupled with even slight additional evidence of unfairness is sufficient to authorize setting the sale aside, *Winbigler v. Sherman*, 175 Cal. 270, 275, 165 P. 943; 25 Cal.Jur. 90-91.

We need go no further than the *Winbigler* case to support the finding of unfairness. In that case the owner, who had learned of the proposed sale 30 minutes before, asked the auctioneer for a reasonable continuance to procure the cash to make a bid. The auctioneer's refusal coupled with inadequacy of price was held to make the sale voidable.

[2,3] Defendants seek to distinguish the *Winbigler* case on the ground that there the owner had not known of the proposed sale in time to procure the cash. But whether the particular facts justify setting the sale aside rests very largely in the trial court's discretion, *Humboldt Savings & Loan Society v. March*, 136 Cal. 321, 323, 68 P. 968, and we cannot say that under the facts of this case that discretion was abused. The denial of such a short delay as one quarter of an hour or less when the agent acting on behalf of plaintiff had a check of his firm which he could readily cash at a bank indicates a desire to secure the property for the trustee bidder on any technicality rather than one to obtain the highest and best bid.

[4,5] Defendants point to the rule that an offer to pay the indebtedness is a prerequisite to a judgment vacating the sale. *Py v. Pleitner*, 70 Cal.App.2d 576, 582, 161 P.2d 393. In his complaint plaintiff did offer to pay the indebtedness. This offer was refused by defendants' election to stand on the sale and to contest plaintiff's right to have it set aside. The decree merely vacates the sale and orders a new one to be held. Under the circumstances defendants cannot be heard to assert on appeal that plaintiff refused to do equity.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.



101 Cal.App.2d 704

PEOPLE v. HOPKINS.

Cr. 2659.

District Court of Appeal, First District,
Division 2, California.

Jan. 15, 1951.

Richard Norton Hopkins was charged by indictment in the Superior Court in and for the City and County of San Francisco, William T. Sweigert, J., with manslaughter. The Superior Court granted the defendant's motion to set aside the indictment on ground that it was returned without reasonable or probable cause, and the People of the State of California appealed. The District Court of Appeal, Schottky, J., pro tem, held that there was reasonable and probable cause for return of the indictment.

Order reversed with directions to deny motion to dismiss.

1. Homicide §30(1)

If two persons decide to take heroin, which under statute is an unlawful act not amounting to a felony, and one of them stands by to keep a lookout while the other takes heroin, and the latter dies as result of narcotic poisoning, the former can be charged with manslaughter as a principal

under statutes. Pen.Code, §§ 31, 192, subd. 2; Health and Safety Code, § 11009; § 11721, as amended by St.1945, p. 1845, § 40.

2. Indictment and Information ⇐10

An indictment is invalid if unsupported by any evidence before grand jury, but if there is some evidence to support the indictment, courts will not inquire into its sufficiency.

3. Indictment and Information ⇐10

Evidence that defendant and deceased purchased heroin, that they got into automobile, and that defendant took a shot of heroin in the arm and that while deceased took a shot, defendant held deceased's arm with a handkerchief so as to force the arm veins out, in order to facilitate the taking of the shot by the deceased, and that deceased died from narcotic poisoning, was sufficient to authorize grand jury to return an indictment charging defendant with manslaughter. Pen.Code, §§ 31, 192, subd. 2, 921; Health and Safety Code, § 11009; § 11721, as amended by St.1945, p. 1845, § 40.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty. of City and County of San Francisco, Janet Aitken, Deputy Dist. Atty., San Francisco, for appellant.

J. Maxwell Peyser, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

By an indictment respondent was accused of manslaughter in that he "did wilfully, unlawfully, feloniously and without malice kill one Herbert Caro."

After pleading not guilty respondent was permitted to withdraw his plea, whereupon he moved to set aside the indictment on the ground that it was returned without reasonable or probable cause. His motion was granted, and this appeal was taken by the People. § 1238, Pen. Code.

The transcript of the Grand Jury hearing which was before the court on the motion shows that six witnesses testified.

The cause of death appears from the testimony of the doctor on duty at the Park Emergency Hospital in San Francisco early Sunday morning, September 18, 1949 when decedent was brought in by respondent in his car. He diagnosed the case as one of narcotic poisoning, and learned from respondent that decedent had taken heroin. After emergency treatment decedent was taken to the San Francisco Hospital where he died that day.

An Inspector of the San Francisco Police Department on the homicide detail was the principal witness before the Grand Jury. He testified that he investigated the case on the day of decedent's death and took a statement from respondent. The substance of it, according to the officer's testimony, was that on September 17 respondent left his ship in the early afternoon and after going over to Marin County returned to San Francisco about 11:30 p. m. About an hour later he visited a tavern where he saw decedent whom he had known for approximately three years. They engaged in conversation and after respondent had told decedent about his voyage decedent asked him "if he would like to get high to-night" to which he assented and they left the place in respondent's car. Respondent gave decedent \$13 and about 15 minutes later decedent returned to the car, having purchased some heroin. They then drove out to Funston Avenue where they stopped, opened the package, and decedent produced an eyedropper which he filled with water at a service station. They drove around a few blocks and then parked on 14th Avenue beside the Park-Presidio Boulevard "where they took a cap of heroin and mixed it in a spoon, heated it, and after they had it mixed, Hopkins said he took a shot in the arm, and then he said Caro took a shot, *he held his arm with a hankerchief. Q. Hopkins said he held Caro's arm? A. Yes. He had wrapped a hankerchief around it to force the veins out.* And that Hopkins took a shot. He said he took another one, and that Hopkins took another one. The first one he thought he took in the arm, and the second one some-

where down around the wrist. After—Hopkins—after Caro took the second shot, he said he felt sick, so he got out of the car and attempted to heave. He wasn't able to. And he said, Hopkins said, he got out, walked around the front of the car, and that Caro was practically unconscious then, he had to drag him back into the car, put him in the back seat, and from there he drove him to the Park Emergency Hospital, where he was admitted and treated by doctors." (Emphasis added.)

The district supervisor of the Federal Narcotics Bureau for the states of California and Nevada also testified before the Grand Jury. He described the several methods used in taking heroin, one of which is to inject it by needle directly into the vein on the inner surface of the arm. To get the quickest reaction the vein is forced to the surface by the application of a tourniquet or by manual pressure. A handkerchief is often used as a tourniquet he said.

Section 11721, Health & Safety Code, as it was in effect on September 18, 1949, the date of Caro's death, read as follows: "A narcotic addict, as defined in Section 11009 [of the Health & Safety Code], is punishable by imprisonment in the county jail for not less than three nor more than six months." St. 1945, p. 1845, § 40.

Section 11009 of the same code then read: "'Addict,' as used in this division, means a person who unlawfully uses, or is addicted to the unlawful use of, narcotics."

When decedent injected the heroin into his own arm he violated said §§ 11721 and 11009, and when respondent manipulated the handkerchief-tourniquet around decedent's arm he assisted him in the commission of an unlawful act not amounting to a felony. As a result of these acts decedent died.

Section 192, Penal Code, defines manslaughter as "the unlawful killing of a human being, without malice. It is of three kinds: * * * 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a

lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; * * *."

Section 31, Penal Code, provides that "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission * * * are principals".

The help which respondent gave decedent brings respondent within the provisions of § 31. That he aided is clear; that he abetted is equally clear, since he and decedent had deliberately set out together with the purpose of doing that which § 11721 denounced. See *People v. Dole*, 122 Cal. 486, 492, 55 P. 581.

In order to charge respondent with manslaughter it was not necessary for the testimony before the Grand Jury to show that he injected the heroin, since § 31 draws no line between persons who "directly commit the act constituting the offense" and those who "*aid and abet in its commission*". Both are principals.

[1] If respondent had not touched decedent's arm or otherwise physically aided him, but had merely stood by and kept a lookout for passers-by he could still be charged as a principal under § 31 Penal Code, *People v. Wilson*, 93 Cal.App. 632, 636, 269 P. 951; *People v. Wade*, 71 Cal. App.2d 646, 651, 163 P.2d 59, and its citations; see, also *People v. Mummert*, 57 Cal.App.2d 849, 135 P.2d 665.

People v. Le Grant, 76 Cal.App.2d 148, 154, 172 P.2d 554, 558, cited by appellant, is in point. In a fight between a companion of Le Grant and another man the latter was killed. Le Grant struck no blow but, while his companion was engaged in the affray, stood by on the sidelines "to keep other people back who might have 'buted in' and have thus prevented the tragedy. By so doing he acted with full knowledge that an assault and battery was in progress, the reasonable and natural consequence of which might be a serious injury to, or possibly the death of, either or both of the combatants. Such a course of conduct on the part of Le Grant con-

stituted an aiding and abetting of Vincent in the unlawful assault and battery and resulting homicide, thus making him also liable as a principal for the crime of involuntary manslaughter. [Citations.]” His conviction of manslaughter was affirmed.

Two cases sharply illustrate the question now under discussion because in each of them the defendant was legally incapable of directly committing the act constituting the offense but was nevertheless held as a principal because such defendant aided and abetted. They are *People v. Bartol*, 24 Cal.App. 659, 142 P. 510 and *In re Kantrowitz*, 24 Cal.App. 203, 140 P. 1078. Both cases were cited approvingly in *People v. Wallin*, 32 Cal.2d 803 at page 807, 197 P. 2d 734, where *People v. Young*, 132 Cal. App. 770, 23 P.2d 524, is likewise cited.

Respondent's brief does not attempt to answer the argument of appellant which is illustrated and supported by *People v. Le Grant*, supra, and by the *Bartol*, *Kantrowitz* and *Young* cases, that one who aids and abets may be prosecuted as a principal. Respondent apparently relies solely on the point that he did not actually inject the needle in decedent's arm.

Section 921 of the Penal Code provides: “The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or contradicted, would, in their judgment, warrant a conviction by a trial jury.”

[2] It is said in *Greenberg v. Superior Court*, 19 Cal.2d 319, at page 322, 121 P.2d 713, 715: “It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573) * * *.”

As this court said in *Davis v. Superior Court*, 78 Cal.App.2d 25, at page 27, 177 P.2d 314, 315:

“‘It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573) * * *.’”

“It has long been settled that in the analogous case of an information the evidence before the committing magistrate is not subject to the same test as that before a trial jury in a criminal case and probable cause may be found for the holding to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. *People v. Mitchell*, 27 Cal.2d 678, 681, 166 P.2d 10; *People v. Wisecarver*, 67 Cal. App.2d 203, 209, 153 P.2d 778; 7 Cal.Jur. 982.

“The Supreme Court in *Greenberg v. Superior Court*, supra, did not explain whether it thought that the same rule should apply in the case of an indictment as in the case of an information. It at least indicated that no severer rule should be applied when it used the language above quoted.”

[3] We are satisfied that with the testimony that the Grand Jury had before it there was reasonable and probable cause for the finding of a true bill, and that the trial court erred in granting the motion to dismiss the indictment.

The order dismissing the indictment is reversed with directions to the trial court to deny the motion to dismiss.

NOURSE, P. J., and DOOLING, J., concur.

101 Cal.App.2d 748

**MACHINERY ENGINEERING CO. v.
NICKEL et al.****NICKEL et al. v. MACHINERY ENGI-
NEERING CO.**

Civ. 7800.

District Court of Appeal, Third District,
California.

Jan. 16, 1951.

Action by Machinery Engineering Company, a corporation, against John B. Nickel, and others, to foreclose contractor's lien and for recovery of balance allegedly due plaintiff for the construction of a hay mill for the defendants. The defendants filed a cross-complaint. The Superior Court, Merced County, H. S. Shaffer, J., rendered judgment and the plaintiff and the defendants appealed. The District Court of Appeal, Adams, P. J., held that a large and expensive hay mill the construction of which required a high degree of engineering skill and which was intended to be operated as a commercial enterprise grinding hay for farmers generally was not a construction or operation incidental to "farming" within Business and Professions Code, § 7049, permitting such construction by unlicensed contractor, and hence contractor constructing mill without license could not recover balance allegedly due for the construction.

Judgment against defendants reversed and plaintiff's appeal dismissed.

1. Licenses ⇨39.43

A large and expensive hay mill, the construction of which required a high degree of engineering skill and which was intended to be operated as a commercial enterprise grinding hay for farmers generally was not a construction or operation incidental to "farming" within statute permitting such construction by unlicensed contractor, and hence contractor constructing mill without license could not recover balance allegedly due for the construction. Business and Professions Code, §§ 7000 et seq., 7026, 7049.

See publication Words and Phrases, for other judicial constructions and definitions of "Farming".

2. Appeal and error ⇨780(1)

Where contractor's action for balance due for construction of hay mill for de-

fendants was not maintainable under statute on ground of contractor's lack of license, contractor's appeal from judgment for contractor for an amount from which had been deducted the sum granted to defendants on their cross-complaint for damages for breach of warranty would be dismissed. Business and Professions Code, §§ 7031, 7049.

Linneman, Burgess & Telles, Dos Palos, for appellants.

Sans, Hudson & Perry, Watsonville, C. Ray Robinson, Merced, for respondent.

ADAMS, Presiding Justice.

Machinery Engineering Company, a corporation, brought this action seeking foreclosure of a contractor's lien against property of defendants, and the recovery of a balance alleged to be due it for the construction of a hay mill for defendants. Defendants filed a cross-complaint, alleging breach of warranty on the part of plaintiff, and also that the work done by it was worthless for the purpose for which it was intended and agreed upon by the parties.

The action was tried by the court sitting without a jury, and eventuated in a judgment for plaintiff for \$15,179.59, there having been granted to defendants on their cross-complaint the sum of \$15,000.00 which had been deducted from the amount which plaintiff claimed to be due to it. Defendants filed a motion for a new trial, which was denied. Both parties appealed on an agreed statement of the facts. After the filing of briefs by both parties it became apparent, and it is conceded by plaintiff, that its appeal was taken too late. Accordingly it must be dismissed.

Defendants, referred to hereinafter as appellants, seek reversal of the judgment against them on the ground, first that plaintiff was not licensed as a contractor as requisite to a recovery by it, under the provisions of chapter 9 of Division III of the Business and Professions Code. Other grounds for reversal are asserted but in view of our conclusion on the ground above mentioned, they need not be considered.

It is conceded by plaintiff that it was not licensed as a contractor. It claims, however, and the trial court held, that under section 7049 of the Business and Professions Code it was not necessary for it to have a license.

Section 7049 reads: "This chapter does not apply to any construction or operation incidental to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or to farming, dairying, agriculture, viticulture, horticulture, or stock or poultry raising, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter."

In the agreed statement it is set forth that the hay mill was desired by defendants to process loose and baled hay which was to be conveyed to it for processing; that "The hay mill was and is located in a rural area approximately 15 miles from the nearest railroad. It is in the midst of an agricultural area and surrounded by and adjacent to extensive hay lands owned by several of the Defendants. It is but a few yards from a large dairy in which the brother of Defendant John Nickel has an interest. Plans were considered by Defendants for the development by them of a large feed yard upon that portion of the property not occupied by the mill. The mill consumed and processed only agricultural products and produced material usable only in agricultural dairying, farming and stock raising enterprises."

The mill is located upon real property formerly owned by defendant Donald C. Bennett and his brother, near Los Banos, Merced County. It does not appear from the agreed statement whether or not the individual defendants are all farmers, but it is inferential that they are; nor is it stated whether the mill is to be used solely for the processing of hay produced by the individual defendants, or whether it is intended to process the hay of others. Subsequent to the execution of the agreement with plaintiff and after the mill was practically finished, all the rights and interests in the contract and in and to the land and premises upon which the mill was con-

structed were conveyed by the individual defendants to Santa Rita Mill Products Co., a corporation, which corporation was made a party defendant in the action. The question, then, is does the work which plaintiff undertook to and did perform come within the exemption of said section 7049. We are constrained to hold that it does not.

Section 7026 defines the term "contractor," declaring that the term "contractor" for the purposes of the chapter is synonymous with the term "builder" and that a contractor is "any person * * * who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to * * * construct * * * any building * * * or other structure * * *".

It is not contended that plaintiff was an employee of the other contracting parties, and it must be conceded that the mill which it contracted to construct is a building or structure which required a high degree of engineering skill and knowledge of construction. The cost of same exceeded \$80,000. According to the agreed statement it operates as follows: The hay arrives at the mill either in bales or piled loose in a truck or van. Two methods of handling it before it reaches the grinding system are required. Baled hay is placed upon a long chute in individual bales one behind the other. (These bales weigh around 200 pounds each.) The bales are drawn up to the mill by an endless chain drag in the bottom of the chute. As they progress the baling wires are cut so that when the bales reach the mill they are ready to be broken up. They are then fed automatically (that is, by machinery) into the first machine known as the bale buster. When broken up the loosened hay enters an air stream of the mill on its way to the hammer mill. En route through it passes through a metal catcher designed to remove foreign material picked up in the field such as nails, wire, stones, etc. It then goes to the hammer mill where it is pounded against metal screens, the result in coarseness being determined by different screens which are placed in accordance with the result desired. The hammers work against these screens as the chopped hay passes through the screen. It again enters the

same air stream to cyclones where it settles to the bottom. It is then fed into a trough through a screw conveyor and carried out of the building. This is the grinding operation. To put molasses into the chopped hay a unit known as the "molassizing" unit was provided, though it failed to work. The air stream meanwhile returns to the front of the bale buster to be used again. At the point of the cyclones the air system is tapped by a rubber fan designed to equalize pressure in the air system and also to remove dust through cloth segments like a vacuum cleaner. Electricity is employed for operation of the mill, and a heating system is required in connection with the molassizing unit.

From the foregoing it is obvious that the undertaking was a large and complicated one. The mill was capable of handling 14 tons of hay per hour, or 112 tons per eight-hour day. Admittedly it was not to be connected with any particular farm as a part thereof, or used in connection with any particular farm; and the capacity and cost of such mill indicate that it was to be used to mill the hay of others than the six individuals who contracted for its construction. That it was intended to be a commercial enterprise is also supported by the statement that it was built in an area almost exclusively devoted to farming, which suggests that it would be used to grind the hay of farmers generally, located in the area; also the transfer of the mill to the corporation supports such a conclusion.

[1] Our conclusion from the foregoing is that upon the facts of this case the project, that is, the design and construction of this hay mill and the intended operation thereof were such that there is no factual support for a finding that it came within the terms of the exemption as being either a construction or operation incidental to farming or as being within the plain, ordinary meaning of the word "farming."

Apparently section 7049 of the Business and Professions Code has not heretofore been before the appellate courts for construction except in the case of *Bowline v. Gries*, 97 Cal.App.2d 741, 218 P.2d 806. In that case it was held that an unlicensed

well driller, who had contracted with a farmer to drill a water well for the farmer's use on his own land, was a contractor under section 7026, supra, and that he was not exempt from being licensed under section 7049, the court saying that well drilling is a well recognized profession requiring great skill and engineering ability, and that the underlying purpose of the contractor's license law is to protect the general public respecting structural improvements to real property wherein special skill, training and ability are required. The same principle applies in the case before us.

[2] It follows that under section 7031 of the Business and Professions Code plaintiff's action was not maintainable. Therefore the judgment against defendants is reversed, and plaintiff's appeal is dismissed.

PEEK and VAN DYKE, JJ., concur.



101 Cal.App.2d 720

In re TURNEY'S ESTATE.

TURNEY et al. v. NANZER et al.

Civ. 18109.

District Court of Appeal, Second District,
Division 3, California.

Jan. 15, 1951.

Rehearing Denied Feb. 14, 1951.

Hearing Denied March 15, 1951.

Proceeding in the matter of the estate of Helen E. Turney, also known as Helen E. Schinauer, deceased. A will in which Robert J. Wagdlen was named as executor was admitted to probate, and thereafter George L. Turney, as surviving husband, petitioned for revocation of probate of the will as to him, opposed by Helen Nanzer and others. The Superior Court of Los Angeles County, John Gee Clark, J., entered a judgment adjudging that the will was revoked as to petitioner, a surviving spouse, and Helen Nanzer and others appealed. The District Court of Appeal, Vallée, J., held that where testatrix, after making will while still unmarried bequeathing her property to her daughter and stepchildren, met and subsequently married

spouse who eventually survived her, provision in will that testatrix, except as therein provided, with full knowledge omitted to provide for her heirs living at time of her demise was not a mention of or a provision for surviving spouse within statute, so as to prevent her subsequent marriage from operating as a revocation of will as to surviving spouse.

Judgment affirmed.

1. Wills ⚡191

Upon marriage an antecedent will shall be revoked. Probate Code, § 70.

2. Wills ⚡191

The law presumes that a subsequent marriage of the testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will. Probate Code, § 70.

3. Wills ⚡290

A party seeking to rebut statutory presumption of revocation of will must bring himself within literal terms of one of the exceptions. Probate Code, § 70.

4. Wills ⚡191

To prevent a subsequent marriage from working a revocation of a will, the "mention" in will must show an intention not to make provision for surviving spouse. Probate Code, § 70.

See publication Words and Phrases, for other judicial constructions and definitions of "Mention".

5. Wills ⚡481

The intention of maker of a will is to be determined only as of date of making of the will.

6. Wills ⚡191

Where testatrix, after making will while unmarried bequeathing her property to her daughter and her stepchildren, met and subsequently married spouse who eventually survived her, provision in will that testatrix, except as therein provided, with full knowledge omitted to provide for her heirs living at time of her demise was not a "mention of" or "provision for" surviving spouse, within statute, so as to prevent the subsequent marriage from revoking will as to surviving spouse. Probate Code, § 70.

See publication Words and Phrases, for other judicial constructions and definitions of "Mention of" and "Provision for".

George C. Bliss, Daniel Schnabel, Beverly Hills, for appellants.

Kenneth D. Holland, Beverly Hills, for respondent George L. Turney.

VALLÉE, Justice.

Appeal from a judgment of the probate court adjudging that a will, made by an unmarried woman, was revoked as to her surviving spouse by her subsequent marriage.

On March 20, 1946, Helen E. Schinauer, being then unmarried, made her will. On April 12, 1947, she married George L. Turney. She died on April 7, 1949, leaving her husband surviving.

The will bequeathed certain personal property to her daughter; \$1000 to a stepchild; devised and bequeathed the residue of her estate to her daughter and her stepchildren; and contained these provisions:

"*Sixth*: I have except as otherwise in this Will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my demise.

"*Seventh*: If any devisee, legatee or beneficiary under this Will, or any person claiming under or through any devisee, legatee or beneficiary, or any other person who, if I died wholly or partly intestate, would be entitled to share in my estate, shall in any manner whatsoever, directly or indirectly, contest this will or attack, oppose or in any manner seek to impair or invalidate any provision hereof, then, in each of the above-mentioned cases, I hereby bequeath to such person or persons the sum of One Dollar (\$1.00) only, and all other bequests, devises and interests in this will given to such person or persons shall be forfeited."

The will was admitted to probate. Thereafter the surviving husband petitioned for revocation of probate as to him. Evidence was received, without objection, that de-

cedent was 48 or 49 years old at the time the will was made; she had been married twice at that time, was then unmarried; she first met respondent (the surviving spouse) in July or August, 1946 (four or five months after the will was made); and that no provision had been made for respondent by marriage contract. The probate court held that the will was revoked as to the surviving husband by reason of the marriage of the testatrix subsequent to the making of the will. The daughter and stepchildren appeal.

Probate Code section 70 reads: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The question is: Is the surviving spouse "provided for in the will, or in such way mentioned therein as to show an intention not to make such provision"?

Appellants claim that respondent was "provided for" and "mentioned" in the will. They rely on *Estate of Kurtz's Estate*, 190 Cal. 146, 210 P. 959. Respondent claims that he was neither "provided for" nor "mentioned" in the will and that the Kurtz case was "overruled and laid to rest" by *Estate of Axcelrod's Estate*, 23 Cal.2d 761, 147 P.2d 1.

[1-4] It has long been the policy of the law that upon marriage an antecedent will shall be revoked. *Estate of Axcelrod*, supra, 23 Cal.2d 761, 767, 147 P.2d 1; 1 Page on Wills, Lifetime Ed., 929, sec. 507; 5 Wis.L.Rev. 387. In England, since the Wills Act of 1837, every will made by a man or woman is revoked by his or her marriage, except a will made under certain circumstances in exercise of a power. Stats. at Large, 1 Vict. ch. 26, sec. 18. The rule appears to be different since 1925 as to wills expressly made in contemplation of marriage. See *Pilot v. Gainfort* (1931), Prob. Div. (Eng.) 103. In many states the

rule is that every will made by a man or woman is revoked by his or her marriage. 68 C.J. 831, sec. 536; anno. 92 A.L.R. 1010, 1013. A number of jurisdictions have held that a subsequent marriage revokes an antecedent will notwithstanding an antenuptial agreement. Ibid. "The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will * * *." *Sanders v. Simcich*, 65 Cal. 50, 52, 2 P. 741, 742. A party seeking to rebut the statutory presumption of revocation must bring himself within the literal terms of one of the exceptions. See *Corker v. Corker*, 87 Cal. 643, 25 P. 922; *Estate of Smith*, 15 Cal.App.2d 548, 59 P.2d 854. To prevent a subsequent marriage from working a revocation of the will, the mention must show "an intention * * * not to make * * * provision" for the surviving spouse. *Estate of Ryan*, 191 Cal. 307, 310-312, 216 P. 366, 368.

In *Estate of Kurtz*, 190 Cal. 146, 210 P. 959, 960, the widow of the testator contested the admission of the will to probate on the ground that since it contained neither "provision for" nor "mention of" her or their unborn child, it had been revoked by the operation of then sections 1298 and 1299 of the Civil Code. The will was made June 3, 1921. The next day the testator married the spouse who survived him. The will contained this provision: "Fourth. I hereby generally and expressly disinherit each and all persons whatsoever claiming to be, and who may be, my heirs at law, except as such may be determined by this will, and if any of such parties or such heirs, or any person whomsoever who, if I died intestate, would be entitled to any part of my estate, shall either directly, singly, or in conjunction with other persons, seek or establish or assert any claim to my estate, or any part thereof, excepting under this will, or attack or oppose or seek to set aside the probate of this will, or impair, invalidate or set aside the provisions, or endeavor to secure or procure any part of my estate other than through or under this will; then in any or all of the above-mentioned cases and events, I hereby give and bequeath to said person or persons the sum of one

(\$1.00) dollar and no more in lieu of any other share or interest in my estate, and all the rest of the interest, share or property which would otherwise have gone to such person or persons by device or inheritance, or which they might be entitled to take under any provision of law shall go * * *

As will more fully hereinafter appear, the court held that the surviving spouse was provided for in the will because of 1) the phrase "any person whomsoever who, if I died intestate, would be entitled to any part of my estate"; and 2) the further phrase referring to any interest in the estate "which they might be entitled to take under any provision of law"; and, 3) evidence that at the time the will was made the surviving spouse was engaged to marry the testator and that they were married the next day.

It is not necessary to determine whether Estate of Kurtz, supra, 190 Cal. 146, 210 P. 959, was "overruled and laid to rest" by Estate of Axelrod, 23 Cal.2d 761, 147 P.2d 1; Estate of Rozen-Goldenberg, 1 Cal.App. 2d 631, 37 P.2d 132, which is on all fours with the case at bar, was expressly approved by the Supreme Court in the Axelrod case. The opinion in the Rozen-Goldenberg case does not set forth the provisions of the will under consideration. Examination of the record reveals that the will provided:

"Fifth: I have, except as otherwise in this Will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my demise.

"Sixth: If any devisee or legatee under this Will, or any person claiming under or through any devisee or legatee, or any other person who, if I died wholly or partially intestate, would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly, contest this Will, or attack, oppose, or in any manner seek to impair or invalidate any provision hereof, or shall, in any manner whatsoever, conspire or cooperate with any person or persons attempting to do any of the acts or things aforesaid, or shall endeavor to succeed to any part of my estate otherwise than through this Will, then in each of the

above mentioned cases, I hereby bequeath to such person or persons, the sum of One (\$1.00) Dollar only, and all other bequests, devises and interests in this Will given to such person or persons shall be forfeited and shall be distributed pro-rata among such of my devisees and legatees as shall not in any manner have participated in such acts or proceedings. If all my devisees and legatees shall participate in such proceedings, I give, devise and bequeath the whole of my estate to my heirs-at-law, according to the laws of succession of the State of California, then in force, excluding all contestants and said devisees, legatees and their successors in interest."

It will be noted that the material parts of these provisions of the Rozen-Goldenberg will are identical with the same provisions of the will in the case at bar. The court there held, 1 Cal.App.2d at page 633, 37 P.2d at page 133,

"It would appear that the intention to make no provision for the future surviving spouse would have to be set out with greater certainty and explicitness than in the instant case if the revocation provided by section 70 of the Probate Code is to be averted, where, as here, there is no marriage contract and no provision for such survivor in the will.

"The case is to be distinguished from Estate of Kurtz, 190 Cal. 146, 210 P. 959, 960. In that case deceased married the day after he made his will. The court sustained the will, but held that the ruling of the trial court excluding evidence to the effect that testator was engaged to marry contestant at the time he executed the will was error, and that it should have been admitted 'for the purpose of showing *who the maker of the will intended to include* by the phrase "any person whomsoever who, if I died intestate, would be entitled to any part of my estate," a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement.' (Italics ours.)

"The cited case is not authority in the instant case, for the reason that a person,

unknown to testatrix at the time of the execution of the will and subsequently married to her, could not have been included among those whom testatrix intended to refer to in her will."

In Estate of Axcelrod, supra, 23 Cal.2d 761, 147 P.2d 1, 2, the will was made December 9, 1935. On April 17, 1936, the testatrix married the spouse who survived her. No evidence was offered to or received by the trial court. Paragraph "Sixth" of the will read: "I have intentionally omitted all of my heirs who are not specifically mentioned herein, intending thereby to disinherit them, and if any such persons, or heirs, or any devisees or legatees under this will * * * shall * * * seek to establish or assert any claims to my estate or any part thereof, excepting under this Will, or attack [etc.] * * *, then * * * I hereby give and bequeath to such person or persons the sum of One (\$1.00) Dollar and no more, in lieu of any other share or interest in my said estate. * * *"

The respondents there relied, as do appellants here, on Estate of Kurtz, supra, 190 Cal. 146, 210 P. 959. The Supreme Court said, 23 Cal.2d at page 765, 147 P.2d at page 3,

"But in that case there was different testamentary language to be construed, and an extrinsic factual basis upon which to interpret it was held admissible in evidence. [Italics added.] * * *

"The facts here involved, insofar as they are disclosed by the record, appear to be more similar to those which were before the District Court of Appeal in Estate of Rozen-Goldenberg (1934), 1 Cal.App.2d 631, 37 P.2d 132, than to those which were the basis of the decision in Estate of Kurtz (1922), supra, 190 Cal. 146, 210 P. 959. We adopt here the language used by Judge Scott in speaking for his court in the Rozen-Goldenberg case (page 633 of 1 Cal. App.2d, page 133 of 37 P.2d): 'It would appear that the intention [if any] to make no provision for the future surviving spouse would have to be set out with greater certainty and explicitness than in the instant case if the revocation provided by

section 70 of the Probate Code is to be averted, where, as here, there is no marriage contract and no provision for such survivor in the will.'"

In the Kurtz case, as we have said and as was emphasized in the Axcelrod case, the court considered evidence that at the time the will was made the testator was engaged to be married to the surviving spouse. The evidence was offered to show whom he intended to include by the clause in question. The court held this evidence admissible on the ground that the description of the class in the will was so ambiguous as to justify the reception of extrinsic evidence to explain it. The court also considered the fact that the testator married the surviving spouse the next day after making the will. Implicit in the opinion is the view that the after-acquired spouse was not to be considered as "provided for" or "mentioned" within the meaning of the statute, unless the words of the will, aided by the extrinsic evidence, showed the intention of the testator to include her as a member of the class referred to. Upon the facts, it was reasonable to conclude that the testator made the will in contemplation of his subsequent marriage. While it appeared probable in the Kurtz case that the testator intended the general clause in his will as a provision for his future wife, such a conclusion cannot reasonably be drawn in the present case.

[5] The intention of the maker of a will is to be determined only as of the date of the making of the will. The testatrix in the instant case was not even acquainted with respondent on that date. She did not meet him until four or five months after the will was made. He could scarcely have been considered by the testatrix as a surviving husband, and he could not have been included among those whom testatrix intended to refer to in her will.

[6] We are of the opinion that the testatrix, by inserting the provision in her will relied on as "providing for" or "mentioning" a later acquired husband, was merely adopting the means in common use of preventing a contest of the will or of its provisions. She was not providing for

her future husband in the will or mentioning him in such a way as to show an intention not to make such a provision.

The judgment appealed from is affirmed. Appellants will bear respondent's costs on appeal.

SHINN, P. J., and WOOD, J., concur.



101 Cal.App.2d Supp. 932

PEOPLE v. ALLISON.

No. 162213.

Superior Court of California
San Diego County, Appellate Department.

Decided Jan. 16, 1951.

David Nesbit Allison was convicted in Justice's Court, Encinitas Township, county of San Diego, state of California, Thomas F. McLoughlin, Justice of the Peace, of reckless driving under section 505 of the Vehicle Code, and he appealed. The Superior Court, Per Curiam, held that evidence was insufficient to sustain conviction.

Judgment reversed and new trial ordered.

1. Automobiles 330

Gravamen of offense of reckless driving is driving by motorist on public highway in willful or wanton disregard for safety of persons or property. Vehicle Code, § 505.

2. Automobiles 355(4)

In order to convict under section of the Vehicle Code dealing with reckless driving, trier of facts must be convinced by evidence beyond reasonable doubt and to moral certainty that motorist in management of automobile at time and place in question intentionally did something with knowledge that injury to another was probable or acted with wanton and reckless disregard for safety of others and in reckless disregard of consequences of his acts. Vehicle Code, § 505.

3. Automobiles 330

Negligence, even though it be gross negligence, is not "willful misconduct" on part of motorist and does not amount to "reckless driving". Vehicle Code, § 505.

See publication Words and Phrases, for other judicial constructions and definitions of "Reckless Driving" and "Willful Misconduct".

4. Automobiles 355(4)

Evidence was insufficient to sustain conviction of motorist for reckless driving. Vehicle Code, § 505.

Overton, Lyman, Prince & Vermille and Carl J. Schuck, all of Los Angeles, for appellant.

James Don Keller, Dist. Atty. of County of San Diego, and Harold P. Curtis, San Diego, and H. D. Cornell, Deputies Dist. Atty., for respondent.

PER CURIAM.

[1] Defendant was convicted in the Justice's Court of Encinitas Township, San Diego County, of reckless driving, contrary to Section 505 of the Vehicle Code. The gravamen of the offense is driving upon a public highway "in wilful or wanton disregard for the safety of persons or property".

The record presents several grounds of appeal, but the defendant has waived all grounds except the sufficiency of the evidence to sustain the conviction.

[2] To convict under Section 505 of the Vehicle Code, it is necessary that the trier of fact be convinced by the evidence beyond a reasonable doubt and to a moral certainty that the defendant in the management of his automobile at the time and place in question intentionally did something with knowledge that injury to another was probable or acted with a wanton and reckless disregard for the safety of others and in reckless disregard of the consequences of his acts.

We have reviewed many cases of our appellate tribunals construing the language of Section 505 of the Vehicle Code under varying circumstances. These definitions

are collected and well summarized in the case of *People v. McNutt*, 40 Cal.App.2d Supp. 835, 105 P.2d 657. In that case the court observed that the statute did not penalize a state of mind but penalized conduct indicating a state of mind that was wilful and was indicative of wanton disregard for the safety of persons or property. In seeking an objective test that could be applied to the conduct in question, the court decided that reckless driving was conduct such as would indicate consciousness of the results with intent to omit or do an act, realizing the probable injury to another; or, acting in reckless disregard of the consequences; or conduct exhibiting reckless indifference as to the probable consequences with knowledge of likely resulting injury.

Considering this definition, the court concluded that "reckless driving" and "wilful misconduct", which under the guest statute, 403, Vehicle Code, rendered a driver liable for injuries to his guest, were very similar. 40 Cal.App.2d Supp. at page 839, 105 P.2d at page 659 the court says: "On consideration of all these authorities, we find no substantial difference between wilful misconduct and reckless driving, and conclude that they are in truth the same thing, so far as they are concerned with the state of mind of the driver whose conduct is in question, so that the decisions construing the term 'wilful misconduct' may be applied to the statutory provision prohibiting 'reckless driving'."

The decision in *People v. McNutt*, supra, has been cited and followed on many occasions, and was approved by the supreme court in *People v. Young*, 20 Cal.2d 832, 129 P.2d 353, 356, in which the court came to the same conclusions in defining the language of Section 500 of the Vehicle Code (negligent homicide) as it existed at that time.

"Reckless disregard of the safety of others appearing in section 500 is doing an act while recklessly ignoring the safety of others. It is thus equivalent to, quoting from the definition, the 'intentional doing of an act with a wanton and reckless disregard of its possible result.' Wilful in-

difference to the safety of others, is an intentional lack of regard concerning the safety of others, or an 'intentional doing of something * * * with knowledge that serious injury is a probable * * * result.' With particular reference to a reckless disregard for the safety of others it is worthy of note that reckless driving is defined as driving a car 'in wilful or wanton disregard for the safety of persons.' Vehicle Code, § 505, St. 1939, p. 2107. And in a well reasoned decision by the superior court sitting as an appellate tribunal in *People v. McNutt*, 40 Cal.App.2d Supp. 835, 105 P.2d 657, the court concluded that reckless driving and wilful misconduct as specified by the Vehicle Code were the same. See, also, *People v. Thompson*, 41 Cal.App.2d Supp. 965, 108 P.2d 105; *People v. Nowell*, 45 Cal.App.2d Supp. 811, 114 P.2d 81. While it is true that with reference to the disregard for the safety of others in defining reckless driving, the character of the disregard is described as 'wilful or wanton' rather than 'reckless' as appears in section 500, there is no substantial difference." *People v. Young*, 20 Cal.2d 832, 837, 129 P.2d 353.

This court in *People v. Thompson*, supra, adopted the reasoning of the court in *People v. McNutt* in reversing a conviction for reckless driving.

[3] It is of course thoroughly settled that negligence, even though it be gross negligence, is not wilful misconduct and does not amount to reckless driving. *Meek v. Fowler*, 3 Cal.2d 420, 45 P.2d 194; *McCann v. Hoffman*, 9 Cal.2d 279, 70 P.2d 909; *Porter v. Hofman*, 12 Cal.2d 445, 85 P.2d 447.

Plaintiff is in accord with the construction placed upon the language of Section 505 of the Vehicle Code by the cited cases, but contends that the evidence in this case was sufficient to establish beyond a reasonable doubt to a moral certainty that the defendant drove his automobile in wilful or wanton disregard for the safety of the complaining witness and his children.

[4] Viewing the evidence here most favorable to the judgment, we believe it is insufficient to sustain the conviction.

The complaining witness, intending to take his children to the beach at Del Mar, had taken one child across the highway, leaving the other, and after having crossed the highway noticed the defendant driving toward him. When he saw the defendant approaching he waved his fishing pole back and forth to attract defendant's attention. The defendant did not slacken speed but continued to approach, and when approximately opposite the complaining witness, the complaining witness shouted at him and shook his fist. The defendant then slackened his speed, went about three-hundred feet to the end of the block, made a "U" turn and drove back toward the complaining witness. He stopped at the place where the complaining witness was standing. The complaining witness jumped away from the front of the defendant's car because he thought he was going to be hit, and thereupon swung his fishing pole at the defendant, hit the car and broke the pole. The defendant then suddenly put his car in reverse, left ten feet of skid marks and stripped the reverse gear in his haste to depart from the scene. An independent witness testified that he saw defendant almost hit the complaining witness, and upon being asked by the court whether in his opinion the defendant would have hit the complaining witness, he answered that he might have but that the complaining witness was extremely excited and did not know what he was doing at the time.

Other evidence indicated that defendant was driving slowly upon his return toward the complaining witness and was driving at a moderate speed when he first passed the complaining witness.

In applying the test of reckless driving as defined in cases to the defendant's conduct in this case, we find that his conduct does not amount to reckless driving nor does it amount to wilful misconduct. At most the defendant can be said to have been negligent, possibly grossly negligent, but there is no evidence that he wilfully and wantonly disregarded the safety of the complaining witness or that he acted with conscious and reckless disregard for the safety of the complaining witness or

his children, or that his conduct indicates a wanton and reckless disregard of probable (as distinguished from possible) injury to the complaining witness.

The testimony of the complaining witness that he jumped from the front of the defendant's car because he thought the defendant was going to hit him is insufficient to sustain the conviction when considered in the light of the circumstances and the state of mind of the complaining witness himself and his conduct both preceding and after the event complained of.

Considering all of the evidence in the record, we cannot find that defendant's conduct amounted to reckless driving under the circumstances and rules above stated. Judgment is reversed and a new trial is ordered in the Superior Court of San Diego County.



101 Cal.App.2d Supp. 912

PEOPLE v. BUCK.

PEOPLE v. GUERRA.

PEOPLE v. YOUNGREN.

No. 161612.

Appellate Department, Superior Court,
San Diego County, California.

Dec. 14, 1950.

Petition for Rehearing Denied Jan. 9, 1951.

Norman H. Buck, Miguel R. Guerra, and Louis C. Youngren were convicted in the Justice's Court of National Township of San Diego County, California, Lowell Howe, J., of violating county ordinance making it unlawful for anyone to drive a taxicab in unincorporated areas of county without first obtaining a permit to do so from sheriff, and from judgments of conviction and from orders denying motions in arrest of judgment, they appealed. The Superior Court, Appellate Division, Burch, J., held that ordinance as applied to defendants, did not contravene the commerce clause of the federal constitution.

Judgments and orders affirmed.

1. Commerce ⇨47

Taxicab drivers, who transported passengers for hire from the Republic of Mexico to San Diego County, California, were engaged in "foreign commerce". U.S.C.A. Const. art. 1, § 8, cl. 3.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Foreign Commerce".

2. Automobiles ⇨133

County ordinance providing that it shall be unlawful for anyone to drive or to be in actual physical control of any taxicab in unincorporated areas of San Diego County without first obtaining a permit in writing to do so from sheriff of county, and requiring examination by sheriff as to knowledge of applicant as to provisions of ordinance, vehicle code, traffic regulations and geography of county, and authorizing sheriff to deny permit if applicant is found to be of bad moral character or to have been convicted of an offense involving moral turpitude, was an exercise of the state's police power delegated by the state to board of supervisors of the county.

3. Commerce ⇨8(1)

The federal power over commerce is supreme. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

4. Commerce ⇨8(1)

The distribution of power between state and federal systems in regard to commerce belongs to Congress. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

5. Commerce ⇨8(1), 12

In event of conflict between state and federal system in regard to commerce, local law must give way to supremacy of federal law, whether local law be under taxing power or under police power in its more conventional sense. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

6. Commerce ⇨53

Not all the burdens on commerce, but undue or discriminatory burdens, are forbidden by the commerce clause of the federal constitution. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

7. Commerce ⇨8(12), 12

After Congress enters field of motor carrier transportation beyond state lines, the state law and the state's power to enact law in the same field stands or falls on intent of Congress to exercise exclusive jurisdiction or to accept the aid of the state. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

8. Commerce ⇨61(4), 63

One attacking, as unreasonably burdening commerce, the validity of a regulatory or taxing measure enacted by state authority for use of highways, has burden of showing want of reasonable relation to increased cost of maintenance and policing due to such traffic. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

9. Commerce ⇨62

County ordinance providing that it shall be unlawful for anyone to drive or to be in actual physical control of any taxicab in unincorporated areas of San Diego County, California, without first obtaining a permit in writing to do so from sheriff of county, and requiring examination by sheriff as to knowledge of applicant as to provisions of ordinance, vehicle code, traffic regulations, and geography of county, and authorizing sheriff to deny permit if applicant is found to be of bad moral character or to have been convicted of an offense involving moral turpitude, does not contravene the commerce clause of the federal constitution as applied to taxicab drivers transporting passengers for hire from the Republic of Mexico to a destination outside of unincorporated areas of San Diego County. U.S.C.A. Const. art. 1, § 8, cl. 3; art. 6, cl. 2.

10. Commerce ⇨62, 85(3)

Requirement of county ordinance that applicants for permit to drive a taxicab in unincorporated areas of county must show good moral character does not conflict with Federal Motor Carrier Act, does not coincide with any regulation of the Interstate Commerce Commission, and is not in conflict with the National Transportation Policy Act of 1940. Interstate Commerce Act, §§ 201-228, 203(b), 204(a)(2), 49 U.S.C.A. §§ 301-327, 303(b), 304(a)(2); Transportation Act of 1940, § 1, 49 U.S.C.A. note preceding section 1.

Manuel Ruiz, Jr., Los Angeles, for appellants.

James Don Keller, Dist. Atty., by Duane J. Carnes, Deputy Dist. Atty., San Diego, for respondent.

BURCH, Judge.

The defendants were convicted of a violation of Section 9 of San Diego County Ordinance No. 464 (N.S.) as amended by Ordinance No. 609 (N.S.), which provides that "it shall be unlawful for any person to drive or to be in actual physical control of any taxicab in the unincorporated areas of the County of San Diego without first obtaining a permit in writing so to do from the Sheriff of the County of San Diego." It then requires the payment of a \$1 fee annually; and examination by the sheriff as to the applicant's knowledge of the provisions of the ordinance; knowledge of the Vehicle Code, traffic regulations and geography of the county; and that the sheriff may grant or deny the permit or may revoke the same if he finds the person holding any such permit to be of bad moral character or convicted of an offense involving moral turpitude. Provision is made that if the permit is refused or revoked by the sheriff the applicant may appeal to the Board of Supervisors for a hearing thereon.

According to the agreed statement of facts, the defendants were arrested while driving taxicabs on the highways in unincorporated territory in San Diego County. The defendants were not stopping to pick up or discharge passengers, using the highways only as a means of transporting passengers for hire from the Republic of Mexico, on their way to a destination outside of the unincorporated areas of the County of San Diego. This was their usual course of business. When not in use the taxicabs were stationed in Tijuana, Republic of Mexico, and all passenger service originated there. The defendants are American citizens.

Each of the defendants had applied for and been denied the license required by the ordinance in question. One only of the defendants appealed from the sheriff's deci-

sion to the Board of Supervisors, but his appeal was denied. No one of the defendants has sought in the courts a review of the administrative action. Instead they contend that the ordinance, as applied to them, contravenes the commerce clause of the federal constitution, Article I, Section 8, Clause 3, and is therefore void.

Since the constitution and laws of Congress are the supreme laws of the land, we will have to decide whether the ordinance is valid as tested by the commerce clause and acts of Congress thereunder. In this connection, it has been held that neither a tax measure nor a police regulation by local authority may unduly burden nor be discriminatory as to the commerce clause. Our concern here is with a police regulation.

[1-7] The defendants were engaged in foreign commerce. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455. The ordinance is an exercise of the State's police power properly delegated by the legislature of the State to the Board of Supervisors of the county. In *re Martinez*, 22 Cal.2d 259, 138 P.2d 10. The federal power over commerce, Article I, Section 8, Clause 3, United States Constitution, is supreme, Article VI, Clause 2, United States Constitution. The distribution of power between the State and federal system in regard to commerce belongs to Congress. *Panhandle Eastern Pipe Line Co. v. Public Service Commission, etc.*, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128. In the event of conflict in that field the local law must give way to the supremacy of the federal law. *Francis et al. v. Southern Pacific Co.*, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798. This is true whether the local law be under the taxing power or under the police power in its more conventional sense. *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265. Not all burdens upon commerce but only undue or discriminatory ones are forbidden. *Postal Telegraph Cable Co. v. City of Richmond*, 249 U.S. 252, 259, 39 S.Ct. 265, 63 L.Ed. 590; *Western Live Stock et al. v. Bureau of Revenue et al.*, 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823; *McGoldrick v. Berwind-White Coal*

Mining Co., 309 U.S. 33, 46, 60 S.Ct. 388, 84 L.Ed. 565; *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888; *Nippert v. City of Richmond*, 327 U.S. 416, 425, 66 S.Ct. 586, 90 L.Ed. 760. It was recognized in *People of State of California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, that positive intervention by Congress was required to displace the reserve power of the State to promote safety and honesty in the business of motor carrier transportation beyond State lines. After Congress "enters the field" the State law and the State's power to enact law in the same field, stands or falls upon the intent of Congress to exercise exclusive jurisdiction, or to accept the aid of the State. *People of State of California v. Zook et al.*, 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005.

Congress entered the field of motor vehicle carriers for the first time by Act of August 9, 1935. 49 U.S.C.A. §§ 301-327. The National Transportation Policy Act was enacted September 18, 1940, c. 722, Tit. I, § 15, 54 Stat. 919. One of the declared purposes of the latter Act is "to cooperate with the several States and the duly authorized officials thereof". Section 1, 49 U.S.C.A. note preceding section 1. By Section 303(b) of the above motor vehicle act "taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini" are excluded except "It shall be the duty of the Commission * * * To regulate * * * qualifications and maximum hours of service of employees and safety of operation and equipment." 49 U.S.C.A. § 304(a) (2). In performance of this mandate the Interstate Commerce Commission has provided rules and regulations. Code Federal Regulations, Parts 190-197. These cover general definitions, hours of service, qualifications of drivers, driving of motor vehicles, accident reports, inspection and maintenance and carrying of explosives or other dangerous articles by motor vehicles.

Our question for the purpose of decision here is narrowed to whether the ordinance conflicts or coincides with the federal law

above outlined. In this respect the ordinance exacts of the defendants at the point where they complain an annual fee of \$1 which is no more than the cost of its administration. Defendants offer no evidence to the contrary. *Western Union Telegraph Co. v. Borough of New Hope*, 187 U.S. 419, 23 S.Ct. 204, 47 L.Ed. 240; *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252, 39 S.Ct. 265, 63 L.Ed. 590; *Sprout v. City of South Bend*, 277 U.S. 163, 169, 48 S.Ct. 502, 72 L.Ed. 833; *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953; *South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, etc.*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99.

[8] One attacking as unreasonably burdening commerce the validity of a regulatory or taxing measure enacted by State authority for the use of the highways, has the burden of showing a want of reasonable relation to the increased cost of maintenance and policing due to such traffic. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, etc.*, supra.

The principal requirement of the ordinance is that the carrier's operator be of good moral character. This is a reasonable requirement of police regulations. In *re Porterfield*, 63 Cal.App.2d 518, 536, 147 P.2d 15. There is no such specific requirement in the federal regulations, Parts 190-197. Having in mind the purpose of the Act of 1940, supra, to cooperate with the State and its duly authorized officials, we can see no conflict here.

In *People of State of California v. Zook, et al.*, 336 U.S. 725, 69 S.Ct. 841, 842, 93 L.Ed. 1005, Sections 654.1, 654.3, of the California Penal Code were found not to conflict with the Federal Motor Carrier Act though the latter "has substantially the same provision." A quotation from the *Zook* case may be helpful: "It is difficult to believe that the I.C.C. intended to deprive itself of effective aid from local officers experienced in the kind of enforcement nec-

essary to combat this evil—aid of particular importance in view of the I.C.C.'s small staff." 336 U.S. at page 737, 69 S.Ct. at page 847, 93 L.Ed. 1005.

[9] The State's interest in its own highways has been recognized superior to the federal interest against "burdening" commerce in *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (State law forbid on highways vehicles of width greater than 90 inches); *Clark et al. v. Poor et al.*, 274 U.S. 554, 557, 47 S.Ct. 702, 71 L.Ed. 1199 (carrier required to procure a certificate and pay a tax for use of highways); *Maurer et al. v. Hamilton et al.*, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969 (regulation of "size and weight"); *Hendrick v. State of Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385 (licensing and registration required of nonresident operator); *H. P. Welch Co. v. State of New Hampshire*, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500 (State law limits hours on duty); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, etc.*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (annual State tax levied for use of highways).

Defendants argue that *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 69 S.Ct. 657, 661, 93 L.Ed. 865, marks a departure from earlier decisions in interpreting the effect of local police regulations upon the federal commerce clause. The Court stated quite to the contrary: "New York's regulations * * * have been complied with. It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here."

Defendants contend that what San Diego County may do, every county and municipality in the State may do. The force of the argument in a proper case was recognized in *Nippert v. City of Richmond*, 327 U.S. 416, 425, 66 S.Ct. 586, 90 L.Ed. 760. The record does not disclose that defendants are required by any other political division than San Diego County to evidence their fitness to operate taxicabs on the State's highways.

A peculiar situation of San Diego County in relation to taxicab passenger traffic across the border from Mexico would seem to put the county in a position to exercise such control over this traffic as might ordinarily be exercised by the State legislature since taxicab control is delegated by the State to the county. See *Bob-Lo Excursion Co. v. Michigan*, supra.

[10] We are of the opinion that the ordinance's requirement of examination to show good moral character of taxicab operators does not conflict with the Federal Motor Carrier Act, nor does it coincide with any regulation of the Interstate Commerce Commission. Code Federal Regulations, Parts 190-197. The ordinance, moreover, in the respect mentioned, is not in conflict with the National Transportation Policy Act of 1940.

The judgments are affirmed.

TURRENTINE, P. J., and GLEN, J., concur.



101 Cal.App.2d Supp. 918
PEOPLE v. PAPAYANIS.
Cr. 2649.

Appellate Department, Superior Court,
Los Angeles County, California.

Dec. 26, 1950.

George Papayanis pleaded guilty of violating an ordinance of the City of Los Angeles by causing and permitting discharge of black oil from a navy tanker into the waters of Los Angeles Harbor, and he moved to set aside a judgment sentencing him to pay a fine of \$500. From an order of the Municipal Court of the City of Los Angeles, I. Clifford Higgins, J., granting the motion and dismissing the action, the People appealed. The Appellate Department of the Superior Court, County of Los Angeles, Bishop, J., held that the order was erroneous because defendant was charged with public offense and convicted by his plea, despite

conflicts between the ordinance and the State Fish and Game Code and the Harbors and Navigation Code.

Order reversed.

1. Municipal corporations ⚡641

An order granting defendant's motion to set aside judgment imposing fine on his plea of guilty of violating city ordinance by causing and permitting discharge of black oil from navy tanker into city harbor, and dismissing action against him, was erroneous, as he was charged with public offense and convicted by his plea, despite conflict between ordinance and State Fish and Game Code and Harbors and Navigation Code. Fish and Game Code, § 481; Harbors and Navigation Code, § 133.

2. Criminal law ⚡998

A trial court has no power to set aside its own judgment on plea of guilty, not improperly induced, and dismiss criminal action, in order to correct mere error committed by court, but such power must rest on very fundamental lack of jurisdiction.

3. Municipal corporations ⚡592(1, 2, 4)

A local ordinance may be in conflict with general law within constitutional provision authorizing municipalites to make and enforce within their limits local regulations not in conflict with general laws, if ordinance or general law prohibits what the other authorizes, general law purposely occupies entire field, or that which ordinance attempts to interdict is forbidden by state law. Const. art. 11, § 11.

4. Municipal corporations ⚡592(2)

A conflict between local ordinance and general law because ordinance attempts to interdict something forbidden by state law exists only to extent that same acts are made public offenses by both ordinance and law, and ordinance may validly contain further prohibitions not covered by general law. Const. art. 11, § 11.

5. Municipal corporations ⚡592(2)

The statute, declaring it a misdemeanor to discharge oil of any kind or form into state's navigable waters from vessel using oil for generation of power

or carrying more oil than necessary for its lubricating requirements, does not cover entire field of legislation, so that city ordinance prohibiting discharge of any oil, spirits, flammable liquid, etc., into waters of city harbor, is not invalid as in conflict with statute on such ground. Harbors and Navigation Code, § 133; Const. art. 11, § 11.

6. Municipal corporations ⚡592(2)

The Los Angeles city ordinance, prohibiting discharge of oil or other specified liquids and substances into city harbor, and state statute, prohibiting discharge of oil into state's navigable waters from vessels using oil to generate propulsion power or carrying more oil than necessary for their lubricating requirements, are in conflict, within constitutional provision authorizing municipalities to make and enforce local regulations not in conflict with general laws, to extent that both make it a misdemeanor to discharge oil into Los Angeles harbor from such vessels. Harbors and Navigation Code, § 133; Const. art. 11, § 11.

7. Municipal corporations ⚡592(2)

In prosecution for violating city ordinance by permitting discharge of black oil from navy tanker into city harbor, statute prohibiting discharge of oil into state's navigable waters from vessels using oil to generate power or carrying more oil than necessary for their lubricating requirements must be held supreme and ordinance invalid as in conflict with such statute, though there is no showing as to whether tanker used oil to generate power or had excess of lubricating oil; natural supposition being that it was a vessel within statute. Harbors and Navigation Code, § 133; Const. art. 11, § 11.

8. Indictment and Information ⚡1

A criminal complaint is filed in court having jurisdiction over ordinary misdemeanors, not for purpose of obtaining declaratory judgment concerning identity of law which People contend has been violated, but for purpose of prosecuting violator.

9. Municipal corporations ⇨592(2), 639(1)

Where act charged against defendant by criminal complaint is made a misdemeanor by both state statute and local ordinance, ordinance is invalid, but statute is valid and act remains a public offense, so that complaint states such an offense, though it refers to ordinance, instead of statute as basis for prosecution.

10. Criminal law ⇨252(3)

The Penal Code section, prescribing contents of complaint in municipal court, does not require reference to statute creating, or other legislative source of, offense charged. Pen.Code, § 1426.

11. Indictment and information ⇨154

Defendant failing to demur to complaint, charging public offense of discharging oil from navy tanker into city harbor in violation of either city ordinance or statute, on ground of uncertainty as to whether tanker was vessel generating its own power by oil, as required to bring it within statute, waived such defect. Harbors and Navigation Code, § 133; Pen. Code, § 1428.1.

12. Navigable waters ⇨14(3)

In prosecution under complaint charging that defendant caused and permitted discharge of black oil from navy tanker into waters of city harbor in violation of city ordinance, uncertainty of complaint as to whether tanker was vessel generating its own power by oil, within statute declaring discharge of oil into state's navigable waters from such vessels a misdemeanor, did not go to trial court's jurisdiction, as complaint stated public offense sufficiently to support judgment imposing fine on defendant's plea of guilty under either ordinance or statute. Harbors and Navigation Code, § 133.

13. Constitutional law ⇨265

Indictment and information ⇨59

No principle of procedure or due process requires that People or criminal complaint, charging offense under one of three conflicting legislative acts, advise defendant as to which of such acts he has violated, but it is sufficient to advise him of

criminal act alleged to have been committed by him, together with particulars required by Penal Code. Pen.Code, § 1426.

14. Municipal corporations ⇨641

Where criminal complaint plainly charged and defendant confessed that he caused or permitted discharge of black oil from navy tanker into waters of city harbor, trial court erred in setting aside its judgment, imposing fine on defendant's plea of guilty, because of defendant's contention that he violated section of State Fish and Game Code, instead of city ordinance, as alleged. Fish and Game Code, § 481; Pen. Code, § 1426.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Philip E. Grey, Deputy City Atty., all of Los Angeles, for appellant.

Lillick, Geary & McHouse, and Wm. H. Brainerd, all of Los Angeles, for respondent.

BISHOP, Judge.

[1] The defendant, charged with having violated an ordinance of the City of Los Angeles, entered a plea of guilty and was sentenced to pay a fine of \$500. Shortly thereafter he moved the trial court to set the judgment aside on the ground that the ordinance was in conflict with section 481 of the Fish and Game Code and with section 133 of the Harbors and Navigation Code. The trial court granted his motion and then dismissed the action, and in so doing erred, we have concluded, not because there is no conflict between the ordinance and the sections, but because in spite of such conflict the defendant was charged with a public offense, convicted by his plea, and the judgment of conviction was rightly imposed upon him.

[2] There is, of course, no such procedure prescribed as that which was followed in this case, whereby a trial court passes upon its own judgment, after the same is entered upon a plea of guilty, not improperly induced, sets it aside and then dismisses the action. We stress the pro-

cedural aspect of the case no further than to express the obvious conclusion that no such action lies within the power of the trial court to correct any mere error committed by it, but, if it ever has the power to so dispose of a case, it must be because of some very fundamental lack of jurisdiction. No such lack appeared in this case, and the People quite properly appealed from the order.

The complaint which initiated this case first of all alleged that "a misdemeanor, to-wit: Violation of Rule 38, Section 12, of the General Rules and Regulations of the Board of Harbor Commissioners of the City of Los Angeles was committed by [the defendant]." It continued by charging, among other things, "that he caused and permitted to be pumped, discharged and deposited from the U. S. Navy Tanker 'Tamalpais' located at Berth 151, in and into the waters of the Los Angeles Harbor, the following substances: Black Oil." The accusatory provisions of the complaint concluded by stating, "All of which is contrary to the form of the Ordinances and Resolutions adopted and approved by the Municipal authorities of said City, in such cases made and provided, and against the peace and dignity of the People of the State of California."

Although the complaint refers to "Rule 38, Section 12, of the General Rules and Regulations of the Board of Harbor Commissioners," we must deal with Rule 38 in its true character, that is, as a provision of Ordinance No. 79,895, adopted by the City Council in June, 1938. The ordinance by its terms ratifies, confirms and approves the rules and regulations theretofore adopted by the Board of Harbor Commissioners, and declares that any person who violates any of the rules and regulations so adopted shall be deemed guilty of a misdemeanor, and subject to a \$500 fine or six months' imprisonment, or both. Rule 38 provides: "It shall be unlawful for any person to pump, discharge or deposit, or to cause or permit to be pumped, discharged or deposited, or to pass or to allow to escape in or into the waters of Los Angeles Harbor any oil,

spirits, or flammable liquid, or any coal tar, or refuse or residuary product of coal, or any petroleum, asphalt, bitumen, or other carbonaceous material or substance, or any product or compound thereof, or any bilge water containing any of said materials or substances."

Unless it is "in conflict with general laws", this ordinance is obviously a proper exercise of the police power lodged in the City by section 11, Article XI, State Constitution, which reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Considering first the contention that there is a conflict between the ordinance and section 133 of the Harbors and Navigation Code, and that the conflict affects the present action, we find the provisions of that section to be: "Except in case of emergency imperiling life or property, or unavoidable accident, collision, or stranding, or as otherwise permitted by law, it is unlawful and constitutes a misdemeanor for any person to discharge, or suffer the discharge of oil by any methods, means, or manner, into or upon the navigable waters of the State from any vessel using oil as fuel for the generation of propulsion power, or any vessel carrying or having oil in excess of that necessary for its lubricating requirements, and such as may be required under the laws and prescribed rules and regulations of the United States and this State.

"As used in this section, the term 'oil' means oil of any kind or in any form, including fuel oil, oil sludge, and oil refuse * * *." The punishment fixed for a violation of this section, constituting, as it does, a misdemeanor, is made by section 19, Penal Code, the same as that prescribed by the city ordinance for a violation of its terms (that is, not to exceed six months' imprisonment, a fine of not over \$500, or both).

[3, 4] As we noted in *People v. Commons*, 1944, 64 Cal.App.2d Supp. 925, 929-930, 148 P.2d 724, 727-728, there are several modes by which a local ordinance may be

in conflict with general law. There is such a conflict if one prohibits what the other authorizes. Or the conflict may arise out of the fact that the general law purposely occupies the entire field, leaving no room for local regulation. A conflict is also held to exist when that which the city or county ordinance attempts to interdict is forbidden by some state law. The conflict last referred to exists, however, only to the extent that the same acts are made public offenses by the ordinance and the general law; the ordinance may validly contain further prohibitions not covered by the general law. *Natural Milk Producers Ass'n v. City and County of San Francisco*, 1942, 20 Cal.2d 101, 109, 124 P.2d 25, 29-30; *Remmer v. Municipal Court*, 1949, 90 Cal.App.2d 854, 856-858, 204 P.2d 92, 94-96.

[5, 6] Examining Rule 38 and section 133 in the light of these principles, we discover that they do conflict, in part. This is not because one prohibits that which the other authorizes, for neither authorizes anything. Nor is there the slightest foundation for the contention that the state statute covers the entire field. It is, quite obviously, very restricted in its prohibitions. In the first place, it concerns itself with the discharge into navigable waters of oil only, and while it carefully enlarges the meaning of oil to include oil "of any kind or in any form," it is still "oil" and oil alone with which it is dealing. Secondly, it is not oil from every source that is the subject of the statute's concern, but only oil from a vessel using oil to make the vessel go, or carrying oil in excess of its lubricating requirements. The ordinance, on the other hand, prohibits the discharge not only of oil (generally) but of many other substances than oil and does not care where the oil or other substances come from, but only where they go. As a result, however, both section 133 and Rule 38 do make it a misdemeanor for a person to discharge oil into Los Angeles Harbor from a vessel using oil as fuel for the generation of propulsion power or having too much lubricating oil ("except in cases of emergency," etc.) and to this limited extent the two are in conflict.

[7] "Black oil" is oil, moreover, and so the complaint in this case may come within the area of conflict. "May," we are forced to say, for there is nothing in the record so far to tell us whether or not the vessel from which the oil was discharged, the U. S. Navy Tanker *Tamalpais*, used oil to generate its own power or had an excess of lubricating oil. The natural supposition, however, is that it was a vessel coming within the terms of section 133, for we know that there are almost no coal or corn cob burning vessels on the coast, and so we take the position urged by the defendant, that is, that section 133 is supreme, and that Rule 38 has no validity, in this case.

[8, 9] At this point we would emphasize that a criminal complaint is filed in a court having jurisdiction over ordinary misdemeanors, not with the purpose of obtaining a declaratory judgment concerning the identity of the law that the People contend has been violated, but with the purpose of prosecuting the violator. If, perchance, the act charged against the defendant is made a misdemeanor both by a state statute and a local ordinance, while this situation prevails the local ordinance has no validity, but the state statute has, and the act remains a public offense. A complaint which alleges that the defendant committed the act states a public offense, therefore, and it continues to be stated even though the complaint refers to the ordinance instead of the statute as the basis for the prosecution.

The conclusion we have thus expressed is supported by authority. *Ex parte Taylor*, 1890, 87 Cal. 91, 25 P. 258, 259, involved the contention that an ordinance of the City of San Jose, which declares it to be unlawful to obstruct a street or sidewalk, was invalid because in conflict with the state statutes declaring such obstruction a nuisance and declaring one who maintains a nuisance guilty of a misdemeanor. Two conclusions were reached, the second one concurred in by all the justices: first, there was no conflict between the general law and the ordinance; second, if a conflict existed, even so, the

petitioner, who had been convicted, was not entitled to his discharge, for "The complaint states facts which constitute a public offense under the statute, and alleges that they were done 'contrary to the form of the statute in such case made and provided * * *.' * * * Both the offense and the penalty were within the jurisdiction of the justice's court."

[10] The case just cited may be distinguished from ours in that in our complaint the *contra formam statuti* statement was "all of which is contrary to the form of the Ordinances and Resolutions adopted and approved by the Municipal authorities * * *." This distinction is an irrelevant one, however, as will appear from a consideration of *Ex parte Mansfield*, 1895, 106 Cal. 400, 39 P. 775, 777. In that case, we find, a county ordinance made it a misdemeanor to carry on a business without a license, the very thing that section 435 of the Penal Code did. Two contentions were made: (1) that because of the conflict, the provision of the ordinance was void; (2) that the prosecution was under the ordinance because "the complaint on which he was tried referred only to the ordinance, and did not conclude with the declaration that his acts were contrary to the form, force, and effect of the statute." The Supreme Court agreed with the first contention; the provision of the ordinance was void. The petitioner was remanded, nevertheless, because section 1426, Penal Code, prescribing the contents of a complaint in a justice's court, did "not include a conclusion to the statute", as the common law had required. Section 1426, Penal Code, today prescribes the contents of a complaint in a municipal court, as well as in a justice's court, stating: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified." Neither in this sentence nor in any other sentence of the section is there any requirement of a reference to the statute or other legislative source of the offense charged.

The problem was again presented in *Re Murphy*, 1923, 190 Cal. 286, 212 P. 30. This time an ordinance of the City and County of San Francisco was involved, one making it a misdemeanor to drive an automobile in other than a careful manner, with due regard to the safety of others. The petitioner had been sentenced to fifty days in jail upon his conviction under a complaint, which after alleging the careless driving, without regard to others, continued, "Thereby violating the provisions of sections 2 and 83 of Ordinance No. 1850 (New Series) of the Board of Supervisors of the City and County, contrary to the form, force and effect of the Statute [etc.]," and he wanted out, because he had been convicted under a void ordinance, the state law prohibiting the same acts as did the city ordinance. Our Supreme Court held the ordinance void, because of the conflict, but refused to release the petitioner, concluding that the complaint's reference to the ordinance was uncalled for and did not change the fact that an offense under the statute was stated, and that the petitioner had been properly convicted.

The defendant was discharged in *Ex parte Mingo*, 1923, 190 Cal. 769, 214 P. 850, but for the reason that the superior state law provided no imprisonment. In disposing of the point of interest to us, the Supreme Court stated 190 Cal. at page 771, 214 P. at page 850: "The mere fact that the complaint alleged a violation of the county ordinance instead of the state law would not render the judgment void in so far as the facts alleged and proved showed a violation of the state law. [Citing cases.]"

We would not have dwelt on this point so lengthily but for two cases: In *re Sic*, 1887, 73 Cal. 142, 14 P. 405, and In *re Portnoy*, 1942, 21 Cal. 2d 237, 131 P.2d 1. It was held in each of these cases that a conflict existed between a local ordinance and a general law; that the local ordinance was void because of the conflict; and, as a result, a conviction purportedly based on the ordinance was insufficient excuse for petitioner's imprisonment. This was

said of *In re Sic* in *Ex parte Taylor*, supra, 87 Cal. 91, 95, 25 P. 258, 259: "In *Re Sic*, 73 Cal. 142, 14 P. 405, relied upon by the petitioner, the question whether the judgment was valid, notwithstanding the invalidity of the ordinance, was not raised or considered." The same comment can be made of *In re Portnoy*. None of the cases that we have relied upon was considered and either distinguished or overruled in the *Portnoy* case. There is nothing in the case, other than the result reached, that is inconsistent with the cases upon which we rely. We do not regard them as being overruled or superseded, just overlooked. We make bold, therefore, to continue to follow them.

[11, 12] We have been considering the complaint as though it stated a public offense created by section 133, Harbors and Navigation Code. But, as we noted earlier, it does not clearly do so, for nowhere is the character of the vessel alleged. We do not deem this important, however, because of the dilemma in which the defendant is placed. It does not matter, really, whether the vessel generates its power by oil or does not. True, in the one case he who discharges black oil violates section 133, but in the other case he violates the ordinance. The defendant argues that he was prejudiced by the prosecution under the ordinance because it cut off the defenses he would have had under the code section. Possibly they were eliminated by the stricter ordinance. We do not decide this question, for in this case the defendant essayed no defense (that he came within an exception to the statute); he pleaded guilty. If he was under any disadvantage by not knowing the character of the vessel he could have attacked the complaint for its uncertainty in that particular by a demurrer. Section 1428.1, Penal Code. Having failed to demur, he waived the defect (section just cited). In any event, the uncertainty was not one going to the jurisdiction of the court. The complaint stated a public offense, either under the ordinance or the section, plainly sufficient to support the judgment that was entered, See *In re Jingles*, 1946, 27 Cal.2d 496, 165 P.2d 12.

[13, 14] We conclude, furthermore, that at some points the ordinance and section 481 of the Fish and Game Code touch the same subjects and are in conflict. That section reads: "It is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this State, any petroleum, acid, coal or oil tar, lamp black, aniline, asphalt, bitumen, or residuary product of petroleum, or carbonaceous material, or substance, or any refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill or factory of any kind, or any sawdust, shavings, slabs, edgings, or any factory refuse, or any lime, any *cocculus indicus*, or any slag, or any substance or material deleterious to fish, plant life, or bird life." The punishment for a violation of this section is set by section 1410, Fish and Game Code, at a minimum fine of \$100 or imprisonment for twenty-five days, with a maximum of \$500 or six months, or both.

We are not bringing our judicial notice of the laws of chemistry into sufficiently sharp focus to enable us to determine whether or not "black oil," the subject of the complaint, which, being oil, is covered by the ordinance, is also one of the materials referred to in the section just quoted, because, by reason of the principles already discussed, there is no need to. The complaint charged that the defendant caused black oil to get into the waters of Los Angeles Harbor. If this act was covered by section 481, Fish and Game Code, the judgment of a \$500 fine, entered upon defendant's plea of "guilty," was authorized by the combined provisions of sections 481 and 1410. If the act charged was not one of those covered by section 481, then disregarding section 133 of the Harbors and Navigation Code, the city ordinance was violated, and the judgment was authorized.

We can understand that a defendant, who is called upon to plead to and to defend against a complaint making a charge which comes under one of three conflicting legislative acts, would like to know which one is controlling. There is no principle of procedure that requires the com-

plaint, or the People, to advise him which law he has violated, and no principle of due process requires that he be so advised. It is enough that he be advised of the act which he is charged with having committed, together with the particulars required by section 1426, Penal Code. In this case before us such an act was plainly charged. The defendant confessed that he had com-

mitted it. The trial court should not have set the fully authorized judgment aside because of the contention that it was a state law and not the ordinance which the defendant had violated.

The order appealed from is reversed.

SHAW, P. J., and STEPHENS, J., concur.

36 Cal.2d 599

CALL et al. v. PETERSON.**L. A. 21809.****Supreme Court of California, in Bank.****Jan. 17, 1951.**

Petition by Joseph L. Call, and others, judges of municipal court of the City of Los Angeles whose terms of office expire June 30, 1951 to secure a writ of mandate to compel Walter C. Peterson, City Clerk of the City of Los Angeles, to take the necessary steps for the election of judges to the municipal court at the city election to be held in 1951. The Supreme Court, Gibson, C. J., held that under the constitutional amendment in 1950 establishing a new system of municipal and justice courts in the state, which amendment was to become effective January 1, 1952, the judges of the municipal court of Los Angeles whose term of office expire in 1951, were required to stand for election in the regular city election in 1951.

Writ granted.

Judges ☞3

Under 1950 constitutional amendment establishing a new system of municipal and justice courts in the state, which amendment was to take effect on January 1, 1952, judges of municipal court of City of Los Angeles whose terms of office expire June 30, 1951, were required to stand for election in regular city election to be held in 1951, pursuant to municipal court act of 1925. Gen. Laws, Act 1880, §§ 2, 3, 8; Act 5238; Const. art. 6, § 11, as amended in 1950.

Herman F. Selvin and Loeb & Loeb, all of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Los Angeles, and Roger Arnebergh, Asst. City Atty., Los Angeles, for respondent.

GIBSON, Chief Justice.

Petitioners, judges of the Municipal Court of the City of Los Angeles whose terms of office expire June 30, 1951, seek a writ of mandate to compel respondent city clerk to take the necessary steps for the election of judges to that court at the city election to be held in 1951 pursuant to the Municipal Court Act of 1925. 2 Deering's

Gen. Laws, Act 5238. That act provides that the election laws of the city in which a municipal court is established shall be applicable to the judges of that court.

Under the Los Angeles City Charter the primary election will be held on the first Tuesday in April, and the general municipal election on the last Tuesday in May, 1951. The charter requires nominating petitions to be filed at least forty-five days before the primary election, and a city ordinance provides that, as a condition to the issuance of nominating petitions, a candidate shall file with the city clerk, on a form prepared and furnished by the clerk, a signed declaration of intention to become a candidate. Respondent has refused to prepare and furnish these forms, claiming that by virtue of the amendment of section 11 of article VI of the Constitution in November, 1950, and the enactment of the Municipal and Justice Court Act of 1949, 1 Deering's Gen. Laws, Act 1880, petitioners are to be continued in office until their successors have been elected at the general state election to be held in 1952.

Section 11 of article VI as amended in 1950 establishes a new system of municipal and justice courts in this state. It provides, however, that each existing court shall continue to function as presently organized until the first selection and qualification of the judge or judges of the new court by which it is superseded, and that judges of municipal courts heretofore established pursuant to general law shall continue in office during the terms for which they were elected or appointed and until their successors are elected and qualify.

Supplementary legislation required to put the system into operation was enacted in 1949 and was validated and made effective by the 1950 amendment. 1 Deering's Gen. Laws, Act 1880. This legislation provides in some instances for the automatic succession of incumbent judges as the method for the first selection of judges of the new courts, and in those instances the new system will begin to function on January 1, 1952. Act 1880, §§ 2 and 3. Where automatic succession does not occur, the

existing courts will continue to function until the judges of the new courts are elected at the general state election in 1952 and qualify for office. Act 1880, § 2. The primary is included in the general state election, and a judge may, of course, be elected at the primary. See Cal.Const. art. II, §§ 2 1/2, 2 3/4; art. VI, § 6; Elections Code, §§ 950, 951; Deering's Gen. Laws, Act 1880, § 8.

It is clear that there will be automatic succession of judges in the Municipal Court of the City of Los Angeles and that insofar as that court is concerned the system goes into effect on January 1, 1952. Until that time the election of judges is governed by the Municipal Court Act of 1925 and by article VI of the Constitution as it read prior to amendment in 1950. Although the 1949 act became effective upon the adoption of the constitutional amendment, provision is made for a period of transition during which the reorganization will take place. The procedure adopted by the amendment and supplementary legislation is similar to that used when new courts were created in 1862. In commenting on that reorganization this court said, In the Matter of Oliverrez, 21 Cal. 415, 418, "there is no incongruity or inconsistency in the amendments taking effect at once, so far as to authorize the necessary measures to be taken for the organization of the new Courts, while the former provisions continue in force so far as to uphold the existing Courts * * * until the new Courts shall be prepared to exercise the jurisdiction intended to be substituted. The old provisions will cease to have effect, from time to time, as the substituted provisions commence to operate."

The judges elected at the city election in 1951 will automatically succeed to judicial positions in the new or superseding municipal court on January 1, 1952, and will serve for the balance of the six-year terms for which they are elected. Art. VI, § 11; 1 Deering's Gen. Laws, Act 1880, § 8. At the close of their six-year terms in 1957 these judges will be continued in office until their successors have been elected at the general state election in 1958 and have qualified. This follows from

the provision of section 8 that if the time fixed for the election of the successor of an incumbent municipal court judge is at a time when no general state election is held, "such judge shall continue to hold office until his successor has been elected and qualifies, said election to be held at the general state election next succeeding the expiration of his term."

Similarly, other incumbent judges of the Municipal Court of the City of Los Angeles will automatically become judges of the superseding municipal court on January 1, 1952, and they will not only serve for the remainder of the terms for which they were elected or appointed, but they will also continue to serve thereafter until their successors are elected at the first general state election following the expiration of their terms and have qualified.

Let the peremptory writ issue forthwith as prayed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.



36 Cal.2d 615

PEOPLE v. STROBLE.

Cr. 5100.

Supreme Court of California, in Bank.

Jan. 19, 1951.

Rehearing Denied Feb. 15, 1951.

Fred Stroble was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., for first degree murder, and he appealed from judgment imposing death sentence and order denying his new trial motion. The Supreme Court, Schauer, J., held that evidence independent of defendant's confessions was sufficient to show that the murder was deliberate and premeditated.

Judgment and order affirmed.

See also, 96 Cal.App.2d 346, 215 P.2d 749.

I. Criminal law ⇨1186(1)

The Supreme Court will not reverse a judgment solely as a rebuke to law en-

forcement officers for their own lawless acts and improper administration of law, independent of the trial which resulted in the judgment.

2. Homicide $\Rightarrow$ 232

Evidence independent of defendant's confessions was sufficient to show that murder was deliberate and premeditated.

3. Criminal law $\Rightarrow$ 633(1), 700, 1166½(1), 1171(1)

The district attorney's press releases during course of confessions and the taking of news photographs and televising of scenes in court room were improper but were not reversible error where jury's verdict was not influenced thereby.

4. Constitutional law $\Rightarrow$ 265

Criminal law $\Rightarrow$ 1169(12)

The introduction in evidence of confession resulting from physical abuse or psychological torture or a combination of both, if confession was admissible at all, would offend due process clause of federal Constitution, but use of confession was not reversible error where defendant thereafter without any coercion made five similar confessions after consulting with counsel and appearing before magistrate. U.S.C.A.Const. Amend. 14.

5. Arrest $\Rightarrow$ 70

The delay in taking defendant before magistrate until morning after day of arrest was unnecessary so as to be in violation of defendant's constitutional and statutory rights, where municipal court was open for business and was located in same building as district attorney's office in which defendant was held and questioned for two hours on afternoon of day of arrest. Pen.Code, §§ 145, 814, 825, 848, 858; Const. art. 1, § 8.

6. Criminal law $\Rightarrow$ 641(1)

The refusal to permit attorney, who at request of defendant's son-in-law arrived at 1:43 p. m. in district attorney's office in which defendant was being questioned, to consult with defendant until 9:30 p. m. was in violation of defendant's constitutional and statutory rights. Pen.Code, §§ 825, 858; Const. art. 1, § 8.

7. Arrest $\Rightarrow$ 70

Criminal law $\Rightarrow$ 641(1)

Officers' delay in taking defendant before magistrate and in not permitting defendant's attorney to promptly consult with defendant is illegal even though similar conduct may not be unusual and such conduct may make the work of the police and district attorney easier. Pen.Code, § 825; Const. art. 1, § 8.

8. Criminal law $\Rightarrow$ 1166(1), 1166½(1)

The denial of defendant's constitutional and statutory rights to be taken promptly before magistrate and to consult immediately with his attorney on attorney's arrival at district attorney's office was not reversible error, where outcome of defendant's trial was not affected thereby in view of the fact that the defendant continued repeatedly to make detailed confessions after consultation with attorney. Pen.Code, § 825; Const. art. 1, § 8.

9. Criminal law $\Rightarrow$ 232

Defendant was not deprived of effective representation by counsel at preliminary hearing which on Friday was set for Monday, on ground of insufficient time for counsel to prepare, where deputy city public defender appointed on Friday to represent the defendant stated on Monday that deputy was ready and did not request continuance and defendant was not in any way prejudiced.

10. Criminal law $\Rightarrow$ 1166½(6)

Defendant was not prevented from disclosing possible bias on part of juror by ruling refusing further examination of juror concerning matter disclosed by informer, where counsel for defendant and for the people agreed that if there was any question as to the juror's disqualification an alternate juror would be substituted and investigation by such counsel disclosed that the informer's charges against juror were unfounded.

11. Criminal law $\Rightarrow$ 641(4)

Defendant's right to counsel does not include the right to be represented by a particular deputy public defender.

12. Criminal law **§641(6)**

Defendant was not deprived of right to counsel by withdrawal of deputy public defender from active representation of defendant, where defendant thereafter was properly and adequately represented by another deputy.

13. Jury **§29(1)**

Evidence whether defendant understood meaning of "waiver of jury" was sufficient to show that waiver was valid.

14. Criminal law **§624**

The submission of issue of defendant's sanity on testimony adduced at trial of not guilty issue and on written reports of six physicians who had examined defendant was not error in absence of showing that any harm was done to defendant's cause by the manner in which the sanity issue was submitted.

15. Criminal law **§1186(1)**

Misconduct which does not make the trial unfair and does not amount to a breach of due process is not ground for reversal of conviction. U.S.C.A.Const. Amend. 14.

John D. Gray, Harold J. Ackerman and Harry Kotlar, all of Los Angeles, Clore Warne, Beverly Hills, Edmund W. Cooke, A. L. Wirin, Fred Okrand, Loren Miller, Robert S. Morris, Jr., Bayard F. Berman and Leon M. Cooper, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., W. E. Simpson, Dist. Atty., and A. Alexander, Deputy Dist. Atty., Los Angeles, for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment which imposes the death sentence and from an order denying his motion for a new trial. He was charged with murder and pleaded not guilty and not guilty by reason of insanity. The death sentence was imposed pursuant to a jury verdict which found him guilty of first degree murder and the trial court's finding, after waiver of jury on the insanity phase of

the trial, that he was sane at the time of the homicide. We have concluded that defendant was fairly tried and properly convicted.

[1] It is true, as defendant points out, that the record discloses that representatives of the People, prior to the trial, were guilty of flagrant misconduct. Such misconduct, however reprehensible, does not appear, under the extraordinary circumstances of this case, to have materially affected the regularity of defendant's trial and conviction; and it is not the function of this court to reverse a judgment solely as a rebuke to "law enforcement" officers for their own lawless acts, and improper administration of law, independent of the trial which resulted in that judgment.

Sufficiency of Evidence

Defendant urges that the evidence does not show deliberation and premeditation. Except as to this issue there is little conflict in the evidence as to any significant fact, either objective (defendant's physical acts, which included the infliction of many mortal wounds) or subjective (defendant's state of mind, which included the ultimate fact of specific intent to kill). There is much expert testimony variously interpreting defendant's state of mind in relation to "deliberation" and "premeditation." Defendant did not take the stand; his description of his unwitnessed behavior is found in seven detailed confessions, all in substantial accord, and at least five of which appear to have been voluntarily and legally given.

Defendant's victim was a girl six years of age. On the day of the killing (November 14, 1949) defendant, a man of 68, was in a state of nervous apprehension and had been drinking alcoholic beverages. This mental state, which was an important contributing cause of the homicide, arose in the following manner: Four months previously defendant had been arrested on a charge of contributing to the delinquency of minors. The charge was based largely upon his having assertedly fondled small girls to satisfy his sexual desires. Defendant was released on bail. He did not appear for trial, but fled from the state,

and a warrant for his arrest was issued. In November he furtively returned to Los Angeles to visit his daughter, son-in-law and their children. The son-in-law told defendant that he must surrender to the authorities. Defendant was terrified at the prospect of going to the police; he promised to, but did not, do so.

Defendant was alone in the home of his daughter and son-in-law on the afternoon of November 14. His victim came to the house seeking defendant's grandchild, her playmate. Defendant kissed and fondled her. Assertedly, the child on previous occasions had submitted to such treatment without protest and with apparent pleasure. On this occasion, however, she objected and started to scream. Defendant, in a terrified attempt to silence her, choked her with his hands. She became quiet; he stopped choking her; then she moved again; and defendant knotted a necktie tightly around her neck. Then, with intent to kill the child (who was not yet dead) in order to terminate her suffering, defendant inflicted the following injuries with various instruments which he obtained successively from various places: Two hammer blows on the temple; three stab wounds, two in the chest and one in the back, with an ice pick; six skull fractures with the blunt end of an axe; one stab wound, which cut the spinal cord, in the back of the neck with a kitchen knife. The last wound was in imitation of the final wound which defendant had seen inflicted on bulls at bull fights.

Defendant then went to Ocean Park, rented a room under an assumed name, and spent two days wandering about. On the morning of November 17 he returned to Los Angeles. He was sitting in a bar at Fifth and Hill Streets, drinking beer and attempting to decide whether he should get in touch with his family, the attorney who had represented him in connection with the pending morals charge, or the police, when he was arrested.

Corpus Delicti

[2] Defendant urges that the corpus delicti was not proved by evidence independent of his confessions. He argues

that there is nothing in the record except his extra-judicial statements which could show that the murder was deliberate and premeditated, because (citing *People v. LeTourneau* (1949), 34 Cal.2d 478, 487, 211 P.2d 865) deliberation and premeditation cannot be inferred from the manner in which the wounds were inflicted. The *LeTourneau* case does not support this argument. There, *LeTourneau's* attorney asked the autopsy surgeon whether "whoever inflicted the wounds on this woman certainly must have been operating at the time under an abnormal * * * frame of mind." An objection to this question was held to have been correctly sustained, in that, as was expressly pointed out, "it is not shown that from the nature of the wounds alone the doctor could draw any material inferences which the jury themselves could not draw"; it is not there suggested that the jury could draw no inferences from the condition of the victim's body. Here, five different implements were used, each in a manner evidencing an intent to inflict death, not merely injury or random mutilation. There is evidence apart from defendant's confessions that before the child's death the implements were at various places about the premises. An inference can be drawn that the killer who collected and used the implements had determined that he wished to bring about death and carried out that determination. This, in the light of the other circumstances including the charges against defendant which were then pending, is a sufficient prima facie showing of deliberation and premeditation.

Asserted "Atmosphere of Public Pressure"

Defendant claims that he was deprived of a fair trial because the trial court did not protect him from, and the district attorney fostered, "public pressure." The killing and the subsequent search for defendant received much publicity. Immediately after defendant's arrest he was taken to the office of the district attorney, interrogated, and confessed. The district attorney, even before defendant completed his statement, released to the press details of the statement (including defendant's admissions of sex play with his victim

and other children on occasions prior to the killing) and also announced his belief that defendant was guilty and sane. At the time of defendant's arrest and at the time of his trial (which began some 7 weeks later) there was notorious widespread public excitement, sensationally exploited by newspaper, radio and television, concerning crimes against children and defendant's crime in particular. In these circumstances, defendant urges, it was impossible for him to obtain an unbiased jury, and due process requires a new trial even though there is no showing that any juror was actually influenced by the sensational publicity and the popular hysteria.

In connection with his claim of "public pressure" defendant also calls attention to the following statement by one of his counsel (veteran deputy public defender John J. Hill; defendant was not then represented by his present private counsel) made during his closing argument: "I wish to make this commentary with reference to just what has occurred before the Court took the Bench. I refer to the televising and the pictures taken of the jury entering the box, and with counsel. * * * I don't like this added publicity in the case; and yet we conform, we cooperate with the men, our fellow human beings in the vocation, and therefore we accept it as part of what we have to expect in a case that has attracted so much attention, that has been so widely publicized, and concerning which there have been utterances over the radio, in the public press, which have unduly accentuated the importance of this case * * * [W]e shall not be influenced in the slightest degree in that calm deliberation, dispassionate discussion, and arriving at a verdict under the institutions under which we live, and concerning which we are proud: the American way of the conduct of a trial."

[3] It seems that the traditional concept of the "American way of the conduct of a trial," particularly a trial for a sordid criminal offense such as that of defendant, includes both the aspects mentioned so understandingly by Mr. Hill: on the one hand over-stimulation, by mass media

of communication, of the usual public interest in that which is gruesome; on the other hand a trial by a judge and jury immune from the public passion. General denunciations of the journalistic sensationalism which customarily surrounds a trial such as that of defendant, and which did surround defendant's trial, do not solve the question whether defendant's trial was fair. We may agree with defendant that it was improper for the district attorney to issue "play-by-play bulletins" during the course of defendant's confession. But there is no indication that the jury, two months after the improper statements were made and immediately after hearing evidence, based their verdict on the newspaper accounts of the statements rather than upon the evidence. We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the court room; but there is no indication that the jury's verdict was influenced by the taking of the pictures or the televising of court room scenes.

As defendant points out, the bias of jurors who have been exposed to repeated sensational publicity concerning a case is likely to be unconscious; they may honestly disclaim bias and yet have unknowingly prejudged the case. But where, as here, the defendant has been represented by able and experienced counsel, the evidence of guilt is ample, and the presentation of the case in court (despite the improper taking of pictures and televising) is fair, we should not reverse because of mere speculation that the jury might unconsciously have been improperly influenced adversely to defendant in the performance of their duties.

Confession of Defendant Made in the District Attorney's Office Immediately After Arrest

Defendant contends that admission in evidence of this confession was a denial of due process. There is no claim that the confession is false; in fact, defendant relies on it as true in his discussion of the asserted insufficiency of the evidence; and its substance is the same as that of other confessions which were put in evidence without

suggestion that they were coerced or made under the influence of the asserted previous coercion.

It is asserted that the following circumstances made the first confession involuntary: Prior to defendant's arrest, a complaint charging him with murder had been filed and a warrant for his arrest had been issued. At about 11:50 a. m. on November 17, 1949, defendant was arrested. The arresting officer "pulled him off the stool [in a bar where defendant was drinking beer] and searched him" and took him to the park foreman's office in adjacent Pershing Square. There the officer at once reported by telephone to the Homicide Division. Defendant was asked "if he was guilty of what he was accused and he mumbled something under his breath that sounded like 'I guess I am,'" and the park foreman slapped defendant with his open hand, knocking off defendant's glasses. The officer then searched defendant thoroughly; he "stood Stroble up facing the wall and put his hands up against the wall * * * and kicked his feet out so he would be off balance for the search. [T]wo or three times he put his feet forward," and the officer "just kicked his feet back out again." The kicks assertedly were directed at defendant's toes "and possibly it slipped off and he hit his shin once or twice." Then, while waiting for the homicide officers, the arresting officer "was pacing back and forth and he took out his sap stick and he held it up and asked Fred Stroble if he had ever seen one of these," and waved it under defendant's nose. Defendant said nothing and the officer put away the stick. A police car arrived, defendant was taken to Wilshire Station, and at 12:30 p. m. he was turned over to the homicide officers who were working on the case. They took defendant to the Hall of Justice. Instead of taking him before a magistrate immediately (the Municipal Court was on the 7th floor of the Hall of Justice) they took him to the district attorney's office (which was on the 6th floor of the same building). Defendant arrived at 1 p. m. and was questioned until 3 p. m. Before defendant entered the office a wire recorder had been put in operation, and the questioning was recorded. The ques-

tioning was also taken in shorthand by five stenographers, working in relays. There were present 19 representatives of the police department and the district attorney, but practically all the questioning was done by a single deputy district attorney. Defendant was offered water and cigarettes and was not physically mistreated during the questioning. Prior to the questioning he was not advised that he had any right to counsel or that his statements could be used against him. He did not ask to communicate with his family or a lawyer, but he was not informed that, as will hereinafter appear, an attorney who had previously represented him was attempting to communicate with defendant.

[4] We may assume, that as a matter of law under the circumstances shown, this first confession was the result of physical abuse or psychological torture or a combination of the two (cf. *Watts v. Indiana* (1949), 338 U.S. 49, 69 S.Ct. 1347, 1357, 93 L.Ed. 1801; *Turner v. Pennsylvania* (1949), 338 U.S. 62, 69 S.Ct. 1352, 1357, 93 L.Ed. 1810; *Harris v. South Carolina* (1949), 338 U.S. 68, 69 S.Ct. 1354, 1357, 93 L.Ed. 1815, reversing convictions because of the admission of confessions elicited after intensive questioning by relays of officers for hours a day over periods of days). We may further assume that from the record it appears as a matter of law that defendant, although legally sane, was of somewhat weakened mentality (the result of arteriosclerosis and the excessive use of alcohol), and that this first confession was the result of terror indubitably following from the slap by the park foreman, the repeated acts of battery by the arresting officer when he searched defendant, and the presence of 19 law enforcement officials and 5 stenographers while defendant was questioned. The introduction in evidence of such a confession, if it were material at all, would offend the due process clause of the Fourteenth Amendment. (See *Ashcraft v. State of Tennessee* (1944), 322 U.S. 143, 154, 64 S.Ct. 921, 88 L.Ed. 1192; *Haley v. State of Ohio* (1948), 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224; see also *Foster v. State of Illinois* (1947), 332 U.S. 134, 137, 67 S.Ct. 1716, 91 L.Ed. 1955; *Gibbs v. Burke*

(1949), 337 U.S. 773, 781, 69 S.Ct. 1247, 93 L.Ed. 1686. But here the use of the first confession could not have affected the fairness of defendant's trial, because defendant thereafter made at least five confessions, of materially similar substance and unquestioned admissibility, which were put in evidence. It does not appear that the outcome of the trial would have differed if the first confession had been excluded, nor does it appear that the coercive influence surrounding the first confession continued to operate on the mind of defendant and induce subsequent confessions which were made after defendant had consulted with counsel and been taken before a magistrate (cf. *People v. Jones* (1944), 24 Cal.2d 601, 609, 150 P.2d 801).

Violation of Defendant's Rights to be Taken before a Magistrate and to Counsel Immediately After his Arrest

Defendant's first two confessions (one made in the district attorney's office and one made shortly thereafter to the county jail physician) were obtained during a period when rights of defendant under the state Constitution and Penal Code were being flagrantly violated. At 1:43 p. m., while defendant was making his first confession, John D. Gray, an attorney at law, arrived at the district attorney's office and asked to see defendant. Mr. Gray was attorney of record for defendant in connection with the pending charges of contributing to the delinquency of minors. He came to see defendant at the request of defendant's son-in-law. All this was known to the deputy district attorneys and police officers who were working on the murder case. Nevertheless the representatives of the People refused Gray's repeated requests and demands that he be allowed to see defendant. At 3 p. m., after defendant had confessed, he was taken from the office of the district attorney and was rushed past Mr. Gray, who was still waiting outside the office to see defendant. Officers drove defendant to the office of a physician, who gave defendant a

physical and mental examination; in the course of the examination defendant made a second confession. Defendant was then taken to the county jail and there, at 9:30 p. m., Mr. Gray was finally allowed to talk with him for the first time since defendant's arrest. The next morning defendant was taken before a magistrate.

[5, 6] The above described procedure was in violation of section 8 of article I of the state Constitution, which provides, "When a defendant is charged with the commission of a felony, by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he shall, without unnecessary delay, be taken before a magistrate of such court. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel." It apparently was also in violation of section 825 of the Penal Code, which provides, "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor.¹ Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction." (See also Pen.Code, § 848: "An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law"; § 814 [form of warrant: "you are * * * com-

1. No showing has been made that any disciplinary action, or any criminal prose-

cutiion, has been instituted as against any of the offending officials.

manded forthwith to arrest the above-named C. D. and bring him before me * * * or * * * before the nearest or most accessible magistrate in this county"]; § 145 [willful delay in taking before magistrate is misdemeanor]; § 858 ["when the defendant is brought before a magistrate upon an arrest * * * on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings"].) It is apparent that here the delay in taking defendant before a magistrate (where defendant would have been advised of his right to counsel) was "unnecessary," for a municipal court open for business was located in the same building as the office where defendant was held and questioned, but defendant was not taken to such court; even after the questioning he was taken from that building for further examination by a physician. It is also apparent that defendant should have been allowed to see Mr. Gray, who was present at the request of defendant's son-in-law, a "relative of such prisoner" (Pen.Code, § 825). We disregard as a quibble the suggestion of the People that their officers had no duty to let Mr. Gray see defendant because Gray did not wish to advise or represent defendant but was present because of mere curiosity.

[7] The conduct of the officers, as above related, was patently illegal. Its illegality is not lessened by argument that similar conduct is not unusual or that such conduct makes the work of the police and the district attorney easier. In the present case the conduct cannot even be explained as an expedient born of desperation to meet an imperative exigency. (Cf. the situations described in the concurring and dissenting opinion of Mr. Justice Jackson in *Watts v. Indiana* (1949), *supra*, at page 58 of 338 U.S., at page 69 S.Ct. 1347, 1357, 93 L.Ed. 1801 ["no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large"]; and in the majority

opinion of Mr. Justice Black in *Upshaw v. United States* (1948), 335 U.S. 410, 414, 69 S.Ct. 170, 93 L.Ed. 100 ["The arresting officer himself stated that petitioner was not carried before a magistrate [more promptly] * * * because the officer thought there was 'not a sufficient case' for the court to hold him"]; see also the majority opinion of Mr. Justice Douglas in *McDonald v. United States* (1948), 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153.) We can only conclude that the representatives of the People, when they unreasonably and illegally refused to permit Mr. Gray to see Stroble, yielded in some degree to the general hysteria which was manifest by such symptoms as the slapping of Stroble by the park foreman, the kicking of him by the arresting officer, and by popular demands for more federal legislation against "sex crimes."

[8] Theoretically, taking defendant promptly before a magistrate and permitting Mr. Gray to consult with defendant immediately upon his arrival at the district attorney's office, might have been of considerable importance to defendant on his subsequent trial. If defendant had been confessing reluctantly, it would have been particularly important to him to know that he could remain silent; if he had been confessing in extravagant and exaggerated terms, it would have been particularly important for him to know that his words could be used against him. As the situation actually developed, however, it became obvious that defendant did not wish, or was not able to remain silent. After he had consulted with Mr. Gray and with attorneys from the public defender's office defendant continued repeatedly to make detailed confessions. Each of these confessions appears to be an attempt by defendant, to the best of his ability, to recount the entire truth as to the killing, including his state of mind at the time. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest appears not to have affected the outcome of defendant's trial. The situation is not like that in such cases as *People v. Sarazawski* (1945), 27 Cal.2d 7, 11, 161 P.2d

934, and cases there cited, where judgments of conviction were reversed because of fundamental defects in the conduct of the trial, on the theory that, even though it appeared that the defendant was guilty, there was a miscarriage of justice because of the denial to him of fair, orderly trial procedure.

Asserted Deprivation of Effective Representation by Counsel at the Preliminary Hearing

[9] On Friday, November 18, the day after defendant's arrest, he was taken before the municipal court, arraigned, and a Deputy City Public Defender was appointed to represent him. The municipal court fixed Monday, November 21, as the date for preliminary hearing, rather than November 22, as requested by the deputy. Defendant contends that his representation at the preliminary hearing was only pro forma because his counsel was not allowed sufficient time to prepare. However, defendant does not point out any respect in which he was prejudiced and, furthermore, the deputy, when he appeared on November 21, stated that he was ready and did not request a continuance.

Trial Court's Refusal to Permit Voir Dire Examination of Juror at Beginning of Insanity Section of the Trial

[10] The original jury returned to try the issue of defendant's sanity. Deputy Public Defender Al Mathews, representing defendant, then asked permission to further examine a juror on voir dire. The trial court refused permission. Mr. Mathews began an offer to prove that the juror in question had falsely answered, on the original voir dire examination, a question as to his occupation. The trial court interrupted the offer and asked that counsel discuss the matter in chambers. The greater part of what took place in chambers was not made a part of the record on appeal which was first prepared. Defendant's present counsel (who did not represent defendant during the trial) argued in his opening brief that the trial judge, by refusing to permit further examination of the juror, prevented (or may have prevented)

Mr. Mathews from showing facts which had developed since the original voir dire examination and which would disqualify the juror. On motion of defendant the record on appeal has since been augmented by inclusion of the discussion in chambers. It now appears from the record that after the first stage of the trial had begun the matters concerning which Mr. Mathews wished to examine the juror had been brought to the attention of the trial judge and counsel by an informer; counsel for the defendant and for the People had agreed that if there was any question as to the juror's disqualification an alternate juror would be substituted; investigation by representatives of the district attorney and public defender disclosed that the informer's charges against the juror were unfounded; no objection to the juror was made until after the jury had found defendant guilty; then Mr. Mathews, in a voice which was loud enough to be heard by the jurors, raised the question of the juror's qualification. It thus appears from the augmented record that defendant's claim that he was prevented from disclosing possible bias on the part of the juror is without merit.

Asserted Deprivation of Defendant's Right to Counsel of His Choice on Trial of the Issue of Insanity

During the trial of the issue of not guilty Deputies Mathews and Hill of the public defender's office handled the defense in the courtroom. Only Mr. Mathews had interviewed defendant, but Mr. Hill had been present and active on defendant's behalf at all times during the trial. Public Defender Ellery Cuff had not met defendant or appeared for him in court, but he was familiar with the case, having read the daily transcript and consulted with and advised Mr. Mathews and Mr. Hill and interviewed witnesses during the trial. It appears from the record of the above mentioned discussion in chambers at the beginning of the insanity stage of the trial that the trial judge believed that Mr. Mathews acted improperly in raising the question of the juror's qualification in the presence of the jury and also believed that certain prior conduct of Mr. Mathews (not in trying the

case but in preparing the defense and in releasing information about it) was improper; therefore the trial judge asked Public Defender Cuff "to attend upon the remainder of this trial * * * to see that this trial is conducted in a manner in which I believe trials should be conducted." The transcript of this discussion further shows that there had been previous discussions concerning Mr. Mathews' conduct, the substance of which need not here be set out. It is sufficient to note that these matters were never discussed in the presence of the jury and the judge's disapproval of Mr. Mathews' conduct was not expressed before them, so that the triers of fact could not have been influenced against defendant by such disapproval. A recess followed the discussion in chambers at the beginning of the trial of the sanity issue. At the beginning of the recess (as appears from testimony on defendant's motion for new trial) Mr. Mathews introduced Mr. Cuff to Mr. Stroble. Thereafter Mr. Cuff discussed waiver of the jury with Mr. Mathews and Mr. Hill and also asked the advice of Judge William B. Neeley, who had had long experience as public defender. At about 10 minutes before 2 p. m. Mr. Cuff and Mr. Bliss visited defendant in the prisoner's room, near the courtroom. Mr. Cuff told defendant that on a jury trial of the insanity issue evidence of details of all other instances of his molestation of children could and probably would be presented by the prosecution, the possible harmful effect of such evidence was discussed, and defendant said, "I have had enough of that jury. Get rid of them." He repeated this at least three times. When court reconvened at 2 p. m. Mr. Mathews was present but silent. Mr. Hill, who had not talked with defendant, said, "Information has been conveyed to me that it is the desire of the defendant * * * to withdraw the case on the * * * plea of not guilty by reason of insanity, waiving his right to a trial by jury * * *. Is that correct, Mr. Stroble?" Defendant replied, "That is correct." The question whether defendant waived a jury trial, and defendant's affirmative answer, were repeated. Counsel joined in the waiver, and stipulated that the question be submitted on the evi-

dence already in the case and the written reports of six physicians who had examined defendant.

[11, 12] Defendant contends that his right to counsel of his choice was violated because Mr. Mathews, the only public defender whom defendant had come to know personally and in whom defendant had confidence, did not interview defendant as to the waiver of jury and actively represent defendant on the trial of the sanity issue. Defendant's right to counsel does not include the right to be represented by a particular deputy public defender. (See *People v. Manchetti* (1946), 29 Cal.2d 452, 458, 175 P.2d 533.) The record sustains defendant's assertions that Mr. Mathews was required to retire from the active representation of defendant because Mr. Cuff and the trial judge disapproved of certain things he had done in connection with the case; it does not sustain defendant's charge that thereafter he was not properly and adequately represented. This will appear from the subsequent discussion of defendant's contentions that two important steps taken by his counsel on the trial of the issue of sanity were ineffective.

Asserted Invalidity of Defendant's Waiver of Jury Trial

[13] Defendant argues that his waiver of a jury at the insanity stage of the trial was ineffective because he did not understand the meaning of "waiver of jury." On the motion for new trial defendant, Mr. Cuff, and Mr. Bliss, an investigator for the public defender's office, testified to their conference which resulted in the waiver of a jury. There is a sharp conflict between defendant's testimony and that of Mr. Cuff and Mr. Bliss, as to what was said. Defendant relies upon his own testimony that he did not understand the meaning of "waiver of jury" and it was not explained to him; that he did not say "Get rid of them"; that "I didn't even know that could be done. I always had that idea that a jury and counsel should be there from the beginning to the end." We accept the determination of the trial judge, who saw and heard the witnesses and who announced that he believed the testimony of the public officials and disbelieved defendant.

In this connection defendant also calls attention to the statement of Mr. Cuff, made in chambers preceding his conference with defendant, that he had "had little or no contact with Mr. Stroble. It would be difficult for me to handle—" However, Mr. Cuff was familiar with the development of the case and, particularly after conferring with Deputies Hill and Mathews, who had "handled" it throughout, was in a position to intelligently advise defendant of the probable course of a jury trial of the sanity issue and the meaning of "waiver."

Failure to Examine Witnesses on the Trial of the Sanity Issue

[14] As previously stated, defendant by stipulation submitted the issue of sanity on the testimony adduced at the trial of the not guilty issue and on the written reports of six physicians who had examined defendant. Defendant now argues that this procedure, in effect, deprived him of any trial on the issue of his sanity because no evidence that defendant was legally insane had been introduced on the trial of the issue of not guilty and because the doctors' reports were hearsay. However, defendant does not suggest that he could have produced evidence of insanity under the right-and-wrong test if a different procedure had been followed. It does not appear that any harm was done to defendant's cause by the manner in which the sanity issue was submitted, nor that such submission shows any lack of wisdom or preparedness on the part of defendant's counsel.

Conclusion

[15] Defendant has pointed out no instance of misconduct or error which appears to have affected the result of the trial. Misconduct which did not make the trial itself unfair, nor amount to a breach of due process, is not ground for reversal of a conviction. Therefore, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

EDMONDS, CARTER and SPENCE, JJ., concur in the judgment.

EARL v. SAKS & CO.

SAKS & CO. v. EARL et al.

SAKS & CO. v. BARBEE.

L. A. 21069, 21337.

Supreme Court of California, in Bank.

Jan. 19, 1951.

Rehearing Denied Feb. 15, 1951.

Action by Mrs. Richard Earl against Saks and Company, for alleged conversion of a fur coat, wherein defendant filed a cross-complaint against plaintiff and against A. K. Barbee, also known as Al Barbee, and also brought a separate action against A. K. Barbee, also known as Al Barbee. The actions were consolidated for trial. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., rendered judgments to the effect that plaintiff Earl was the owner and entitled to possession of the coat and that defendant Barbee was indebted to Saks and Company, and defendant and cross-defendant Barbee appealed. The Supreme Court, Schauer, J., held that where store and proposed donee of coat, knowing that prospective buyer intended to make a gift of coat but would not pay more than \$1000 for it, had entered into secret agreement under which donee paid almost \$1000 of purchase price and buyer was led to believe price had been reduced to approximately \$4000 which he paid, both contract of purchase and gift were induced by fraud of store and donee and hence were voidable.

Judgments reversed.

Traynor and Edmonds, JJ., dissented.

Prior opinion, 210 P.2d 864.

1. Pleading $\S$ 380

Evidence which was not relevant to any issue raised by the pleadings was properly rejected.

2. Gifts $\S$ 38

Sales $\S$ 38(1, 9)

Where store and proposed donee of fur coat, knowing that prospective buyer intended to make a gift of coat but would not pay more than \$4000 for it, entered into secret agreement under which donee paid almost \$1000 of purchase price and buyer was led to believe price had been reduced to approximately \$4000 which he paid, both contract of purchase and gift were induced by fraud of store and donee and hence were voidable. Civ.Code, $\S$ 1572, subs. 1, 5.

3. Appeal and error ⇨1041(3) Pleading ⇨237(3)

Allowing buyer and donor of coat to amend answers at trial so as to add allegations as to fraud inducing purchase and gift was not prejudicial to seller and hence not abuse of discretion, where seller knew of secret agreement and misrepresentation relied on as constituting fraud from the time they were made.

4. Gifts ⇨41

Donor could justify rescission of gift on ground that it was fraudulently induced by secret agreement between donee and seller under which donee paid almost \$1000 of purchase price and donor was led to believe that price had been reduced to approximately \$4000 which donor paid, though donor had rescinded gift before learning of such agreement and sought to prove at trial another fraudulent representation which also was an inducement to making the gift.

5. Contracts ⇨258

An asserted rescission may be justified by proof that adequate cause for rescission existed at the time, though not known to party rescinding until later.

6. Gifts ⇨41

A gift induced by fraud or material misrepresentation, whether by donee or a third person, or by mistake as to a basic fact may be rescinded.

7. Gifts ⇨41

Donor was entitled to rescind gift of fur coat made under mistaken belief induced by seller and donee that coat had been purchased entirely by donor, whereas in fact donee had paid approximately one-fifth of the purchase price.

8. Trial ⇨404(1)

Finding that store had actively misrepresented that price of fur coat had been reduced and that stated amount was the full price, as constituting ground for rescission of contract of purchase, was implicit in finding that buyer was informed by store's representative that store would sell coat to buyer for such price.

9. Sales ⇨38(1)

A representation by clerk in a reputable store that article has a stated price, followed by clerk's preparation and customer's signature of a sales check showing purchase of the article for such price amounts to a representation by store that the total price and the actual sales transaction are as represented.

10. Sales ⇨38(2)

A representation to prospective buyer that price of article had been reduced made by store with knowledge that buyer insisted on a reduction in price must have been made with intent to deceive buyer and induce him to buy the article.

11. Trial ⇨404(3)

Findings of ultimate fact ordinarily cannot be controlled by findings of probative facts.

12. Sales ⇨365

In action to recover price of goods sold, wherein buyer sought to rescind contract of sale on ground of fraud, finding that seller was not guilty of fraud was not controlling, where such finding was drawn as a conclusion from findings of probative facts which established the contrary and was contrary to seller's own pleadings and all the evidence on the subject. Civ.Code, § 1574.

13. Contracts ⇨94(1), 98

A misrepresentation made by any person with knowledge of its falsity intending or expecting thereby to cause a mistake by another in order to induce the other to enter into a transaction constitutes "fraud" and makes the transaction induced by it voidable. Civ.Code, § 1572, subs. 1, 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

14. Contracts ⇨94(1)

A transaction may be rescinded on ground of fraud where the party to whom misrepresentation was made obtains something substantially different from that which he was led to expect or where he obtains the very thing that he expected but it is worth less than he was led reasonably to expect.

15 Contracts ¶94(1)

Where person to whom misrepresentation was made obtains exactly what he expected, though there was misrepresentation, whether transaction is voidable on ground of fraud depends upon whether the social interest in not having one intentionally take advantage of another outweighs the social interest in the stability of transactions.

16. Sales ¶359(1)

Evidence established that buyer had properly rescinded contract of purchase of coat, though he had expressed willingness to carry out objectively manifested agreement to purchase coat at quoted price, which agreement seller was unable to carry out. Civ.Code, § 1572, subs. 1, 5.

Chas. L. Nichols, Ivan Miller, William R. Law, R. S. McLaughlin and McClean & Petty, all of Los Angeles, for appellant.

Thomas D. Mercola, Beverly Hills, Wright, Wright, Green & Wright, Loyd Wright and Herschel B. Green, all of Los Angeles, for respondents.

SCHAUER, Justice.

A. K. Barbee appeals from judgments, in consolidated actions hereinafter described, that respondent Mrs. Richard Earl is the owner of a certain mink coat and that Barbee owes respondent Saks and Company \$3,981.25. He contends that an asserted sale of the coat to him by Saks, and an asserted gift of the coat by him to Mrs. Earl, were voidable, and were rescinded by him, because his consent thereto was induced by fraud of Mrs. Earl and Saks. We have concluded that these contentions are tenable.

On April 4, 1947, Barbee and Mrs. Earl went to the fur salon of Saks. A representative of Saks showed them a mink coat and told them its price was \$5,000. Barbee told Saks that he would like to buy the coat for Mrs. Earl but that he would pay no more than \$4,000 for it. Saks rejected repeated offers of Barbee to purchase the coat for \$4,000. Unknown to Barbee, Mrs. Earl then asked Saks to pretend to sell the coat to

him for \$4,000 and stated that she would pay the difference between \$4,000 and the price of the coat. Saks agreed to this. It told Barbee that it would sell the coat to him for \$3,981.25, made out a sales slip for that amount, and Barbee signed it in the belief that that was the full price of the coat. Saks then delivered the coat to Barbee; he in turn delivered it to Mrs. Earl and said that he gave it to her. Mrs. Earl, wearing the coat, left the store with Barbee.

The next day, April 5, Mrs. Earl returned the coat to Saks to be monogrammed and paid Saks the balance of its price, \$916.30. Later the same day Barbee told Saks that he had revoked the gift to Mrs. Earl, that he was the owner of the coat (which he thought he had purchased for \$3,981.25), that he would pay the agreed price (\$3,981.25) only if Saks would deliver the coat to him, and that it was not to deliver the coat to Mrs. Earl. Thereafter Mrs. Earl demanded that Saks deliver the coat to her; Saks refused and attempted to return her \$916.30; but she refused to accept the money; Saks retained (and still retains) possession of the coat.

Mrs. Earl then sued Saks, alleging conversion of the coat. Saks answered, denying the conversion, and at the same time filed a pleading which it denominated "Cross-Complaint in Interpleader," which, however, not only named Mrs. Earl and Barbee as asserted interpleader cross-defendants but also implicitly and necessarily, in the light of the circumstances, required, if Saks was to prevail, the granting of affirmative adversary relief against Barbee or Mrs. Earl or both of them. Saks alleged that it sold the coat to Barbee for \$3,981.25; that Mrs. Earl, "as additional consideration * * * to induce" Saks to make the sale to Barbee, agreed to pay Saks \$916.30 and later paid Saks that sum; that Saks is indifferent between the claims of the cross-defendants and is willing to deliver the coat to either cross-defendant as the court may direct (but, it is implicit from Saks' several pleadings read together, only upon condition that it recover from Barbee or from Mrs. Earl or from both of them the full price of the coat); it asked that the cross-defendants be required to

"litigate between themselves their claims to said mink coat"; it did not offer to relinquish its asserted claim for any part of the full price of approximately \$4900. Mrs. Earl's answer to the cross-complaint admitted that she paid Saks \$916.30 and alleged that at that time title to the coat "was transferred to her as is more fully alleged in her complaint." The complaint, however, contains no allegations as to transfer of title. Barbee in answer to the cross-complaint admitted that he told Saks he would pay the price discussed between Saks and Barbee if and only if Saks "would sell and deliver the coat to him at and for [such] price," and alleged that Mrs. Earl's agreement to pay Saks \$916.30 was fraudulently concealed from him by Saks and Mrs. Earl; that they represented to him that the full price of the coat was \$3,981.25; and that if he had known of the secret agreement he would not have agreed to buy the coat. No pleadings joining issues between Barbee and Mrs. Earl were filed. Saks also brought a separate action against Barbee, alleging that he owed Saks \$3,981.25 for goods sold and delivered. Barbee in answer made allegations of fraud substantially similar to those in his answer to Saks' cross-complaint. The two actions were consolidated for trial.

From what has been stated it appears that Saks, because of its duplicitous compact with Mrs. Earl, finds itself in this position: It knowingly and purposefully caused Barbee to believe that it was selling him—and him only—a certain fur coat for the full price of \$3,981.25. It wants to collect the \$3,981.25 from Barbee but it cannot (or will not) deliver the coat to him—fully paid, for \$3,981.25 or otherwise—because, although it has possession of the coat, it has already collected \$916.30 for the same coat from Mrs. Earl, and she claims to own the coat and refuses to release her claim to it (or for damages for its alleged conversion) as against either Saks or Barbee. Mrs. Earl further claims the coat as against both Saks and Barbee on the theory of an asserted gift from Barbee. But the gift is, necessarily, dependent upon Barbee's having purchased the coat from Saks and that purchase, it is obvious, was induced by the

joint fraud of Mrs. Earl and Saks. Saks and Mrs. Earl—both guilty of express fraud—are seeking the aid of the court to recover that which they are entitled to, if at all, only because of their fraud.

[1] While, as indicated above, the pleadings do not specifically allege, or suggest the theory of, the origin of Mrs. Earl's claim of title to the coat, the trial proceeded on the theory that the issues were whether there was a sale by Saks to Barbee and a gift by Barbee to Mrs. Earl, and whether the two transactions were voidable by Barbee because of the secret agreement and misrepresentation. Barbee testified that he would not have bought the coat if he had known that the price was more than \$4,000. Every element of the transaction and all the circumstances shown appear to support this position; no evidence is inconsistent with it. At the trial Barbee's counsel restated the position which Barbee had announced to Saks before the actions were instituted: "we are perfectly willing to accept the coat and pay * * * the price that we agreed to pay for it [\$3,981.25] * * * but we certainly are under the circumstances disclosed here already in this evidence [the secret agreement] * * * not willing to let this coat be handed over to this young lady." Counsel for Barbee also offered to prove that the gift was made in reliance on Mrs. Earl's representations that she would "reciprocate his affection and would give up running around with other men" and that Barbee rescinded the gift when he learned that those representations were false. The offered proof on the latter theory was properly rejected, for no such issue was raised by the pleadings.

The trial court gave judgment against Mrs. Earl on her complaint for conversion and in favor of Saks on its complaint against Barbee for goods sold and delivered. On Saks' "Cross-Complaint in Interpleader" it gave judgment that Mrs. Earl is the owner and entitled to possession of the coat. We are satisfied that the judgment in neither action is tenable insofar as it is adverse to the defendant and cross-defendant Barbee.

[2] In the action instituted by Mrs. Earl, in which Saks cross-complained (L.

A. 21069), the trial court made detailed findings of many evidentiary facts, including the above recounted proposal of the secret agreement and misrepresentation by Mrs. Earl, its acceptance by Saks, and the secret payment by Mrs. Earl of \$916.30 to Saks. There is no specific finding as to the truth of Barbee's uncontradicted testimony that he would not have bought the coat if he had known of the secret agreement and the truth as to the matter misrepresented. In the action brought by Saks (L.A. 21337) there is the conclusionary finding that Saks "sold and delivered" the coat to Barbee "at the agreed price of \$3,981.25," but the integrity of this finding is completely destroyed by Saks' own pleadings and by the other findings. In the action instituted by Mrs. Earl there are conclusionary findings that Barbee "made a gift of" the coat to Mrs. Earl; that she "is now the owner of said mink coat"; and that Saks "was not guilty of any fraudulent conduct." But Saks' admitted conduct, like that of Mrs. Earl, is fraudulent as a matter of law, and Mrs. Earl's asserted title to the coat derives directly from her own fraud and that of Saks which she suggested.

Amendment of Barbee's Answers

[3] The allegations as to fraud in each of Barbee's answers were added by amendment when the case came on for trial. Saks contends that the trial court abused its discretion in allowing the amendments (in August, 1948), in view of the fact that Barbee knew of the secret agreement at least from the time Saks cross-complained (in June, 1947). It says, "Had Saks known at the time that appellant filed his answer to the cross-complaint in interpleader * * that appellant was going to allege fraud as an affirmative defense, perhaps more successful efforts could have been made to have terminated expensive and long drawn out litigation." But it appears to us that Saks could not have been prejudiced by Barbee's delay in amending his answers. Saks knew of the secret agreement and misrepresentation to Barbee from the time it made them; it knew that neither the making of the agreement with Mrs. Earl nor the active misrepresentation to Barbee was disclosed to Barbee by or in the presence of its representatives; and its vague

statement as to efforts to terminate the litigation does not show prejudice.

Rescission of Gift

[4, 5] The trial court was not entitled to disbelieve Barbee's uncontradicted testimony (supported by the circumstances shown and by the undisputed evidence of all parties that he repeatedly insisted he would not pay more than \$4,000) that he would not have bought the coat if he had known of the secret agreement between Saks and Mrs. Earl. Although Barbee did not expressly allege or testify that he would not have given the coat to Mrs. Earl if he had known of the secret agreement, it is apparent that the case was tried as if this were in issue and that in fact he would not have made the gift had he known of the secret agreement. Obviously Barbee's belief that the full price of the coat was \$3,981.25 underlay and was a material element in, and inducing cause of, the gift as well as the immediately preceding purchase. As previously indicated, he could not have made the gift unless he made the purchase, and it is indisputably established that the purchase was induced by the express fraud of both Mrs. Earl and Saks. The facts that Barbee at the trial, by correctly rejected offers of proof, sought to show another fraudulent representation which also was an inducement to his making the gift, and that he announced rescission before he learned of the secret agreement, do not prevent him from now basing his defense on such secret agreement. "One may justify an asserted rescission by proving that at the time there was an adequate cause although it did not become known to him until later. One cannot waive or acquiesce in a wrong while ignorant thereof * * *." (12 Am.Jur. 1027, § 445.)

[6] A gift can be rescinded if it was induced by fraud or material misrepresentation (whether of the donee or a third person) or by mistake as to a "basic fact." (Rest., Restitution, §§ 26, 39; see *Murdock v. Murdock* (1920), 49 Cal.App. 775, 783-785, 194 P. 762 [fraud of donee]; In re *Clark's Estate* (1931), 233 App.Div. 487, 489, 253 N.Y.S. 524, 527, noted 45 Harv.L. Rev. 750, 80 Pa.L.Rev. 747 [innocent mis-

representation of third party]; Rest., Contracts, § 477, Comment a.) "A failure by the donee to reveal material facts when he knows that the donor is mistaken as to them is fraudulent nondisclosure." (Rest., Restitution, § 26, Comment c.) "A mistake which entails the substantial frustration of the donor's purpose entitles him to restitution. No more definite general statement can be made as to what constitutes a basic mistake in the making of a gift. The donor is entitled to restitution if he was mistaken as to the * * * identity or essential characteristics of the gift." (Rest., Restitution, § 26, Comment c.)

[7] Since Barbee was not merely mistaken but was actively misled as to a material element in the purchase and as to an essential characteristic of the gift—he believed that the coat was purchased entirely by him so that it could be given in its entirety as a gift—he was entitled to, as he did, rescind the gift.

Rescission of Contract

[8-10] It appears from the findings of probative facts that Saks did more than merely fail to disclose its agreement with Mrs. Earl. In the circumstances, implicit in the finding that Barbee "was informed by Saks and Company's representatives that they would sell said mink coat to him for the sum of \$3,981.25" is a finding that Saks actively misrepresented that the price had been reduced and that \$3,981.25 was the full price. It is completely unreasonable to deny that a representation by a clerk in a reputable store that an article has a certain price, followed by the clerk's preparation and the customer's signing of a sales check showing purchase of the article for that price, amounts to a representation by the store that the *total* price and the *entire* sales transaction are as represented. This misrepresentation, it appears from the undisputed evidence, was made by Saks with knowledge that Barbee insisted on a reduction in price; from this it follows that such misrepresentation must have been made with intent to deceive Barbee and to induce him to buy the coat.

[11,12] Although "Actual fraud is always a question of fact" (Civ.Code, § 1574; see 12 Cal.Jur., Fraud and Deceit, § 82), and although findings of ultimate fact ordinarily cannot be controlled by findings of probative facts (see 24 Cal.Jur., Trial, § 205), here the finding that Saks was not guilty of fraud is not controlling, for it was drawn as a conclusion from findings of probative facts which not only do not support it but which establish the contrary (see *LaMar v. LaMar* (1947), 30 Cal.2d 898, 900, 186 P.2d 678, and cases there cited; *Robinson v. Raquet* (1934), 1 Cal. App.2d 533, 541, 36 P.2d 821) and it is contrary to Saks' own pleadings, to undisputed evidence and to all the evidence on the subject.

[13] Saks' conduct was within the letter of the Civil Code definition of "actual fraud" which makes a contract voidable (§ 1572): "any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; * * * 5. Any other act fitted to deceive." Saks' conduct is also within the letter of the Restatement of Contracts definition of fraud which makes a transaction induced by it voidable (§ 471): "misrepresentation known to be such * * * by any person intending or expecting thereby to cause a mistake by another * * * in order to induce the latter to enter into * * * a transaction."

Saks relies on California cases which say that "fraud which has produced and will produce no injury will not justify a rescission." (*Spreckels v. Gorrill* (1907), 152 Cal. 383, 388, 92 P. 1011; *Munson v. Fishburn* (1920), 183 Cal. 206, 216, 190 P. 808; *Darrow v. Houlihan* (1928), 205 Cal. 771, 774, 272 P. 1049.) It asserts that a person is not injured by being induced to buy a \$5,000 coat for \$4,000. But the coat was neither sold nor bought for \$4,000. Saks was selling the coat for the full price, and a person other than seller Saks and buyer Barbee paid a substantial part—approximately one fifth—of the full price.

Furthermore, this "no injury, no rescission" formula is not very helpful, because of disagreement in the authorities as to what is meant by "injury." In a sense, anyone who is fraudulently induced to enter into a contract is "injured"; his "interest in making a free choice and in exercising his own best judgment in making decisions with respect to economic transactions and enterprises has been interfered with." (See McCleary, *Damage as a Requisite to Rescission for Misrepresentation*, 36 Mich. L.Rev. 1, 227, 245.)

Also relied on by Saks is a definition of "injury" which has sometimes appeared in some California cases: "It may be conceded that it must be shown that [one who would rescind] * * * by reason of fraud, suffered an injury of a pecuniary nature, that is, an injury to his property rights, as distinguished from a mere injury to his feelings, but it will be sufficient if the facts alleged show that material injury will necessarily ensue from the fraud, although the amount of pecuniary loss is not stated." (*Spreckels v. Gorrell* (1907), *supra*, 152 Cal. 383, 388, 92 P. 1011.) The "concession" or implication that in every case there must be "pecuniary loss" is incorrect. (See *Freebairn v. Hefferan* (1950), 34 Cal.2d 715, 721, 214 P.2d 386.) And the definition does not take account of the cases which allow rescission of a transaction induced by an agent's misrepresentation of his principal's identity, even though there was no economic reason for the unwillingness to deal with the principal. (See cases collected in 48 Harv.L. Rev. 480, 485; McCleary, *supra*, p. 246 of 36 Mich.L.Rev.)

[14] The McCleary article, *supra*, suggests the following classification of the cases which have considered rescission for fraud:

1. The representee can rescind where he obtains the very thing that he expected but it is worth less than he was led reasonably to expect. In most cases where rescission is sought the representee has received something of less economic value than he expected.

2. The representee can rescind where he obtains something substantially different

from that which he was led to expect. If one is induced to buy a certain lot of land by misrepresentation that it contains a vineyard, he need not keep it when he learns that it contains instead an apple orchard; even though the lot of land is the identical lot of land and although the orchard may be more valuable than the vineyard which he expected to get, it is obviously unfair to require him to keep what he did not bargain for and did not want. The undisputed evidence describing the present sale would put it in this class. The coat bargained for between Barbee and Saks, within the knowledge and belief of Barbee, as was known to Saks, was a coat fully paid for by Barbee, which Saks knew was to be used as a gift, but Saks intended to and did deliver something substantially different; i. e., a coat on which Barbee was charged only with a down payment and for which his intended donee had secretly agreed to pay in a substantial part. The seller was to receive approximately 25 per cent more for the coat than the buyer was paying and the element of a complete gift was being destroyed.

[15] 3. Where the representee obtains exactly that which he expects, although there was misrepresentation, the social interest in the stability of transactions may or may not outweigh the social interest in not having one intentionally take advantage of another. Saks attempts to describe the present sale so as to put it in this class. It says that Barbee bargained for and expected to get a certain coat for a cost to him of not more than \$4,000, and this is what he got. In the present situation, however, where the motives of Barbee were clearly noneconomic, the general social interest in stability of transactions is overriden by the interest in not having a seller make intentional misrepresentations which mislead a would-be donor into the erroneous belief that he alone is purchasing and that his donee is to receive from him a fully paid for gift, when the seller is fully aware of the effect which the misrepresentations may have and intends that they should have that effect. Again, it is important, the element of a complete gift by donor to donee is being destroyed through the misrepresentation and concealment.

[16] Saks contends that Barbee has not rescinded, and cannot rescind, the sale because he has stated that he was willing to carry out the objectively manifested bargain to purchase the coat for \$3,981.25. But at no time since Barbee's announced willingness to stand on the transaction which he believed he had entered into with Saks, did Saks offer to comply with the transaction and give Barbee what he bargained for: a coat for which he was paying in full, without Mrs. Earl, a stranger to the Saks-Barbee transaction, paying a portion of the price. Indeed, Saks, at the time of the rescission and mentioned offer by Barbee, was apparently unable to sell Barbee the coat in question as a fully paid for coat for \$3,981.25 because Mrs. Earl refused to take back the \$916.30 which she paid for the coat and which Saks had previously accepted. Barbee's counsel, at the trial, made clear his position; after the secret agreement, misrepresentation and payment of \$916.30 were in evidence he said, "under the circumstances of this case we shouldn't be required to pay Saks and Company anything * * * [W]hen he [Barbee] learned all the facts he never would have approved that transaction and your Honor knows it * * * [He] would do anything that could be done to repudiate that transaction and say it never was a real transaction." We are satisfied that the contract of purchase and the gift were voidable and were properly rescinded.

For the reasons above stated, the judgments are reversed.

SHENK, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

Barbee received what he bargained for. Cf. *Heffernan v. Freebairn*, 34 Cal.2d 715, 721, 214 P.2d 386. The mink coat that he examined and agreed to pay \$3,981.25 for,

was the one he received and gave to Mrs. Earl. He concedes that the fair value of the coat was \$5,000. It was not unreasonable for the trial court to conclude that, since the coat Barbee received was actually worth more than he agreed to pay, he would not have rejected it because Mrs. Earl arranged to pay the difference. See, *Spinks v. Clark*, 147 Cal. 439, 444, 82 P. 45; *Spreckels v. Gorrill*, 152 Cal. 383, 388, 92 P. 1011; *Munson v. Fishburn*, 183 Cal. 206, 216, 190 P. 808; *Darrow v. Houlihan*, 205 Cal. 771, 774-775, 272 P. 1049; *McCleary, Damage As Requisite To Rescission For Misrepresentation*, 36 Mich.L.Rev. 1, 15, 23-24. It was under no compulsion to believe his statement that he would have rejected it. *Huth v. Katz*, 30 Cal.2d 605, 609, 184 P.2d 521; *Tinkey v. E. F. Houghton & Co.*, 30 Cal.2d 97, 102, 179 P.2d 807; *Blank v. Coffin*, 20 Cal.2d 457, 461-462, 126 P.2d 868.

It was for the trial court to determine whether Barbee was a man of such temperament that he would have preferred having Mrs. Earl get along without the fur coat to accepting her contribution toward its purchase. He declared his love for her, expressing the sentiment several times that he wanted to give her a fur coat. She was "very much in love with the coat and wanted it badly." It was important to him that the woman he loved possess the coat; it was important to her to possess it. Her contribution enabled him to fulfill his wish and hers at a price he was willing to pay. Since they were both fur-coat minded, it is a reasonable inference that he would not have risked disturbing the relationship between them by depriving her of the coat because she was willing to contribute toward its purchase.

Counsel at the trial made it clear that Barbee sought rescission of the sale because Mrs. Earl failed to live up to his expectations.¹ This failure can in no way

1. "Mr. Barbee did entertain real affections for this young lady and in bestowing these gifts he was perfectly willing to do so as long as she showed him due feeling, respects and verity * * *."

"[W]e were perfectly willing if the understanding between these parties was

carried out, we were perfectly willing that she should have the coat * * *."

"[W]hen Mr. Barbee that very day finds out that the pretenses that this girl has been showing him were not genuine, they were false and just insubstantial as they could be, Mr. Barbee concluded and he

be attributed to Saks & Company. Its coat was of sound quality and came up to Mrs. Earl's expectations. The court properly rejected Barbee's offer of proof of his expectations and disappointment. Not only were they no concern of Saks & Company, but no issue was raised in the pleadings regarding his arrangements with Mrs. Earl. I would therefore affirm the judgments.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



101 Cal.App.2d 816

LAWLER v. SOLUS et al.
Civ. 7880.

District Court of Appeal, Third District,
California.

Jan. 22, 1951.

Hearing Denied March 22, 1951.

H. Glenn Lawler, doing business under the firm name and style of Lawler Hay and Grain Company, filed a petition to determine title to cows levied on under a writ in foreclosure of chattel mortgage as the property of T. A. Solus and claimed by Joe F. Soto. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered a judgment in favor of claimant and plaintiff appealed. The District Court of Appeal, Deirup, Justice pro tem., held that there was substantial evidence that notice had been given mortgagee before mortgage was executed that cows belonged to claimant and had been left on mortgagor's ranch under oral bailment.

Judgment affirmed.

did,—the witness says she never was with him again,—that he was off on the wrong tangent and that he wasn't going to give a gift of a coat or anything else to a person that was treating him in that fashion."

"Mr. Barbee had grown very fond of this girl, that he did express affection for her and he told her in effect that if she wanted to reciprocate his affection and would give up running around with other men and give them a chance to see whether or not they might be able to mature their affection, he would be very pleased

1. Animals ⇨22

Chattel mortgages ⇨139

Oral agreement under which owner left cows on ranch of another to be fed and cared for by rancher who as compensation was to have the milk and calves was a "bailment" or "feeder agreement covering livestock", and, not being recorded, agreement was void as to interest of owner and bailor as against chattel mortgage executed by rancher to another, if the cows were included in such mortgage and mortgagee was a bona fide encumbrancer. Civ.Code, §§ 2957, 2980.

See publication Words and Phrases, for other judicial constructions and definitions of "Bailment" and "Feeder Agreement Covering Livestock".

2. Chattel mortgages ⇨138(1)

Chattel mortgagee is protected against prior equities only if he takes mortgage for a valuable consideration and without notice. Civ.Code, § 2957.

3. Chattel mortgages ⇨157(2)

Where third party claimant established title to cows levied on under writ in foreclosure of chattel mortgage, mortgagee, though he had taken mortgage for a valuable consideration, had the burden of proving that he did not have notice that cows belonged to claimant when he took the mortgage. Civ.Code, §§ 2957, 2980; Code Civ.Proc. § 689.

4. Chattel mortgages ⇨157(2)

In third party claim proceeding to determine title to cows levied on under writ in foreclosure of chattel mortgage, substantial evidence that notice had been given mortgagee before mortgage was executed

to give her suitable gifts, a token of his esteem and regard. Now that is all that I meant to say, and I think that is all I did say, and we expect further to attempt to show your Honor that on the very evening of this gift that Mr. Barbee became confronted with the reality that the young lady wasn't telling him the truth about things, she wasn't keeping appointments and on the contrary was misleading him about her plans and intentions and when that realization came upon him he felt that he wanted to interrupt the giving of the gift."

that the cows belonged to claimant and had been left on mortgagor's ranch under oral bailment warranted judgment for claimant. Civ.Code, §§ 2957, 2980; Code Civ.Proc. § 689.

5. Appeal and error ⇨994(3), 1012(1)

In third party claim proceeding to determine title to cows levied on under writ in foreclosure of chattel mortgage, it was trial court's exclusive province to determine the credibility of witnesses and the weight and effect of their evidence, consider inferences reasonably deducible therefrom and from the conflicting evidence determine the disputed fact. Code Civ. Proc. § 689.

6. Execution ⇨198

In a third party claim proceeding findings of fact were not required.

7. Appeal and error ⇨931(3)

Where findings of fact were not filed in third party claim proceeding, it must be assumed on appeal from the judgment that every fact essential to the support of judgment was proved and found by court. Code Civ.Proc. § 689.

8. Execution ⇨200

Denial of motion for new trial in third party claim proceeding was not error, since a new trial is not authorized in such proceedings. Code Civ.Proc. § 689.

Benjamin D. Frantz, Sacramento, for appellant.

John H. Machado, San Jose, for respondent.

DEIRUP, Justice pro tem.

On December 18, 1948, the defendant, T. A. Solus, executed to the plaintiff, H. Glenn Lawler, a mortgage of personal property, including 68 cows. Lawler foreclosed the mortgage and the sheriff of Santa Clara County, acting under a writ, took possession of the personal property which Lawler claimed was covered by the mortgage. The property so levied on included 7 cows which were branded Ao on the right shoulder. Joe F. Soto served upon the sheriff a third party claim for these cows.

Lawler filed a petition to determine title to them, pursuant to the provisions of Section 689 of the Code of Civil Procedure. After a hearing a judgment was entered in favor of the claimant, Soto. A motion for a new trial was denied upon the ground that such a motion does not lie in a proceeding of this nature. Lawler has appealed upon the grounds that the trial court erred in entering the judgment in favor of Soto and also in denying the motion for a new trial.

[1] It appears from the record that Soto acquired title to the cows in July, 1948, and that in September of that year, nearly three months before the mortgage was executed by Solus to Lawler, he left them on Solus's ranch upon an oral agreement that Solus should feed and care for them and, as compensation, should have the milk and calves. This agreement was a "bailment or feeder agreement covering live stock" and, not being recorded, it was void as to the interest of Soto as owner and bailor against the chattel mortgage executed by Solus to Lawler if the 7 cows were included in the mortgage and if Lawyer was a bona fide encumbrancer. Civ. Code, sec. 2980.

[2-7] One who takes a chattel mortgage is protected against prior equities only if he takes it for a valuable consideration and without notice. Civ.Code, sec. 2957; *Fred C. Silverthorn & Sons v. Pacific Finance Corp.*, 133 Cal.App. 163, 23 P.2d 798. Lawler took his mortgage for a valuable consideration but, upon title being shown to be in Soto, the burden was on him to prove that he did not have notice that the cows belonged to Soto. *McLane v. Storr*, 75 Cal.App.2d 459, 171 P.2d 534. Lawler did not take the stand and testify that he did not have notice of Soto's title when he took the mortgage. His counsel argues that the trial judge misconstrued the evidence in respect to whether notice to Lawler was given before the mortgage was taken or after the foreclosure of the mortgage. There is substantial evidence that the notice was given before the mortgage was executed and "it was the exclusive province of the trial court to determine the credibility of the witnesses, the weight

and effect to be given to the evidence, to consider inferences reasonably deducible from it, and from the conflicting evidence determine the disputed fact." *Rabbit v. Atkinson*, 44 Cal.App.2d 752, 758, 113 P.2d 14, 18. Findings of fact were not filed, none being required in a proceeding of this kind, *Getz v. Whisenant*, 93 Cal.App.2d 182, 208 P.2d 708, and it must be assumed on appeal from the judgment that every fact essential to the support of the judgment was proved and found by the court.

[8] The point that the court erred in denying the motion for a new trial is not well taken. A new trial is not authorized in a third party claim proceeding under section 689 of the Code of Civil Procedure. *Jensen v. Hugh Evans & Co.*, 18 Cal.2d 290, 115 P.2d 471; *Wilson v. Dunbar*, 36 Cal.App.2d 144, 97 P.2d 262; *Spiegelman v. Bowlus*, 15 Cal.App.2d Supp. 765, 59 P.2d 225.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 684

RUSSELL v. ANDERSEN et al.

No. 14490.

District Court of Appeal, First District,
District 2, California.

Jan. 15, 1951.

As Corrected Feb. 9, 1951.

Earle W. Russell brought action against A. A. Andersen, one Patton, and others to recover for injuries and property damage sustained in an automobile collision, and one Patton filed a cross-complaint against plaintiff for injuries. The Superior Court of the State of California in and for the County of Monterey, Stanley Murray, J., rendered a judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Schottky, J., Pro Tem, held that refusal of plaintiff's requested instruction that there is a presumption that a person takes

ordinary care of his own concerns, was reversible error.

Judgment reversed.

1. Automobiles ⇨242(8), 246(60)

Where no witnesses who saw automobile collision were produced by plaintiff in action to recover for injuries and property damage, and there was ample evidence to justify conclusion that plaintiff was deprived of his memory of the accident because of injuries received in the accident, plaintiff was entitled to benefit of statutory presumption that he was exercising due care at time of accident, and refusal of his requested instruction dealing with such presumption was error. Code Civ. Proc. § 1963, subd. 4.

2. Automobiles ⇨246(60)

In action for injuries and property damages sustained in automobile collision, given instructions defining presumptions and inferences and stating that among disputable presumptions there are those that a person is innocent of crime or wrong doing and that things have happened according to the ordinary course of nature and the ordinary habits of life, were not a sufficient substitute for instruction which plaintiff had requested, and to which plaintiff was entitled under evidence, that there is a presumption that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subds. 1, 4, 28.

3. Appeal and error ⇨1060(1)

Jury ⇨14(1), 34(1)

In a personal injury case, plaintiff is entitled to a jury trial as a matter of right under the constitution, and if jury is misdirected, a substantial right is taken away, and unless erroneous instruction was cured by other instructions, or verdict rendered was the only verdict which the evidence would support, it is prejudicial.

4. Appeal and error ⇨1170(9)

Where plaintiff in action for injuries and property damages sustained in automobile collision offered no witnesses who saw the accident, and evidence established that plaintiff by reason of loss of memory was unable to testify respecting his conduct at or immediately before time of accident,

and a verdict for either plaintiff or defendant had support in the evidence, trial court's refusal to give instruction, which was requested by plaintiff, and to which plaintiff was entitled as to the statutory presumption that a person takes ordinary care of his own concerns, was reversible error. Code Civ.Proc. § 1963, subd. 4; Const. art. 6, § 4½.

Bardin & Cunningham, Salinas, for appellant.

Donald L. Grunsky, Watsonville, for respondent.

SCHOTTKY, Justice Pro Tem.

On July 3, 1948, plaintiff was operating an automobile in a southerly direction on U.S. 101 in Monterey County and defendant Patton was operating a Chevrolet Panel truck owned by defendants Andersen in a northerly direction. Each party was the sole occupant of his respective vehicle. As a result of a collision between the said automobile and truck plaintiff sued all of said defendants for personal injuries and defendant Patton filed a cross-complaint against plaintiff for personal injuries. Thereafter plaintiff dismissed as to defendants Andersen and issue was joined solely between plaintiff and defendant Patton.

After the accident both cars came to rest in the southbound lane and both cars were pointed south. The Patton car had its left rear corner about four feet west of the center line, and there was a pile of debris in the southbound lane directly behind the Patton car. There were deep scars, beginning on the west edge of the southbound paved portion of the highway, extending approximately 30 feet in a southwesterly direction and terminating under the broken knee-action of the left front wheel of the Russell car, which had come to rest beyond the west edge of the shoulder of the southbound lane.

No other gouge or skid marks, or debris, were found on the southbound lane, and no gouge or skid marks, or debris, were

found at all on the east, or northbound, lane.

Upon the trial plaintiff called defendant under 2055 Code Civ.Proc. and defendant testified as to his version of how the collision occurred. Plaintiff also called witnesses Larson and Betts, highway patrol officers who went to the scene after the accident occurred. Plaintiff himself testified but it seems quite clear from the record, as stated a number of times during the trial by counsel for defendant, that he had no recollection of how the accident occurred. The only other witnesses called by plaintiff were the doctor who testified to the extent of the plaintiff's injuries and a medical technologist.

Defendant called two witnesses besides himself, one being an asserted eye-witness and the other testifying how plaintiff was operating his automobile a few miles north of where the collision occurred.

The jury rendered a verdict that neither party recover against the other. Plaintiff's motion for a new trial was denied and this appeal is from the judgment in favor of defendant.

The principal ground urged by plaintiff and appellant for a reversal of the judgment is that the court erred in refusing to give the following instruction offered by him: "The presumption is that every man takes ordinary care of his own concerns and the presumption in this case is that the plaintiff exercised ordinary care and diligence from all the circumstances of the case—his character and habits and natural instinct of self-preservation. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

Appellant states that the preliminary question to be answered on this appeal is: "In a negligence action for personal injuries, where a plaintiff by reason of loss of memory is unable to testify respecting his conduct at or immediately before the time of the accident, and produces no witnesses who testify to such facts, is he entitled to the benefit of the disputable presumption that he was exercising due care?"

Respondent, however, does not agree that the preliminary question on appeal is as stated by appellant but states that such preliminary question should be: "In a negligence action for personal injuries, where a plaintiff testifies respecting his conduct at and immediately before the time of the accident, is he entitled to the benefit of the disputable presumption that he was exercising due care?"

It is therefore necessary at the outset to determine whether or not appellant, by reason of loss of memory, was unable to testify respecting his conduct at and immediately before the time of the accident. It is apparent that as to this question respondent is taking an entirely different position upon this appeal than he did at the trial for the record shows that upon his motion for a nonsuit respondent's counsel stated: "There is no evidence by plaintiff's own testimony as to how the accident happened * * *. I think that the plaintiff in clarifying his own testimony made it obvious that he remembered nothing of the accident or the circumstances of it * * *." "The only evidence which has been introduced at all as to what happened in this accident was the testimony of the defendant having been called under 2055."

And during the cross-examination of appellant by respondent's counsel the following occurred:

"Q. Now, as to how the accident happened, you have testified if I am quoting you correctly, that you don't recollect very well just how the accident happened? A. I don't.

"Q. Now, at the time—

"The Court: According to his testimony, he knows nothing about the accident.

"Mr. Grunsky: Excuse me, Your Honor?

"The Court: According to his testimony, he knows nothing about the accident so maybe if you cross examine him he may eventually know, but as the record stands, he knows nothing about it.

"Mr. Grunsky: Just so there is no misunderstanding that that was his testimony, Your Honor."

"Q. In fairness to you, you have no independent recollection of this particular day at this particular place? A. No.

"Q. That you were on your own side of the road? A. None.

"Q. And you are positive of that? A. I have no recollection.

"Q. And that goes to where you were or how the accident happened? A. That's right."

In view of the fact that the record fully supports the statements of counsel for respondent and the trial judge that the testimony of appellant showed that he suffered a loss of memory as to how the accident happened, it is difficult to understand how respondent can argue seriously upon this appeal that appellant "was well able to and did testify to the material facts of the accident and was not suffering from a loss of memory."

We believe, therefore, that we must determine the question of whether or not appellant was entitled to the benefit of the disputable presumption that he was exercising due care upon the basis that the record shows that appellant by reason of loss of memory was unable to testify respecting his conduct at or immediately before the time of the accident and produced no witnesses to testify to such facts.

The presumption here under consideration is set forth in subd. 4 of § 1963 of the Code of Civ.Proc. as follows:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 4. That a person takes ordinary care of his own concerns".

The foregoing presumption was considered in the now famous case of *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, 531. That was a case arising out of the death of one Smellie when the truck in which he was riding, which was being operated by one Ireland, was struck at a railroad crossing in the city of Madera by one of defendant company's teams. One defense was contributory negligence of the

deceased. Plaintiff put Ireland, also a defendant, upon the witness stand under § 2055, and upon cross-examination by counsel for his co-defendant, Southern Pacific Company, Ireland testified that the deceased said, just before going onto the track, "It's all clear; let's go." This evidence was not contradicted by any witness. The trial judge directed a verdict in favor of defendants. Upon appeal our Supreme Court reversed the judgment, and in the course of its opinion said 212 Cal. at p. 549, 299 P. at page 532.

"The question is, therefore, directly raised and presented as to whether this presumption, that the deceased exercised due care for his safety, has been overcome and dispelled as a matter of law by the testimony of Ireland. That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state. *People v. Milner*, 122 Cal. 171, 54 P. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 P. 497; *People v. Siemens*, 153 Cal. 387, 95 P. 863; *Pabst v. Shearer*, 172 Cal. 239, 156 P. 466; *Thompson v. Davis*, 172 Cal. 491, 157 P. 595; *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269; *Pacific Portland Cement Co. v. Reinecke*, 30 Cal.App. 501, 158 P. 1041; *Grantham v. Ordway*, 40 Cal.App. 758, 182 P. 73, 76.

"A few quotations from the foregoing authorities will, we think, remove all doubt from this question. In *People v. Milner*, supra, 122 Cal. at page 179, 54 P. 833, 837, the court said: 'Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.' In *Sarraille v. Calmon*, supra, 142 Cal. at page 655, 76 P. 497, 498, the court said: 'The presumption of nonpayment arising from possession of uncanceled notes, admittedly executed by defendant,

was evidence that they were not paid, and produced a conflict with the evidence of defendant's witnesses.' In *People v. Siemens*, supra, 153 Cal. at page 390, 95 P. 863, 865, we find the following language: 'But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that "official duty has been regularly performed"; another that "a writing is truly dated." * * * These presumptions, while disputable, are in themselves evidence (citing authorities) and will support a finding made in accordance with them, even though there be evidence to the contrary.' In *Pabst v. Shearer*, supra, 172 Cal. at page 242, 156 P. 466, 467, this court stated the rule as follows: 'It must be remembered that a presumption declared by statute, although disputable, is itself evidence, and that it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose.' In *Thompson v. Davis*, supra, 172 Cal. at page 493, 157 P. 595, 596, this court again said: 'Under the express provision of section 164 of the Civil Code, as that section has read since the year 1897, such deed to the wife raised the presumption that the title was thereby vested in her as her separate property. This presumption is, to be sure, not conclusive. "It may be overcome by evidence sufficient to satisfy the court that the property in question, although conveyed to the wife, was in fact community property." (Citing authority.) But the presumption, "although disputable, is itself evidence, and * * * it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose.'" In *Olsen v. Standard Oil Co.*, supra, 188 Cal. at page 24, 204 P. 393, 395, this court sustained an instruction in the following words: 'The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is

overcome by satisfactory evidence.' In *Pacific Portland Cement Co. v. Reinecke*, supra, 30 Cal.App. at page 504, 158 P. 1041, 1043, we find the following language: 'The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor may be resorted to in aid of the findings even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption.' In *Mar Shee v. Maryland Assur. Corp.*, supra, 190 Cal. at page 7, 210 P. 269, 272, this court has again said: 'There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts. The Code expressly declares them to be evidence (Code Civ.Proc., §§ 1957, 1963), and admonishes the trial judge to instruct the jury on all proper occasions "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption." Code Civ.Proc., § 2061, subd. 2. Among the decisions of this court recognizing and applying the foregoing rule may be mentioned the following: *Sarraille v. Calmon*, 142 Cal. 651, 76 P. 497; *Adams v. Hopkins*, 144 Cal. 19, 77 P. 712; *Moore v. Gould*, 151 Cal. 723, 91 P. 616; *People v. Siemen*, 153 Cal. 387, 390, 95 P. 863; *Freese v. Hibernia Sav., etc., Soc.*, 139 Cal. 392, 73 P. 172; *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066.'"

The court went on to hold that the plaintiff was entitled to benefit of said presumption and also that the testimony of a defendant called as a witness by plaintiff under Code Civ.Proc. § 2055 was not to be regarded as evidence of the plaintiff and

did not as a matter of law dispel or overcome the presumption that the deceased exercised due care for his own concern. The court said 212 Cal. at page 559, 299 P. at page 537; "Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict."

In *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590, 593, the court held that the principle enunciated in the *Smellie* case applied to a death case when eye-witnesses testified for each side. In that case plaintiffs were suing for damages for the death of their son who was killed in an automobile accident involving a car driven by himself and a truck owned and operated by the defendants. Plaintiff produced three eye-witnesses to the accident while the defendant driver was the only eye-witness for the defense. In view of the fact that the plaintiff had produced eye-witnesses to the accident defendants upon appeal complained of the trial court giving the following instruction: "* * * 'The presumption is that every man obeys the law, and the presumption in this case is that the plaintiffs' son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.'"

In holding that there was no error in giving said instruction the court said 14 Cal.2d at page 364, 94 P.2d at page 593:

"This instruction is in almost the precise words of the instruction set out in the opinion in the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393, 395, which was approved by this court in the following language:

"The defendant claims that this is erroneous. We think it is correct. The rule that contributory negligence of the plaintiff must be alleged in the answer, or it will not be available to the defendant as a defense, is based on this presumption. So, also, is the rule that the burden of proving it by a preponderance of the evidence is on the defendant. The Code expressly declares that this presumption is disputable that it "may be controverted by other evidence," and that unless so controverted, the jury is bound to find in accordance with it. Code Civ.Proc. §§ 1961, 1963, subds. 1, 33. The instruction is therefore strictly in accordance with the Code on the subject."

"In later cases we expressly approved our decision in that case (*Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884; *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 P. 529; *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269), and it thus has been followed by the District Court of Appeal in *Ramsey v. Pasini*, 108 Cal.App. 527, 529, 291 P. 884, and *DeLannoy v. Grammatikos*, 126 Cal.App. 79, 14 P.2d 542.

"From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence. * * *

"We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negli-

gence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him; but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. *Tuttle v. Crawford*, 8 Cal. 2d 126, 63 P.2d 1128; *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 38, 39, 297 P. 884. But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the *Mar Shee* case, and other cases decided by this court following the *Mar Shee* case, an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction. *Ellison v. Lang Transp. Co.*, supra [12 Cal.2d 355, 84 P.2d 510]."

The rule of the *Smellie* case and of *Westberg v. Wilde* has been applied in a number of later cases where plaintiff was not killed in the accident but suffered loss of memory as a result thereof. In the case of *Scott v. Sheedy*, 39 Cal.App.2d 96, 102 P.2d 575, (hearing denied), the exact instruction offered and refused in the in-

stant case was approved. The court said at 39 Cal.App. at page 99, 102 P.2d at page 577:

"The court instructed the jury as follows: 'The presumption is that every man takes ordinary care of his own concerns, and the presumption in this case is that the plaintiff exercised ordinary care and diligence from all the circumstances of the case—his character and habits and natural instinct of self preservation. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence.'

"Similar instructions have been the pivotal point or crucial factor in the determination of the merits of many appeals, and while the position of appellants finds support in decisions heretofore rendered by this and other appellate courts, the point at issue seems to have been decided by the Supreme Court adversely to appellants' position in the recent case of *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590, 593, and as an intermediate appellate court we are bound by the holding therein. * *

"In the instant case the essential difference factually is that the plaintiff did not die as a result of the accident but suffered a brain injury. The following appears in the record: 'Now, Mr. Scott, you need not answer it right away, you may consider it a little while, but is it your testimony now that you can't tell us anything about how this truck came to this opening? A. Yes, sir.' Under the circumstances, in view of the reason for the rule as stated in the *Westberg* case, we feel it can make no difference whether the injured party dies or is incapacitated by loss of all memory of the circumstances of the accident, the result of brain injury from the collision. In other words, notwithstanding the evidence from other witnesses, 'all possible facts both in favor of and against the alleged negligence of the plaintiff' (*Westberg v. Willde*, supra) were not before the court. In this case no witness could have testified that plaintiff saw the danger. A witness might place him in a position from which an inference might be drawn that he could see or realize

danger, but that would not be sufficient if a reasonable inference otherwise could be drawn. If the acts and conduct of an incapacitated party must be testified to by other witnesses, we conclude that the test given in the *Westberg* case and in *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269, is proper. In the *Mar Shee* case, the court, 190 Cal. at page 9, 210 P. at page 273, said: '* * * We deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'

In *Hoppe v. Bradshaw*, 42 Cal.App.2d 334 at page 339, 108 P.2d 947 at page 950 (hearing denied) the court said: "It is appellant's contention that when he, because of loss of memory, is unable to testify respecting his conduct immediately prior to the accident, he is presumed to have exercised reasonable and ordinary care for his own safety, and in support of the applicability of this rule to the facts in the instant case he cites *Borum v. Graham*, 4 Cal.App.2d 331, 40 P.2d 866; *Whicker v. Crescent Auto Co.*, 20 Cal.App.2d 240, 66 P.2d 749; *Parker v. Manchester Hotel Co.*, 29 Cal.App.2d 446, 85 P.2d 152; *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 P. 529; *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 210 P. 269, and *Scott v. Sheedy*, 39 Cal.App.2d 96, 102 P.2d 575, where the District Court of Appeal extended the rule announced in the *Mar Shee* and *Smellie* cases to a case where loss of memory was the direct result of a brain injury sustained in the collision. The justification for the rule there announced was based upon the fact that the injured person died and therefore could not testify. In extending the rule in *Scott v. Sheedy*, supra, the court predicated its opinion upon the same principle, that is, that the person was deprived of his testimony because of the injuries received in the accident. In the instant case there appears to be suffi-

cient evidence, if believed by the jury, to justify the conclusion, if drawn by the jury, that the appellant was deprived of his memory because of a head injury. If the jury so concluded, appellant would then be entitled to the benefit of the presumption."

And in *Simon v. City & County of San Francisco*, 79 Cal.App.2d 590 at page 598, 180 P.2d 393, at page 398 (hearing denied), the court said: "It is now well settled in this state that where a plaintiff by reason of loss of memory is unable to testify respecting his conduct at and immediately before the time of the accident, and produces no witnesses who testify to such facts, he is entitled to the benefit of the presumption that he was exercising due care. This presumption is itself evidence sufficient to create a conflict with the evidence produced by defendant, and requires that the issue of contributory negligence be submitted to the jury. Evidence produced under § 2055 of the Code of Civil Procedure is adverse and cannot be weighed, as a matter of law, against the presumption. *Smellie v. Southern-Pacific Co.*, 212 Cal. 540, 299 P. 529; *Hoppe v. Bradshaw*, 42 Cal.App.2d 334, 108 P.2d 947; *McNear v. Pacific Greyhound Lines*, 63 Cal.App.2d 11, 146 P.2d 34; *Satariano v. Sleight*, 54 Cal.App.2d 278, 129 P.2d 35; *Scott v. Sheedy*, 39 Cal.App.2d 96, 102 P.2d 575."

See also *Douglas v. Hoff*, 82 Cal.App.2d 82, 85, 185 P.2d 607.

Respondent in reply quotes from *Roselle v. Beach*, 51 Cal.App.2d 579 at page 583, 125 P.2d 77 at page 80, where the court said: "Where, as in the case of *Roselle*, a participant in an accident is dead or, for any other reason, is unable to give an account of what occurred and his side of the case is not fully covered by the testimony of witnesses called on his behalf, it is proper to give such an instruction as was given on behalf of the plaintiff. *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590; *Ellison v. Lang Transportation Co.*, 12 Cal.2d 355, 84 P.2d 510; *Schulman v. Los Angeles Ry. Corp.*, 44 Cal.App.2d 122, 111 P.2d 924; *Scott v. Sheedy*, 39 Cal.App.2d 96, 102 P.2d 575. But if, as in the case of *Beach*, a participant testifies to his own

actions or has witnesses who explain them, even though there is a presumption of law that 'a person takes ordinary care of his own concerns' (Code Civ.Proc., § 1963, subd. 4), he should not be given the benefit of the presumption because it can have no weight. For this reason the giving of such an instruction in such a case is uniformly held to be error unless it is made applicable to both of the parties, and in certain instances judgments have been reversed for this reason."

Respondent also cited *Speck v. Sarver*, 20 Cal.2d 585, at page 587, 128 P.2d 16 at page 17, in which the court said: "The rebuttable presumption that a person takes ordinary care of his own concerns is declared in section 1963, subd. 4, of the Code of Civil Procedure. An instruction as to the existence of this presumption may properly be given to the jury in certain situations. See *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590; *Ellison v. Lang Transportation Co.*, 12 Cal.2d 355, 84 P.2d 510; *Downing v. Southern Pacific Co.*, 15 Cal.App.2d 246, 59 P.2d 578. Such an instruction, however, should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. See cases last cited and also *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65; *Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709; *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884. In the instant case the plaintiffs testified in regard to the events leading up to the collision. Plaintiff *Matthew Speck*, the driver, explained all of his actions. Under such circumstances there was no room for the presumption in this case."

Respondent also cited *Barker v. City of Los Angeles*, 57 Cal.App.2d 742, at page 749, 135 P.2d 573, at page 577, where the court said:

"From apparently conflicting opinions of appellate courts of California, the following rules may be adduced:

"(1) It is error for the trial court to give an instruction such as that set forth above where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to

or at the time of the accident (*Speck v. Sarver*, 20 Cal.2d 585, 587, 588, 128 P.2d 16; *Campbell v. City of Los Angeles*, 28 Cal.App.2d 490, 491, 82 P.2d 720.)"

[1] None of the three last cited cases support respondent's contention that the offered instruction was properly refused because in the instant case the facts concerning the happening of the collision were not fully covered by plaintiff's witnesses. On the contrary, no witnesses who saw the accident were produced by plaintiff and in view of the fact that there was ample evidence to justify the conclusion that appellant was deprived of his memory because of injuries received in the accident, we believe that, under the authorities hereinbefore set forth, appellant was entitled to the benefit of the presumption and that the trial court erred in refusing to give such an instruction.

It is not necessary to discuss the question of whether, upon the record in the instant case a presumption of due care was dispelled by facts "wholly irreconcilable" with the presumption, because respondent states quite frankly in his brief that he makes no such contention but contends "rather that plaintiff having testified as to the material facts of the accident was never entitled to a presumption of due care in the first place", a rather surprising contention in view of the fact that counsel for respondent first in the presence of the jury, and, later, upon a motion for a nonsuit, stated and contended that it was obvious that appellant "remembered nothing of the accident or the circumstances of it."

Respondent also contends that the essential elements of an instruction on the disputable presumption of the exercising of due care are contained in the general instructions given by the court defining presumptions and inferences and stating that among disputable presumptions are these: "That a person is innocent of crime or wrong". "That things have happened according to the ordinary course of nature and the ordinary habits of life". Subds. 1 and 28 of C.C.P. § 1963.

[2] The instructions quoted by respondent are, of course, stock instructions given

in every civil case and are taken from the Code of Civil Procedure. Mere general instructions as to the nature and effect of presumptions and inferences can hardly be regarded as a sufficient substitute for a specific instruction on the presumption that a person takes ordinary care of his own concerns. Subd. 4 of C.C.P. § 1963.

Respondent's final contention is that even if it would have been proper for the trial court to have given the offered instruction, it was not reversible error to have refused to give it. Respondent, of course, relies upon 4½ of Art. VI of our State Constitution.

[3] As was said in *Bieser v. Davies*, 119 Cal.App. 659 at page 664, 7 P.2d 388, at page 390: "In a personal injury case the plaintiff is entitled to a jury trial as a matter of right under the Constitution, and, if the jury is misdirected, we think this takes away a substantial right, and, unless the erroneous instruction was cured by other instructions, or the verdict rendered was the only verdict which the evidence would support, it would of course be prejudicial. *Mahoney v. Atchison, T. & S. F. Ry. Co.*, 101 Cal.App. 652, 281 P. 1108. With reference to the evidence in the case, we believe it is apparent from the evidence set forth herein that a verdict for either the plaintiff or the defendant would be supported by the evidence."

And in *Herbert v. Lankershim*, 9 Cal. 2d 409, at page 476, 71 P.2d 220, at page 253, our Supreme Court said: "In such cases the provisions of article 6, § 4½ of the Constitution cannot be invoked in aid of the affirmance of the judgment, unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice. Construing article 6, § 4½ of the Constitution, this court, in *People v. Davis*, 210 Cal. 540, 556, 293 P. 32, 39, said: 'The phrase "miscarriage of justice," used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds

that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial will require a reversal.' The rule applies to civil as well as to criminal cases."

In the instant case plaintiff and appellant produced evidence tending to show that the accident occurred on appellant's side of the highway and that respondent's car had come to rest with its left rear corner about four feet west of the center line, and there was a pile of debris in the southbound lane directly behind respondent's car, which had obviously dropped from respondent's car on the impact. There were deep scars, beginning on the west edge of the southbound paved portion of the highway, extending approximately 30 feet in a southwesterly direction and terminating under the broken knee-action of the left front wheel of appellant's car, which had come to rest beyond the west edge of the shoulder of the southbound lane. No other gouge or skid marks, or debris, were found on the southbound lane, and no gouge or skid marks, debris, were found at all on the east, or northbound lane.

[4] Respondent produced evidence tending to show that appellant had swung into respondent's lane, and that then both cars had cut back to appellant's lane where the crash occurred. A careful reading of the entire record convinces us that a verdict for either party would find support in the evidence. In fact the jury did find for respondent on appellant's complaint and for appellant on respondent's cross-complaint. We have already held that the court erred in refusing to give the offered instruction as to the presumption of due care, and we are convinced that upon the entire record in this case, the depriving of appellant of the benefit of such presumption was prejudicial error requiring a reversal of the judgment. Applicable to the instant case is the language of our Supreme Court in the recent case of *Satterlee v. Orange Glen School Dist.*, 29 Cal.2d 581, at page 593, 177 P.2d 279, at page 286:

"For these reasons the adoption by the trial court of the standard of care imposed by a statute or ordinance becomes an important factor in imposing liability. The instruction given by the court on its own motion had the effect of minimizing, if not completely negating, the code provision. It was, therefore, erroneous and considering the direct conflict in the evidence, constituted 'a miscarriage of justice' within the meaning of Article VI, section 4½ of the California Constitution."

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.



101 Cal.App.2d 709

PEOPLE v. KENNEDY et al.

Cr. 4533.

District Court of Appeal, Second District,
Division 1, California.

Jan. 15, 1951.

Hearing Denied Feb. 8, 1951.

Melvin C. Kennedy, Elbert Mack and John Foster were convicted in the Superior Court of Los Angeles County, William M. Byrne, J., for armed robbery and for kidnapping for purpose of robbery, and Melvin C. Kennedy appealed. The District Court of Appeal, White, P. J., held that the evidence warranted conviction for the first offense, but that the appellant could not be subjected to punishment for both offenses where the defendants committed no act of seizure or confinement other than that necessarily incident to commission of robbery.

Judgment of conviction of kidnapping for purpose of robbery affirmed and judgment of conviction of armed robbery reversed.

1. Criminal law ☞1144(13)

Following a conviction, the reviewing court will epitomize the facts in a light most favorable to the prosecution.

2. Criminal law ☞552(3), 561(1)

Evidence, whether direct or circumstantial, will support conviction if suffi-

cient to establish guilt beyond reasonable doubt of minds of those charged with duty of acting conscientiously on the evidence.

3. Criminal law ☞552(4)

Circumstantial evidence may be as conclusive in its convincing force as testimony of direct witnesses to the overt act.

4. Criminal law ☞552(3)

Circumstances such as to exclude any other reasonable theory than that of the guilt of the accused will justify a conviction.

5. Kidnapping ☞5

Circumstantial evidence disclosing that defendant was actively engaged in advising and encouraging commission of crime for profit of himself and companions, to one of whom a part of the fruits of the robbery were given, and that crime was committed in furtherance of conspiracy in which defendant was actively engaged by way of advice and encouragement, though possibly not actively present when victim was abducted and robbed, warranted conviction for kidnapping for purpose of robbery. Pen.Code, §§ 31, 971.

6. Criminal law ☞511(1)

In prosecution for kidnapping for purpose of robbery, accomplice's testimony was sufficiently corroborated. Pen.Code, § 1111.

7. Criminal law ☞984

Where neither defendant nor codefendants charged with robbery and kidnapping for purpose of robbery committed any act of seizure or confinement other than that necessarily incident to the commission of the robbery, defendant could not be subjected to punishment for both offenses, but only to punishment for offense of kidnapping for purpose of robbery.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defend-

ants Melvin C. Kennedy, Elbert Mack, and John Foster were accused in Count I of the crime of robbery, and in Count II with the crime of kidnapping for the purpose of robbery, both offenses allegedly committed on January 13, 1950.

Following pleas of not guilty and after appropriate waivers of a jury, the cause proceeded to trial before the court. Pursuant to stipulation, the case of the prosecution was submitted on the transcript of the testimony adduced at the preliminary examination with a reservation by both prosecution and defense that either might introduce additional evidence.

At the trial additional evidence was introduced by the people and all defendants. The court found each defendant guilty as charged in both counts of the information and found the robbery to be of the first degree.

From the judgments of conviction, defendant Kennedy alone prosecutes this appeal.

[1] Epitomizing the facts in a light most favorable to the prosecution as we are required to do following a conviction, the record reveals that on the afternoon of the date charged in the information, one Morris E. Hoier was employed as a truck driver for the Simon Levi Distributing Company in the city of Los Angeles and was driving a truck loaded with liquor on his usual route.

At approximately 2:15 p. m., as Mr. Hoier stopped his truck to make a delivery, defendant Elbert Mack approached the truck. He was armed with a pistol which he pointed directly at the driver and commanded the latter to "Get in and drive". Complying with the order, Mr. Hoier drove on with the defendant Mack, and under the latter's direction the truck was driven a short distance and pulled into a lot opposite the Jefferson High School. The driver was then ordered out of the truck, and accompanied by defendant Mack, walked to Compton Boulevard, where defendant John Foster was waiting with an automobile. In obedience to orders from defendant Mack, Mr. Moier entered the automobile with defendant Foster. Defendant Mack then gave his pistol

to defendant Foster who drove around the immediate area for approximately 30 or 35 minutes, during all of which time defendant Foster "held the gun on" Mr. Hoier.

Thereupon the latter was permitted to leave the automobile, told to walk in front thereof and not to look around.

At the time Mr. Hoier was taken from his truck he observed a third man get out of the aforementioned Foster automobile. Mr. Hoier however was unable to observe closely the features of this third man and unable to identify him.

During the time that Mr. Hoier was being driven around by defendant Foster, the liquor truck was taken by defendant Mack to the residence of defendant Kennedy where the latter was waiting. The cases of whiskey were unloaded from the truck by defendants Mack, Kennedy and one Murphy Franklin. Defendants Mack and Kennedy then left in the empty truck with defendant Mack doing the driving. The aforesaid Mr. Franklin followed them in his automobile and after they had abandoned the truck on a street, returned them to defendant Kennedy's residence.

Later that day the liquor unloaded from the truck, was sold to a Mr. Gutierrez, a used car dealer. Practically all the negotiations with respect to the sale of the liquor were carried on by defendant Kennedy, and a check in payment for said liquor was made to the order of defendant Kennedy in the sum of \$330. On the check were written the words "Refund on Chevrolet". Mr. Gutierrez testified that the foregoing words were placed on the check at the suggestion of defendant Kennedy so that "he could get it cashed faster".

The sole ground urged by appellant for a reversal of the judgment is that "the evidence in its entirety is wholly insufficient to support the judgments of conviction".

[2-4] From a reading of the foregoing factual narrative it is at once apparent that the evidence, insofar as it affects appellant, is circumstantial. However, the law recognizes no distinction between direct and circumstantial evidence in the degree of proof required. A conviction

may be had upon evidence of either the one character or the other. All that is required is that the evidence, whether direct or circumstantial, shall be sufficient to establish guilt beyond a reasonable doubt in the minds of those charged with the duty of acting conscientiously upon it. Because circumstances very largely control the conduct of people in the most important affairs of life, it is said that circumstantial evidence may be as conclusive in its convincing force as testimony of direct witnesses to the overt act. And when circumstances are such as to exclude any other reasonable theory than that of guilt of the accused, they will justify a conviction.

In the case at bar the record discloses circumstances which in our opinion are incompatible with innocence. According to the testimony of Murphy Franklin, during the time that Mr. Hoier was being held up, appellant was standing in the driveway of his home where he remained for about a half hour until defendant Mack drove up with the victim's truck. Appellant then requested the witness Franklin to move his car so that defendant Mack could bring the truck in. After the truck was unloaded, Mr. Franklin, at the request of defendants, followed them in his car to where the liquor truck was abandoned, and then returned the defendants to appellant's home. It was appellant who directed defendant Mack where to leave the liquor truck. The question naturally arises as to why defendant Mack should bring the liquor truck directly to appellant's residence without a prior arrangement, pursuant to which appellant was admittedly awaiting its arrival, and subsequently disposed of the stolen merchandise. The fruits of the crime were sold to a long-time acquaintance of appellant, the latter negotiating for the sale. The check in payment therefor, in the sum of \$330, was made payable to appellant. Written on the check were the words "Refund on Chevrolet car". The purchaser of the liquor was a used car dealer.

Another circumstance that commands attention is a conversation had between appellant and Police Officer Coppage of the Los Angeles Police Department, in the

latter's office on January 20, 1950. On this occasion the officer read to appellant a statement made the previous day by defendant Foster, in which the latter implicated appellant as the "brains" and instigator of the crimes charged.

On that occasion the following ensued, as testified to at the trial by the aforesaid police officer:

"At that time I read his statement, the statement issued by Foster the day before, to Kennedy (appellant). I read it word for word to him and after I read the statement, I said, 'Kennedy, it looks to me like you are in a pretty tough spot. Do you want to tell me anything about it?'

"He says, 'Well, I will admit that I sold the liquor; I will admit that I was at 901 East 35th Street when the liquor was brought there; but I wasn't actually on the job.'

"I says, 'Kennedy, I don't believe you, frankly.' I said, 'I'll tell you what I'll do. I am going to have Mack brought up here and I'm going to say nothing to Mack whatsoever. I want you to tell Mack to tell me the truth and if Mack tells me the same story that you do, I won't book you.'

"He says, 'All right.'

"When I brought Mack up there— * *

"A. I brought Mack up and said, 'All right, he is your witness; go ahead.'

"He said, 'Mack, I have told them and Foster has told them. You might as well tell them the truth.'

"Mack hesitated for a few minutes and looked at me and kind of smiled and said, 'All right. If the rest of them want to talk, I can talk, too.'

"At that time Mack, in the presence of Kennedy, stated that Kennedy had called him on the phone on the afternoon of the 13th and told him he had a deal and that later Foster and Kennedy picked him up in his car, that they followed this truck around, and he said when the truck stopped, he walked up to the truck and he said, 'I didn't actually point the gun at the man.' He said, 'I had the gun stuck down under my trousers and opened my coat and showed him and said, 'Man, this

is a holdup. If you get in, you won't get hurt.'

"He said, 'We drove down the street for eight or ten blocks, and I told him to drive in a housing project.' He said, 'At that time Kennedy and Foster came in Foster's car.' He stated, 'Kennedy got out of the car and walked around alongside of the truck. I took the driver off of the truck and put him in Foster's car and handed Foster the gun and told him to keep him for at least 30 minutes.'

"He said, 'Kennedy and I then went back to 901 East 35th Street. I drove the truck. We drove in there and unloaded the whiskey.' He says, 'Then we took the truck over and dumped it on 40th Place.'

"I said, 'Well, Mack,'—at that time I said, 'Mack who followed you over there? How did you get back?' Mack said, 'Well, will that boy get in any trouble?'

"I said, 'As far as I am concerned, he will get in no trouble.'

"He said, 'All right. It was Murphy Franklin. I don't want to see him get in trouble because he had nothing to do with the whiskey and we promised him \$5.00 to follow us over to where we dumped the truck and to bring us back to the house.'

"He said, 'Then we loaded the whiskey in the car and we went down to the used car lot at Jefferson and Washington and we sold the whiskey.' He said, 'We got a check for it.' He said, 'I was with Kennedy when he cashed the check at the Bank of America at Washington and Broadway.' He says, 'We give Foster \$20.00 one time and \$30.00 the next.'

"I said, 'What did you do with the gun?'

"He says, 'I threw the gun away on San Pedro Street.'

"I said, 'Are you willing to take the officers out and show them where you threw the gun?'

"And he said, 'Yes.'

"I then turned to Kennedy and said, 'What about it?' And he said to Mack, 'You know I wasn't there when the driver was taken off the truck.'

"And Mack replied, he says, 'You know you were there and if necessary, I can prove you were there.'

"I says, 'All right, Kennedy, you are going to be booked.'" (Emphasis added.)

It is significant that appellant made no denial of his participation in the crime other than to say that he was not present, "when the driver was taken off the truck".

Police Officer Wise testified on cross-examination that appellant stated to him, "That he went down and sold the liquor, that he hauled part of it in his car, that he got the check for the whiskey, and he had cashed the check for the whiskey, and that he had given the other two boys part of the money, that he had the check made out as a refund on the car, that he didn't think we could trace it."

Officer Wise also testified that appellant told him, "Yes, I knew they were going to pull the job, or some such words." That appellant admitted prior knowledge of the impending robbery was testified to by Officer Coppage as follows:

"Q. Then defendant Kennedy's statement to you at all times has been that he did not participate in the driving of the man or the robbing of the truck and that the most he ever did was cash this—I mean sell this liquor, is that right? A. With one exception. After he was accused of being with Mack at the time of the holdup, he then changed his story that he did meet Foster at the place where Foster told me that he had met him, on 27th and Central, prior to the holdup. Other than that, he still contended that he wasn't there on the actual holdup.

"Q. He wasn't there and didn't know anything about it, that they were going to do it? A. Ie didn't say anthing about he didn't know anything about it.

"Q. What did he say? A. He said he knew they had a deal on."

[5] From the foregoing, we are satisfied that the court was warranted in finding that appellant was actively engaged in advising and encouraging the commission of the crime, Penal Code, secs. 31, 971, for the profit of himself and his companions, or at least one of them, to whom part of the fruits of the robbery

were given. That the crime was committed in furtherance of a conspiracy in which appellant was actively engaged by way of advice and encouragement, though possibly not actively present when the victim was abducted and robbed.

[6] Conceding, as contended by appellant, that his co-defendants were accomplices, we are satisfied that the evidence in the case at bar meets fully the requirements of section 1111 of the Penal Code with reference to corroboration.

[7] In the instant case, the court found appellant guilty on both counts of the information, one of which charged the crime of robbery, and the other accused him of the crime of kidnapping for the purpose of robbery. However, the defendants in this case committed no act of seizure or confinement other than that necessarily incident to the commission of robbery. Appellant therefore, cannot be subjected to punishment for both offenses under the rule enunciated in *People v. Knowles*, 35 Cal.2d 175, 186, 187, 188, 189, 217 P.2d 11.

The judgment of conviction of kidnapping for the purpose of robbery is affirmed, and the judgment of conviction of armed robbery is reversed.

DORAN and DRAPEAU, JJ., concur.



101 Cal.App.2d 753

ANDERSON v. FRATIS.

Civ. 7822.

District Court of Appeal
Third District, California.

Jan. 16, 1951.

Partition action by Elmo Anderson against Orpha Ruth Fratis wherein defendant filed a cross-complaint alleging an agreement under which defendant claimed the realty in controversy. The Superior Court, Yolo County, C. C. McDonald, J., rendered a judgment for the defendant, and the plaintiff

appealed. The District Court of Appeal, Adams, P. J., held that the evidence supported a finding that a previous meretricious relationship between the parties was not a consideration for the agreement.

Judgment affirmed.

1. Contracts ⚖141(3)

In partition action wherein defendant filed cross-complaint alleging agreement under which defendant was to receive realty, evidence supported finding that previous meretricious relationship between the parties was not a consideration for the agreement.

2. Compromise and settlement ⚖9

Man and woman who lived together in meretricious relationship could enter into legal contract settling their property rights after parties had severed the relationship.

3. Compromise and settlement ⚖6(1)

Agreement by woman to waive claim for damages for assault and battery committed by man with whom she previously lived in meretricious relationship was alone sufficient consideration on woman's part for agreement settling property rights between them.

Clifford R. Lewis, Sacramento, for appellant.

A. G. Bailey and John A. Young, Woodland, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action seeking to have partitioned between him and defendant certain real property standing in the names of the two parties as joint tenants, and consisting of a city lot and dwelling house thereon, where the two had lived for some 13 years in a meretricious relationship. Defendant answered and filed a cross-complaint attached to which was a copy of an agreement which had been entered into between the parties after their former relationship had been permanently terminated.

That agreement, stipulated to have been duly executed by the parties, recited that they were desirous of settling all property

rights growing out of their relationship, that defendant, the party of the first part, was to have the real property in controversy, certain defense bonds held in joint tenancy were to be divided equally, defendant was to pay to plaintiff \$300 out of \$400 which she had drawn out of a joint bank account subsequent to their separation, and she was to pay a promissory note of \$200 which plaintiff had executed and delivered to the Graeser Realty Company. Also, defendant agreed to waive any and all causes of action for an assault and battery which plaintiff had committed upon her person.

Plaintiff, answering the cross-complaint, averred "that the said illegal and immoral cohabitation of and between the parties hereto was the sole and controlling consideration for the execution of the said agreement."

At the trial of the action before the court without a jury, plaintiff's only witness was defendant, called under Code of Civil Procedure, section 2055. It was stipulated that at the time the agreement was entered into the parties had separated and had no intention of resuming their relationship. It was also shown that defendant had paid the \$300 to plaintiff, and that she had paid the \$200 to the Graeser Realty Company.

The trial court resolved the issues in favor of defendant and made findings in conformity with the facts aforesaid, and also found that the agreement was based upon a good and valid consideration; that defendant had paid plaintiff's promissory note, returned the \$300 to plaintiff, had fully and fairly performed all of the promises and conditions by her to be performed, and that such agreement and the waiver of her cause of action against plaintiff for assault and battery were good and adequate consideration for the promises of plaintiff in the agreement; and that the meretricious relationship of the parties did not enter into and was no part of the consideration for the making of the agreement relied upon by defendant.

[1] Appellant does not contend that the findings of the court as to the payment of the note, the payment of \$300 to plaintiff and the waiver of the cause of action for

assault and battery are not sustained by the evidence, but he insists that the evidence does not sustain the finding that the meretricious relationship of the parties was not a consideration for the agreement. He relies upon certain statements of defendant as admissions that it was the sole consideration. We have read the record, and do not agree with appellant's construction put upon her testimony. Without quoting the testimony relied upon it is sufficient to say that it presented a question of fact for the trial court who saw and heard the witness, and it is amply sufficient to support its finding. *Hill v. Estate of Westbrook*, 95 Cal. App.2d 599, 602, 213 P.2d 727; *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430.

[2, 3] The agreement in this case was entered into after the parties had severed their relationship, and no reason is shown why, under such circumstances, they could not enter into a legal contract. It was said in *Trutalli v. Meraviglia*, supra, 215 Cal. at pages 701-702, 12 P.2d 430, that the fact that the parties to that action were living together in an unlawful relation, did not disqualify them from entering into a lawful agreement so long as such relation was not made a consideration of their agreement. Also see *Bacon v. Bacon*, 21 Cal. App.2d 540, 69 P.2d 884; 12 Am.Jur., sec. 176, p. 675. The agreement on the part of respondent to waive her claim for damages for the beating given her by plaintiff is alone sufficient consideration on her part. *Bacon v. Kessel*, 31 Cal.App.2d 245, 87 P.2d 857; *Douillard v. Woodd*, 20 Cal.2d 665, 28 P.2d 6; 17 C.J.S., Contracts, § 104, pp. 459-460; 6 Cal.Jur., sec. 120, p. 175; *Reed v. Kansas Postal Telegraph & Cable Co.*, 125 Kan. 603, 264 P. 1065, 57 A.L.R. 279. It appears without contradiction that appellant struck respondent while she was in their automobile, that he dragged her from the car and then attempted to run over her, and that, as a result, she was rendered black and blue, her bladder was injured and she was compelled to undergo an operation in a hospital.

In *Foley v. Cowan*, 80 Cal.App.2d 70, 181 P.2d 410, it was held that the trial court's determination of the adequacy of consider-

ation was a binding determination of a question of fact in an action for specific performance.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



SUPERIOR INS. CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 18160.

District Court of Appeal, Second District,
Division 1, California.

Jan. 25, 1951.

Hearing Granted March 22, 1951.*

The Superior Insurance Company, a Texas corporation, and Paul Witten, petitioned for a writ of mandate requiring the Superior Court of the State of California, in and for the County of Los Angeles, to vacate an order for perpetuation of testimony and to quash subpoenas duces tecum. The District Court of Appeal, White, P. J., held that a person who is, or expects to be, a party plaintiff in an action for personal injuries, does not have right, through proceedings for perpetuation of testimony, to ascertain the amount of a policy of insurance indemnifying defendant, in advance of recovery of any judgment by plaintiff against defendant, and prior to institution of any action against defendant.

Peremptory writ of mandate issued.

Depositions ⇐33

A person who expects to be a party plaintiff in an action for personal injuries does not have right through proceedings for perpetuation of testimony to ascertain amount of a policy of insurance indemnifying defendant, in addition to ascertaining existence and terms of policy, in advance of recovery of a judgment by plaintiff against defendant and prior to institution of an action against defendant. Code Civ. Proc. §§ 2083-2089.

* Subsequent opinion 235 P.2d 833.

Joseph W. Jarrett, Robert L. Moore, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent Superior Court.

Paul Leiter, Beverly Hills, for respondent Sally Priscilla Hays, real party in interest.

WHITE, Presiding Justice.

On August 29, 1950, Sally Hays filed in the Superior Court of Los Angeles County an application for perpetuation of testimony under sections 2083 to 2089 of the Code of Civil Procedure, in which application she alleged that she expected to be a party to an action against Paul Witten and Superior Insurance Company (the petitioners herein) "to enforce payment of a judgment which petitioner expects will be rendered in favor of petitioner" in an action against Paul Witten and others for personal injuries arising out of an automobile accident; that the applicant sought to establish the existence of automobile casualty insurance insuring Paul Witten against liability for personal injuries and property damage. The superior court granted the application and ordered that the depositions be taken of Paul Witten and one F. O. Hoffman. Hoffman is president of Superior Insurance Agency, Inc., the sole agent of Superior Insurance Company for the writing of certain types of casualty insurance in this state, and is also its authorized agent in this state for service of process. The court further ordered the issuance of subpoenas duces tecum requiring Witten to produce all liability policies insuring him on the date of the accident, June 27, 1950, together with receipts for premiums and notices or correspondence pertaining to the effective period of such policies, and requiring Hoffman to produce "copies of all policies of insurance issued to Paul Witten covering said person for liability for personal injury and property damage in effect on June 27, 1950, together with all records of receipts for premiums paid by said Paul Witten pertaining to said policies, and all records and correspondence pertaining to the effective dates of said policies."

On September 15, 1950, petitioners herein moved in the superior court to vacate the order for perpetuation of testimony and quash the subpoenas duces tecum, or in the alternative to modify the order so as to relieve petitioners from producing any documents and further limiting their oral examination to the following: "Testimony as to whether a public liability and property damage automobile insurance policy was in full force and effect on June 27, 1950, covering the ownership and operation of a certain 1949 Oldsmobile sedan owned and operated by Paul Witten, the named insured; testimony as to whether or not there are any known policy defenses affecting said policy or pertaining to said accident; testimony as to whether premiums due upon said policy have been paid; and testimony as to whether said insurance company will satisfy any final judgment rendered against Paul Witten as a result of the personal injury action referred to in said petition to the full contractual indemnity liability under said policy of insurance."

Their motion being denied, petitioners appeared on September 16, 1950, for the taking of their depositions, and, as is alleged in their petition, Hoffman answered "all questions concerning the issuance of said public liability and property damage automobile insurance policies, * * * specimen policies were introduced in evidence, including all provisions of the policies in question, with the exception of policy limits and amount of premium payments; and in substance, all information which could constitute a valid basis of perpetuation proceedings with respect to said insurance coverage, was supplied; that the only information withheld was the amount of the policy limits of said public liability and property damage automobile insurance policy and the amount of premiums paid; that with the exception of production of said specimen policies said F. O. Hoffman did not produce any of the documents required * * * and said Paul Witten produced no documents * * *."

F. O. Hoffman was thereupon directed to show cause before the superior court why he should not answer the questions which he had refused to answer. Before

the hearing of the order to show cause this court issued its alternative writ of mandate, requiring the superior court to grant petitioners' motion to vacate its previous orders (or in the alternative to limit the scope of the examination as aforesaid) or to show cause why it had not done so.

The issue presented herein, therefore, is whether a person who is, or expects to be, a party plaintiff in an action for personal injuries, has the right, through proceedings for perpetuation of testimony, to ascertain not only the existence and terms of a policy of insurance indemnifying the defendant, but also the amount thereof, and this in advance of the recovery of any judgment by plaintiff against the defendant, and prior to the institution of any action against the latter.

In *Demaree v. Superior Court*, 10 Cal. 2d 99, 73 P.2d 605, 607, the application for examination alleged that an action was pending and undetermined wherein the applicant sought damages for personal injuries arising out of an automobile accident; that defendant Dawley was operating the automobile with the consent of defendant Appling; that Appling carried a policy of insurance; that it was believed that the policy contained an omnibus clause indemnifying any person operating the automobile with the consent, express or implied, of Appling. The superior court issued an order authorizing the taking of Appling's deposition and a subpoena duces tecum requiring Appling to produce the policy. Appling declined to produce the policy at the time of his examination. Subsequently the superior court vacated its order and declined to compel Appling to produce the policy. The Supreme Court issued a peremptory writ of mandate. In response to the objections raised by the respondents to the petition for mandate, the court held that the petitioners had sufficiently met the requirements of sections 2083 to 2086 of the Code of Civil Procedure, and that the application, considered as an application for a subpoena duces tecum, sufficiently specified "the exact matters or things desired to be produced," and sufficiently showed the materiality thereof, and that "Appling had the

* * * policy in his possession or under his control". The court further said: "We think it must be conceded that the provisions of the policy of insurance are germane to petitioners' cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy."

To the principal objection that requiring production of the policy would result in unreasonable search and seizure, the court said:

"The authorities cited in support of this contention fail, in our judgment, to meet the case. They relate, for instance, to a subpoena to produce 'all books,' without specific description of particular and material documents. * * *

"The comparatively recent decision of this court in *Kutner-Goldstein Co. v. Superior Court*, 212 Cal. 341, 298 P. 1001, 1003, sufficiently disposes of the issue. The author of the opinion in that case reviews the question at length, and says (212 Cal. 341, at page 345, 298 P. 1001): 'Ordinarily nothing more than the statutory requirements is necessary to be shown in the application, and the courts of this state have so stated on several occasions' (citing leading previous decisions sustaining the point)."

While the court in the *Demaree* case, supra, upheld an order for the production of the policy, it is urged by petitioners that the case is distinguishable from the present one in several particulars. The sole question in the *Demaree* case was whether the insurance policy contained an omnibus clause insuring the operator as well as the owner, the latter being an automobile dealer. It was alleged in the petition in the *Demaree* case that the driver, Dawley, was not financially responsible, that the policy had lapsed, and that there was a possibility that the policy might be lost or destroyed. On the other hand, petitioners state that it appears from the affidavit of F. O. Hoffman that petitioners admit the existence of the policy, that it was in effect on the date of the accident, that there are no known policy

defenses to date and none anticipated, that the premium has been paid, that the policy is a standard automobile public liability and property damage policy approved by the Insurance Department; that all policy records would be preserved. Further, that in the Demaree case there was a complete refusal to reveal anything except that Appling was insured under a policy of insurance which might or might not be in effect at the time of the accident. Further, it is pointed out that subsequent to the Demaree decision in 1937, the Vehicle Code has been amended (sec. 422.6), to require insurers to file with the Department of Motor Vehicles a certificate that a policy of public liability insurance was in effect at the time of the accident. This, it appears from the affidavit of Hoffman, was done in the present case, which act, say petitioners, "had the effect of perpetuating the existence of the policy, the fact of insurance effective at the date of the accident covering the same with at least minimum policy limits," which under the aforesaid Vehicle Code provisions must be not less than \$5,000.00 for injury to any one person and \$10,000.00 for any one accident.

Aside from the case above referred to, counsel on neither side have furnished any authority directly on the point in issue, and research on our part has been equally fruitless. Concededly, the weight of authority appears to hold that records must be produced or questions answered not only with reference to issues which will actually arise in the trial of a cause, but of and concerning issues which may potentially arise. *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 394, 395, 159 P.2d 944; *San Francisco Gas & Electric Co. v. Superior Court*, 155 Cal. 30, 99 P. 359; *Rosbach v. Superior Court*, 43 Cal.App. 729, 185 P. 879.

Proceeding on this theory, we are unable to perceive how the question of the amount of liability insurance or the premium paid thereon can even potentially be regarded as a possible issue on the trial of the contemplated action. Such an issue could only arise following the rendition of a judgment in favor of plaintiff, and then would arise,

not in the action now proposed to be commenced, but in another and separate action, for any judgment the plaintiff might obtain against the defendant could not be enforced against the insurance company except by and through the commencement of another and distinct action predicated upon such judgment against the defendant.

As was held in *New York etc. Co. v. Superior Court*, 30 Cal.App.2d 130, 132, 85 P.2d 965, perpetuation proceedings should be for a legitimate purpose and not be oppressive. Here the fact of insurance has been determined and admitted under the provisions of the Vehicle Code, *supra*. The resident agent, Hoffman, at his deposition, provided the plaintiff with all the terms and conditions of the policy, and further offered to preserve all the records by filing them "as a sealed instrument" with the court.

To permit the disclosure of the policy limits at the present time would not aid in the determination of any of the issues of the personal injury action, but merely provide the plaintiff with an advantage in negotiating for a settlement, which we do not regard as being within the purview of the applicable statutes providing for the perpetuation of testimony and the issuance of subpoenas duces tecum.

For the foregoing reasons let a peremptory writ of mandate issue as prayed, directing respondent court to quash the subpoena duces tecum heretofore issued and to modify or amend said respondent court's order of August 30, 1950, to the extent of specifically limiting the oral examination of F. O. Hoffman, the designated agent of petitioner in California for service of process, and said Paul Witten to the following: Testimony as to whether a public liability and property damage automobile insurance policy was in full force and effect on June 27, 1950 covering the ownership and operation of a certain 1949 Oldsmobile sedan owned and operated by Paul Witten, the named insured; testimony as to whether or not there are any known policy defenses affecting said policy or pertaining to said accident; testimony as to whether premiums due upon said policy have been paid;

and testimony as to whether said insurance company will satisfy any final judgment rendered against Paul Witten as a result of the personal injury action referred to in said petition to the full contractual indemnity liability under said policy of insurance.

DORAN and DRAPEAU, JJ., concur.



101 Cal.App.2d 777

In re WILLARDSON'S ESTATE.

BANK OF AMERICA TRUST & SAVINGS
ASS'N et al. v. WILLARDSON et al.
Civ. 18103.

District Court of Appeal, Second District,
Division 3, California.

Jan. 17, 1951.

As Modified on Denial of Rehearing
Feb. 15, 1951.

Hearing Denied March 15, 1951.

Proceeding in the matter of the estate of Eldon Willardson, deceased, wherein the Bank of America Trust and Savings Association, Frank E. Hess and Mae M. Oury filed petitions for trustees' fees, opposed by Gladys E. Willardson, individually and as guardian of Joann Willardson, a minor, and others. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered an order settling second account current, report of trustees and allowing trustees' fees, and the petitioners appealed. The District Court of Appeal, Shinn, P. J., held that the finding that amounts withdrawn by trustees as compensation were excessive and fixing amounts which court declared to be fair and reasonable was sufficient finding on controverted issue of fact whether trustees' withdrawals as compensation constituted fair and just consideration for trustees' services.

Order affirmed.

1. Courts ⇨202(4)

In an estate proceeding, findings of fact may be included in judgment or order.

2. Trusts ⇨326

In testamentary trustees' accounting proceeding, finding that amounts withdrawn by trustees as compensation were excessive and fixing amounts which court declared to

be fair and reasonable was sufficient finding on controverted issue of fact whether trustees' withdrawals as compensation constituted fair and just consideration for trustees' services. Probate Code, § 1122.

3. Trusts ⇨315(3)

The fixing of just and reasonable compensation for trustees is left to sound discretion of trial court, whose determination will not be interfered with upon appeal in absence of abuse of discretion. Probate Code, § 1122.

4. Evidence ⇨590

The court was not required to accept as satisfactory evidence the testimony of witnesses who could well have been believed to be biased in favor of certain parties.

5. Trusts ⇨317

The refusal of greater compensation to testamentary trustees allowed substantial amounts for their services was not abuse of discretion. Probate Code, § 1122.

6. Trusts ⇨315(1)

Trustees operating business of estate as executors until their final account was settled were not entitled to compensation as trustees prior to the time that the estate was distributed to them as trustees.

7. Interest ⇨39(4)

Testamentary trustees would be required to pay legal interest on money withdrawn by trustees in excess of amounts allowed by court as just and reasonable compensation, from date of withdrawal to date of repayment to estate, where beneficiaries objected to withdrawals as too high and beneficiaries and trustees agreed that withdrawals were subject to court approval. Probate Code § 1122.

Robert E. Ford, Los Angeles, for appellants Frank E. Hess and Mae M. Oury, as Trustees of the Estate of Eldon Willardson, Deceased.

Spray, Gould & Bowers and Charles P. Gould, all of Los Angeles, for appellant Frank E. Hess.

Roane Thorpe, Los Angeles, for appellant Mae M. Oury.

Cannon & Callister, David H. Cannon and Reed E. Callister, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Appeal from an order of the superior court settling second account current, report of trustees and allowing trustees' fees, made and filed on December 28, 1949.

The trustees, Frank E. Hess and Mae M. Oury, appellants, filed an amended petition for trustees' fees for the period from March 1, 1947 to April 30, 1948 in which Hess sought total fees in the sum of \$65,311.86 and Oury total fees in the sum of \$31,714.26. The court allowed Hess \$20,000.00 as fees for that period and Oury the sum of \$8,400.00. The appellants also sought fees for the period from April 30, 1948 to November 30, 1948, Hess in the sum of \$39,413.36 and Oury in the sum of \$19,248.35. For this period the court allowed Hess \$11,666.67 and Oury \$4,900.00.

The decedent, Eldon Willardson, died March 4, 1945, leaving various properties, and cash in excess of \$200,000.00 in joint tenancy with his widow. By the terms of his will, to which the widow had consented at the time of execution, the decedent left the community property, other than that held in joint tenancy, in trust for the benefit of the widow and children who are the objectors and respondents here. The principal asset of the trust was a plumbing and heating contracting business which had been operated by the decedent prior to his death. As trustees to administer the trust and carry on the business he appointed the Bank of America, Frank E. Hess and Mae M. Oury. Both Mr. Hess and Mrs. Oury had been employed by the decedent for many years prior to his death. Appellants, as executors, operated the business of the estate until their final account was settled and the trust estate was distributed to them as trustees on April 30, 1947.

In January, 1948, the business was incorporated with the approval of the court, with a stated capital of \$100,000.00. It appears that during the period from March 1, 1947 to April 30, 1948, the business earned net profits before income taxes in the sum of \$279,423.89, and from April 30, 1948 to November 30, 1948, net profit in the sum of

\$225,452.22. For their services in operating the business, Hess sought confirmation of compensation he had drawn from the business, predicated upon a basic salary of \$25,000.00 per year plus 20 per cent of the net income of the business, before income taxes, in excess of \$100,000.00 per year, and Oury sought to have the court confirm her salary of \$11,700.00 per year plus 10 per cent of the profits in excess of \$100,000.00 per year. Under the terms of the will, the trustees were to receive fair and just compensation for their services. By the order under review, appellants were allowed nothing for the period from March 1, 1947 until April 30, 1947, and it was decreed that they return all moneys withdrawn by them in excess of the amounts allowed as previously set forth, together with legal interest on the excess from the dates of withdrawal to the date of repayment to the estate.

Appellants contend that the court committed error in failing to make written findings of fact on the issues raised; that the order fixing fees is contrary to the uncontroverted and unimpeached evidence presented; that it was error to allow no fees for the March 1, 1947 to April 30, 1947 period; that it was error for the court to order the excess amount returned together with legal interest thereon.

[1, 2] The court in its order of December 28, 1949, decreed that the sums which were allowed were "fair, equitable, just and reasonable for the services so rendered by the said trustees to the said estate and [that] the apportionment thereof so made to the said trustees is reasonable according to the services rendered by them respectively". In *Estate of Janes*, 18 Cal.2d 512, 116 P.2d 438, it was held that findings of fact may be included in a judgment or order. See also *Estate of Kennedy*, 64 Cal.App.2d 757, 149 P.2d 319. The only controverted issue of fact in the instant proceeding was whether the withdrawal made by the trustees as compensation constituted a "fair and just" consideration for their services. In response to this issue the court found that the amounts so withdrawn were excessive and also fixed amounts which it declared to be fair and reasonable. This was a sufficient finding.

[3-5] Appellants' second contention is that the court should have allowed the full amounts claimed for the reason that the evidence showed, without contradiction, that the same would be just and reasonable compensation for the services rendered. This contention also is without merit. Section 1122, Probate Code, provides in part as follows: "Expenses, etc., of trustee. On the settlement of each such account [of a trustee] the court shall allow the trustee his proper expenses and such compensation for services as the court may deem just and reasonable. Where there are several trustees it shall apportion the compensation among them according to the respective services rendered. * * *" The fixing of such compensation is left to the sound discretion of the trial court and its determination will not be interfered with upon appeal in the absence of an abuse thereof. *Estate of McLellan*, 8 Cal.2d 49, 63 P.2d 1120; *In re Bauer's Trust*, 17 Cal.App.2d 426, 62 P.2d 150; *Fernald v. Lawsten*, 26 Cal.App.2d 552, 79 P.2d 742. It is true that appellants and their experts expressed opinions as to the value of the services rendered which would have justified far greater awards. Two of appellants' witnesses, in answering hypothetical questions, valued the services of Hess at 50 per cent of the net profits, presumably upon the theory that the compensation would be contingent upon the earnings of the company. But there was comprehensive evidence as to the services that had been rendered and the results obtained, all of which the court no doubt took into consideration. It would appear to us that the services of the trustees in managing the business were not of so technical a nature as to require expert testimony for their evaluation. *Clark v. Conley School District*, 86 Cal.App. 523, 261 P. 721; *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374; *Kimes v. Davidson Inv. Co.*, 101 Cal. App. 382, 281 P. 639; *In re Pomin's Estate*, 33 Cal.App.2d 544, 92 P.2d 479; *Geisenhoff v. Mabrey*, 58 Cal.App.2d 481, 137 P. 2d 36; *Trumbo v. Bank of Berkeley*, 77 Cal.App.2d 704, 176 P.2d 376. Moreover, the witnesses could well have been believed to be biased in favor of appellants and hence their testimony unreliable. The court was not required to accept it as satisfactory evidence. *Jordan v. O'Connor*, 99 Cal.App.2d 632, 222 P.2d 322; *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374; *Estate of Reinhardt*, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755; *Burns v. Osborne-Fitzpatrick Finance Co.*, 101 Cal.App. 680, 282 P. 419; *Layne & Bowler Corp. v. Grogan*, 56 Cal.App. 31, 204 P. 252. The amounts allowed appellants for their services were substantial, and we are not prepared to say that the refusal of greater compensation was an abuse of discretion.

[6] Appellants contend that their final account as trustees was for the period ending February 28, 1947, and that their trustees' account was started as of March 1, 1947. Since the estate was distributed to appellants as trustees on April 30, 1947, the trial court correctly held that they were not entitled to compensation as trustees prior to that time.

[7] Appellants' final contention is that they should not be compelled to pay interest on any money which they may be ordered to repay because the withdrawals were made with the knowledge and consent of all those concerned. The testimony of Mr. Ford, attorney for appellants, shows that the beneficiaries objected to the fees of the trustees as being too high; that the withdrawals were allowed merely for taxation purposes, were to be without prejudice to any objections on the part of the beneficiaries, and that it was agreed there was no waiver on the part of any of the objectors. It was also agreed that any fees paid to, or withdrawn by the trustees, were subject to court approval. It is apparent that the moneys were withdrawn over the objection of those beneficially interested and that the trial court properly directed that interest run on the excess from the times of withdrawal until the time of repayment to the estate. In *Estate of Piercy*, 168 Cal. 755, 758, 145 P. 91, it was suggested by the appellant as in the instant case that no interest, either simple or compound, was proper because the principal amount was unliquidated and, until the making of the order, unascertained. The court said that the rule contended for applied to an action for damages, and that other considerations must govern a court in fixing the liability of a delinquent trustee. It was held that in such cases the primary consideration is the equitable one that the trus-

tee must be compelled to fully compensate the beneficiary for the unauthorized use of the trust estate. Compensation would not be complete if interest were withheld. Estate of Guglielmi, 138 Cal.App. 80, 90, 31 P. 2d 1078; Katz v. Enos, 68 Cal.App.2d 266, 279, 156 P.2d 461; Estate of McLellan, 8 Cal.2d 49, 55, 63 P.2d 1120; Wheeler v. Bolton, 92 Cal. 159, 172, 28 P. 558; Estate of Cousins, 111 Cal. 441, 452, 44 P. 182.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



101 Cal.App.2d 760

MCGILLIS v. HOFEDITZ.
Civ. 4059.

District Court of Appeal,
Fourth District, California.

Jan. 16, 1951.

Rehearing Denied Feb. 14, 1951.

Action by Martha McGillis against La Verne Dwight Hofeditz to determine the fatherhood of a minor and for support. The Superior Court, Fresno County, Arthur C. Shepard, J., rendered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Mussell, J., held that the evidence supported a finding that defendant was the father of the child involved.

Judgment affirmed.

1. Bastards ⇨65

In action to determine fatherhood of minor and to recover support, evidence supported finding that defendant was father of child involved. Civ.Code, §§ 193, 194.

2. Bastards ⇨3

In action to determine fatherhood of minor and to recover support, where there was evidence that plaintiff wife was not cohabiting with her husband from whom she had separated but with defendant, statutory presumption that issue of wife cohabiting with husband who is not impotent is indisputably presumed to be legitimate, was not applicable. Code Civ.Proc. § 1962.

3. Appeal and error ⇨1011(1)

Where evidence merely created conflict which trial court resolved in favor of plaintiff, decision could not be disturbed on appeal.

4. Appeal and error ⇨1012(1)

Weight and sufficiency of evidence, construction to be put upon it, and inferences to be drawn therefrom are matters for trier of facts.

Claude L. Rowe, Fresno, for appellant.

Lester N. Gonser, Fresno, for respondent.

MUSSELL, Justice.

Action to determine fatherhood of a minor and for support.

Plaintiff, mother of Christopher Galen McGillis, born February 10, 1949, filed an action to compel defendant, as the father of said minor, to provide for the child's support and maintenance. Defendant appeals from a judgment for plaintiff and contends that the evidence is insufficient to support the findings and decision.

Plaintiff and her husband, Mark McGillis, separated in January, 1948, and on April 30th of that year, plaintiff commenced an action for divorce, in which she obtained an interlocutory decree on May 14, 1948.

There was substantial testimony introduced at the trial that plaintiff and defendant became acquainted April 24, 1948, and that sexual intercourse occurred between them either late in April or early in May of that year; that the child involved was conceived during the first week of May, 1948.

Plaintiff and her husband, Mark McGillis, testified that no acts of sexual intercourse took place between them after their separation in January, 1948.

Several witnesses testified that defendant met plaintiff during April, 1948, and that he thereafter, until the following August, visited plaintiff at her home "almost every night", remaining with her for several hours alone on these occasions. There was evidence that plaintiff and her hus-

band, Mark McGillis, were seen together on several occasions after their separation, but there was no testimony that they were living together as man and wife. The defendant admitted that he became acquainted with plaintiff around April, 1948, and admitted several acts of sexual intercourse with her beginning about June of that year. Mrs. Tockey (plaintiff's mother) testified that she discussed plaintiff's pregnancy with the defendant in July, 1948; that he then suggested an abortion and that in this and other conversations with defendant, he at no time denied being the father of the child.

[1,2] The trial court's finding that the defendant is the father of the child involved is supported by substantial evidence, sufficient to overcome the presumptions that "All children born in wedlock are presumed to be legitimate", Section 193, Civil Code, and that "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage", Section 194, Civil Code. The presumption in Section 1962 of the Code of Civil Procedure that "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate", is not here applicable as the evidence before us is that the plaintiff wife was not "cohabiting" with her husband but with the defendant. *Cinders v. Lewis*, 93 Cal.App.2d 90, 92, 208 P.2d 687. (Hearing denied by the Supreme Court.)

[3,4] Evidence was introduced by the defendant tending to contradict plaintiff's testimony as to the time when her sexual relations with defendant began and as to her relationship with her husband after their separation in January of 1948. However, this evidence merely created a conflict which the trial court resolved in favor of the plaintiff and its decision cannot be here disturbed. *Estate of Bristol*, 23 Cal. 2d 221, 223, 143 P.2d 689. The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom were matters for the trier of the facts. *Dillard v. Mc-*

Knight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 756

EDMINSTER et al. v. THORP et al.

Civ. 7824.

District Court of Appeal, Third District,
California.

Jan. 16, 1951.

Phillip Maurice Edminster and Laura G. Edminster sued Howard Thorp, and others, for injuries suffered by Mrs. Edminster alleged to have been sustained in an automobile accident due to alleged negligence on part of named defendant. The Superior Court, Butte County, Harry Deirup, J., rendered judgments for plaintiff and defendants appealed from the judgment of \$4000 in favor of Phillip Edminster. The District Court of Appeal, Adams, P. J., held that by allegation of pleading that plaintiff's husband had been deprived of services of his wife, the defendants were sufficiently advised that recovery for loss of such services was being relied on by plaintiff husband and it was not error for trial court to admit evidence as to expenses incurred by husband for rendition of services by a person employed to perform some of those formerly performed entirely by the wife.

Judgment affirmed.

1. Damages ⇐159(2)

A plaintiff may prove loss of earnings under a general plea of damages resulting from injury.

2. Damages ⇐159(2)

By allegation of pleading that husband was deprived of services of his wife, defendants were sufficiently advised that recovery for loss of such services was being relied on by plaintiff husband and it was not error to admit evidence as to expenses

incurred by husband for rendition of services by a person employed to perform some of those formerly performed entirely by wife. Code Civ.Proc. §§ 452, 475.

3. Damages ⇐163(1)

Where complaint alleged that husband had been and would be deprived of the cohabitation and services and society of his wife to his damage in sum of \$5000, husband became entitled, on admission of negligence and liability on part of defendants, to recover as such damages such amount up to \$5000 as jury might determine, even though no testimony as to husband's actual outlay was introduced.

4. Damages ⇐37, 42

Consequential damages to husband include loss of services of wife, and money expended and indebtedness incurred by reason of injury to wife, such expense incurred for necessary labor and services substituted for ordinary services of wife.

5. Damages ⇐163(1)

Damages for loss of services of wife are recoverable, though there is no direct proof of value of such services.

6. Appeal and error ⇐1058(1)

Where complaint alleged that plaintiff husband had been deprived of services of his wife and defendants admitted negligence and liability and objected only to testimony of husband as to his payment for household help but wife testified without objection to same thing and it was not contended that amount paid was excessive, if there was error defendants suffered no prejudice or substantial injury thereby. Code Civ.Proc. §§ 452, 475.

Russell A. Harris, by Leo Fitzwilliam, Sacramento, for appellants.

Carlton Shadwell, Redding, Charles H. Andrews, Chico, for respondents.

ADAMS, Presiding Justice.

Plaintiffs, Phillip Maurice Edminster and his wife, Laura G. Edminster, brought this action to recover damages for injuries suffered by Mrs. Edminster which were alleged to have been sustained in an auto-

mobile accident due to negligence on the part of defendant Howard Thorp, an employee of defendant Watkins Lumber Co., which company was the owner of the car of which Thorp was the driver. Defendants admitted negligence and liability, and the only issue tried was that of damages. A judgment in favor of Mrs. Edminster based upon the verdict of a jury has been satisfied.

This appeal is taken from the judgment of \$4000 in favor of Phillip Edminster, the question raised, as stated in appellants' opening brief, being "Was it prejudicial and reversible error for the Court to admit over objection by the defendants, evidence of the cost to plaintiff Phillip Maurice Edminster for household help supposedly made necessary as a result of his wife's injuries, when the plaintiffs' complaint contained no allegation of such special damage."

The complaint alleged:

"That prior to said accident, said plaintiff Laura G. Edminster, the wife of plaintiff Phillip Maurice Edminster, was in good health and fully capable of and actually did perform all of the usual duties of a housewife; that as a result of said injuries, said plaintiff Laura Edminster has been, and will be for a long time to come unable to perform said duties; that by reason of the injuries to the said wife of plaintiff Phillip Maurice Edminster, said plaintiff has been and will be for long time to come, deprived of the cohabitation and services and society of his said wife to his damage in the sum of \$5,000.00, all of which is the direct and proximate result of the negligence, carelessness and recklessness of said defendants, as hereinabove alleged."

Plaintiff husband testified, over the objection of defendants, that he had paid over \$320 for household help, which amount, on cross-examination, was stated to have been at the rate of \$1.00 per hour for for an eight-hour day once a week for 40 weeks. He also urged that the cost of such household help during the ensuing five years—the period which medical testimony showed was the probable dura-

tion of disability of Mrs. Edminster—would be \$2080.00, which the jury should take into account in fixing the amount of the damages awarded to him.

Appellants' contention is that such damages were not specially pleaded, and, therefore, evidence of the amount paid out was not admissible; while respondent urges that the expenses incurred by him as a result of the injuries to his wife are general, and not special damages, and that his pleading was sufficient anyhow, as the allegation that prior to the accident his wife was in good health and performed all of the usual duties of a housewife, and that since her injuries she has been and will be for a long time to come, unable to perform said duties, fully informed defendants that he claimed damages for the expense of employing household help necessitated by the injuries suffered by his wife.

In *Meek v. Pacific Electric Railway Co.*, 175 Cal. 53, 55, 164 p. 1117, the allegation of the complaint was:

"That before said accident said plaintiff Evalena Meek was an able-bodied woman; sound in mind and body; made part of her own clothes; did the housework for herself and husband, and when she had any one employed to assist in the housework she overlooked the same, and, in fact, was in charge and control of the household and performed the usual duties that a housewife performs in that behalf; but that since said accident said plaintiff Evalena Meek has been unable to perform, and will never be able to perform, the said duties as aforesaid, to the plaintiff J. F. Meek's damage in the sum of [twenty thousand dollars] \$20,000."

This pleading was held to be sufficient in that case to sustain a judgment for the husband.

Also in *Martin v. Southern Pacific Co.*, 130 Cal. 285, 62 P. 515, the complaint alleged that by reason of the negligence of the defendant the injuries received by plaintiff's wife were permanent, and rendered her wholly unable to perform her usual work and duties, and that by reason thereof plaintiff had been, and would be through

the remainder of her life, deprived of her services and compelled to provide medical aid and care for her. The evidence established that prior to her injuries the wife had done all of the housework without assistance, but that since that time she had been unable to do any of it, and plaintiff had been compelled to employ other assistance for that purpose. The court held that the husband was entitled to recover for loss of services by his wife and for expenditures for other assistance in lieu thereof.

Also see *Jacobsen v. Vaughn*, 131 Cal. App. 277, 281, 21 P.2d 141.

As to the sufficiency of the pleading it is said in 27 Am. Jur. 102:

"The gist of a husband's cause of action for loss of his wife's consortium and for expenses, resulting from injuries to her through the wrongful acts or negligence of another, is such loss and expenses sustained by him, and not the injuries sustained by her; such loss and expenses sustained by him are not merely items of damages, but are, as stated, essential to the cause of action itself. The cause of action exists for such loss and expenses up to the time of her death, where she dies from the wrongful or negligent acts of the defendant; it exists for such loss and expenses up to the date of trial; and it exists for probable future loss of consortium and expenses. *Such expenses are not special damages, in the legal sense of the term, and hence, evidence thereof can be received on trial without special allegation.*" (Italics added.)

[1] In numerous cases it has been held that a plaintiff may prove loss of earnings under a general plea of damages resulting from injury. *Hoffmann v. Lane*, 11 Cal.App.2d 655, 659, 54 P.2d 477; *Tornell v. Munson*, 80 Cal.App.2d 123, 125, 181 P.2d 112; *Perry v. McLaughlin*, 212 Cal. 1, 12, 297 P. 554.

[2] The only real advantage to be had by a defendant from a special plea for damages is that he may not be taken by surprise during the trial. We are satisfied that by the allegation of the pleading that plaintiff husband had been deprived

of the services of his wife, defendants were sufficiently advised that recovery for the loss of such services was being relied upon by him, and that it was not error for the trial court to admit evidence as to the expense incurred by him for the rendition of services by a person employed to perform some of those formerly performed entirely by the wife.

Under section 452 of Code of Civil Procedure pleadings are to be liberally construed; and under section 475 of said code defects in pleadings which in the opinion of the court do not affect the substantial rights of the parties are to be disregarded; and no judgment shall be reversed by reason of any ruling or defect unless it appears from the record that the ruling or the defect was prejudicial and that by reason thereof the appealing party suffered substantial injury, and that a different result would have been probable if such ruling or defect had not occurred or existed; also that there shall be no presumption that error is prejudicial, or that injury was done if error is shown.

[3-5] The complaint alleged that the husband had been and would be deprived of the cohabitation and services and society of his wife to his damage in the sum of \$5000.00. Under the authority of the cases hereinbefore cited the husband became entitled (upon admission of negligence and liability on the part of defendants) to recover as such damages such amount, up to \$5000.00, as the jury might determine, even though no testimony as to his actual outlay was introduced. It is said in 13 Cal.Jur., sec. 83, p. 897:

"Consequential damages to the husband include loss of services of the wife, and money expended and indebtedness incurred by reason of the injury to the wife, such as expense incurred for necessary labor and services substituted for the ordinary services of the wife, * * *. Damages for loss of services of the wife are recoverable, though there is no direct proof of the value of such services."

[6] Appellants' objection to testimony was only to that of Mr. Edminster as to his payment for household help. Further-

more, Mrs. Edminster testified to the same thing, and no objection was made. It is not contended that the amount paid is excessive, and obviously the work for which help was hired was not all that previously had been performed by Mrs. Edminster.

We are satisfied not only that plaintiffs' complaint was sufficient to justify the admission of the testimony to which the objection was made, but that if there was error in admitting it defendants suffered no prejudice or substantial injury thereby.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



101 Cal.App.2d Supp. 927
PEOPLE v. RYAN.

No. 161925.

Superior Court of California
San Diego County, Appellate Department.
Jan. 16, 1951.

James O. Ryan was charged in the Municipal Court of the City of San Diego, State of California, Eugene Daney, J., of violating § 26271 of the Health and Safety Code by misrepresenting a medicine. The Municipal Court, No. 7716, rendered a judgment sustaining the demurrer of the defendant to the complaint, and dismissed the complaint, and the People of the State of California appealed. The Appellate Department of the Superior Court, Burch, J., No. 161925, held that complaint was sufficient to charge an offense.

Judgment reversed.

I. Fraud ☞68

The advertisement prohibited by statute providing that advertisement of a drug shall be false if drug is represented to have any effect in cancer and certain other enumerated diseases, is one that is likely to in-

duce purchase of drug prohibited by statute prohibiting dissemination of any false advertisement of a drug, with exception set up in statute providing that whenever board determines that advance in medical science has made any type of self-medication safe as to named diseases, board shall authorize advertisement of drugs. Health and Safety Code, §§ 26271, 26273, 26286.

2. Fraud ☞69

In prosecution under the Health and Safety Code for misrepresenting a medicine, it is sufficient to limit the charge to the gist of the offense, and if product of defendant is proper to advertise under other provisions of the Health and Safety Code, that is a matter of defense. Health and Safety Code, §§ 26271, 26273, 26286.

3. Fraud ☞69

Complaint charging that accused on certain date at certain place did willfully and unlawfully deliver to named person a salve and did represent that salve had an effect on cancer, was not defective because it did not negative exception in the Health and Safety Code that whenever board determines that advance in medical science has made any type of self-medication safe as to named diseases, board shall by regulation authorize advertisement of drugs. Health and Safety Code, §§ 26271, 26273, 26286.

4. Fraud ☞69

Complaint charging that accused on certain date at certain place did willfully and unlawfully deliver to named person a salve and did represent that salve had an effect on cancer, was not defective as to defendant because of the alleged fact that he was a licensed chiropractor. Health and Safety Code, §§ 26271, 26273, 26286; Gen. Laws, Act 4811.

5. Courts ☞97(4)

The Supreme Court of the United States is the final arbiter of issues of due process and equal protection of the law under the Fourteenth Amendment to the Constitution. U.S.C.A.Const.Amend. 14.

6. Constitutional law ☞240(1), 296(1)

Fraud ☞68

Statute making misrepresentation of a medicine an offense and providing that ad-

vertisement of a drug shall be false within meaning of statute if drug is represented to have any effect on cancer and certain other enumerated diseases is not in violation of the due process and equal protection clause of the Fourteenth Amendment to the federal Constitution. Health and Safety Code, § 26271; U.S.C.A.Const.Amend. 14.

James Don Keller, Dist. Atty. of San Diego County, and H. D. Cornell, Deputy Dist. Atty., all of San Diego, for appellant.

Henry W. Hache, San Diego, for respondent.

BURCH, Judge.

Defendant was charged in the Municipal Court of San Diego as follows: "That said James S. Ryan on or about the 14th day of July, 1950, in San Diego Township in the said County of San Diego, State of California, and before the making or filing of this Complaint, did then and there wilfully and unlawfully deliver to John Dellenbach a salve, and did represent said salve to have an effect in cancer; * * *."

The defendant demurred to the complaint on the ground that it did not state a public offense. The court sustained the demurrer, dismissed the complaint, and the people appeal.

By 1939 Statutes, Chapter 730, Section 1, the legislature enacted the Pure Drugs Act. This has been set up in the Health and Safety Code, Division 21, Chapter 2, Sections 26200-26385. The administration of the Act is committed to the State Board of Health, which is given broad powers to promote the public health and safety. See Sections 200-211, inclusive, Health and Safety Code. Under the Act the term "advertisement" means "all representations * * * which are likely to induce, directly or indirectly, the purchase of drugs * * *." Section 26209, Health and Safety Code.

Drugs are " * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man * * *; (3) articles (other than food) intended to affect the structure or any func-

tion of the body of man * * *." Section 26200, Health and Safety Code.

By Section 26286 the dissemination of any false advertisement of a drug is prohibited. The violation of any provision of the Act is made a misdemeanor and punished by the terms of Section 26295.

Section 26273 provides as follows: "Whenever the board determines that an advance in medical science has made any type of self-medication safe as to any of the diseases named in this article, the board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the board may deem necessary in the interest of public health."

and Section 26271, under which defendant is charged, provides in part as follows: "The advertisement of a drug * * * shall be false within the meaning of this division if the drug * * * is represented to have any effect in * * * cancer, * * *." (The section includes 49 other diseases.)

[1] From the portions of the Pure Drugs Act referred to above, we conclude that the advertisement prohibited by Section 26271 as false is one that is likely to induce a purchase of a drug which is prohibited by Section 26286 with the exception set up in Section 26273.

Defendant asserts that the charge is defective because it does not negative this exception.

[2-4] It is sufficient to limit the charge to the gist of the offense. *People v. Nugent*, 4 Cal. 341; *Ex parte Hornef*, 154 Cal. 355, 360, 97 P. 891. If defendant's product is proper to advertise under other provisions of the Act, that is a matter of defense. *People v. Pierce*, 14 Cal.2d 639, 643, 96 P. 2d 784. So in a prosecution against a physician for violating Section 8½ of the Act to regulate the sale and use of poisons, 1907 Statutes, p. 124, the complaint is not defective in not negating the good faith of the physician in prescribing morphine for the use of a habitual user thereof and that the patient was not suffering from an incurable disease, ailment or injury. See

In re Lord, 199 Cal. 773, 776, 250 P. 714. This contention of the defendant is untenable. Neither, as defendant claims, is the complaint defective as to him because of his assertion that he is a licensed chiropractor. We find nothing in the Chiropractic Act, Gen.Laws, Act 4811, which would exempt the defendant as such from the requirements of the Pure Drugs Act. We think the charging part of the complaint, which is in ordinary concise language and in the words of the statute, is clear and puts defendant on notice of the offense charged. Penal Code, Section 1426.

Defendant further claims the section is in violation of the due process and equal protection causes of the 14th Amendment of the Federal Constitution.

"* * * due process of law has never been a term of fixed and invariable content." *Fed. Communications Commission v. Station WJR*, 337 U.S. 265, 275, 69 S. Ct. 1097, 1103, 93 L.Ed. 1353.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 550, 551, 69 S.Ct. 1221, 1227, 93 L.Ed. 1528, the court said: "The Federal Constitution does not invalidate state legislation because it fails to embody the highest wisdom or provide the best conceivable remedies. Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it. (*Daniel v. Family Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632.) In dealing with such difficult and controversial subjects, only experience will verify or disclose weaknesses and defects of any policy and teach lessons which may be applied by amendment."

In *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224, 225, 69 S.Ct. 550, 552, 93 L.Ed. 632, the court says:

"Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.

"Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desir-

ability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature."

In a note in 93 L.Ed. 637 it is said that: "The decision in *Daniel v. Family Secur. L. Ins. Co.*, (Supra), illustrates the unanimous view of the Supreme Court, announced in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 1949, 335 U.S. 525, 542, 557, 69 S.Ct. 251, 260, 267, 93 L.Ed. 212, that the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare, the Court returning closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific Federal constitutional prohibition, or of some valid Federal law."

[5] We may be guided by the above quoted decisions of the Supreme Court of the United States on the issues of due process and equal protection of the law under the 14th Amendment, because that court is the final arbiter of those issues. *Brookes v. City of Oakland*, 160 Cal. 423, 117 P. 433.

Those issues find like solution in the decisions of our own courts. In *Hollywood Turf Club v. Daugherty*, 36 Cal.2d 352, 224 P.2d 359, 364, the court says: "It is not the function of this court to question the wisdom of the legislative classification and we must be guided by the principles that: "The question of classification is generally one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, and its discretion will not be overthrown unless it is palpably arbitrary. * * * It will be presumed that the legislature made in-

quiry to determine whether or not there were evils to be remedied and that the classification made was based upon the result of the inquiry." * * * "When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification" (California Physicians' Service v. Garrison, 28 Cal.2d 790, 802, 172 P.2d 4, 12 [167 A.L.R. 306].)" See to same effect in *re McKelvey*, 19 Cal.App.2d 94, 64 P.2d 1002; *Ex parte Yun Quong*, 159 Cal. 508, 515, 114 P. 835.

In the light of these and many other authorities that might be cited (see *Nebbia v. People of State of New York*, 291 U.S. 502, 521-539, 54 S.Ct. 505, 78 L.Ed. 940, and notes 8, 9, 12, 13 and 24), it would appear that the judicial responsibility is ended "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, * * *." *Nebbia v. New York*, supra, 291 U.S. at page 537, 54 S.Ct. at page 516; *California Physicians' Service v. Garrison*, supra, 28 Cal.2d at pages 802, 803, 172 P.2d at pages 11, 12.

Coming to the merits of the case, a proper legislative purpose in restricting the uncontrolled trade in drugs which may be poisonous has already been decided in *Re Gray*, 206 Cal. 497, 499, 274 P. 974. The magnitude of the national evil, which the Pure Drugs Act sought to remedy in this State, is revealed in a note in 53 *Harvard Law Review* 828, from which it is made to appear that the unregulated trade in drugs without value in diseases resulted in large annual cost in life, health and money to suffering purchasers among the public, hopefully eager to buy. While public opinion, informed by experience and reading, may not decide constitutionality for the courts, see *Muller v. State of Oregon*, 208 U.S. 412, 420, 28 S.Ct. 324, 52 L.Ed. 551, it certainly has an obvious bearing on the rational exercise of legislative power.

[6] We come to the result that Section 26271, supra, is a reasonable and proper stat-

ute. On the score of due process, and the opportunity of defendant to establish the merit of his product, Section 26273 affords defendant all that he may ask under the law. *Neslen v. Board of Health*, 70 Cal. App.2d 202, 160 P.2d 862; *Downing v. California State Board of Pharmacy*, 85 Cal.App.2d 30, 192 P.2d 39; *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 541, 542, 110 P.2d 992.

The judgment is reversed.

TURRENTINE, P. J., and GLEN, J.,
concur.



101 Cal.App.2d 840

OFFER et ux. v. McMILLAN et al.
Civ. 7920.

District Court of Appeal, Third District,
California.

Jan. 23, 1951.

Karl Offer and Wally Martha Offer, his wife, brought an action against Mabel V. McMillan and Fred Speich for fraud. The Superior Court, Sacramento County, B. F. Van Dyke, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Deirup, J. pro tem., held that findings and conclusions constituted final decision of the trial court, and written opinion could not be resorted to, for purpose of impeaching or gainsaying those findings or judgment.

Judgment affirmed, and appeal from order denying new trial dismissed.

Appeal and error 717

The findings and conclusions of trial court constitute its final decision, and an oral or written opinion cannot be resorted to for purpose of impeaching the findings and judgment.

Darold D. De Coe and Norman R. Samuelsen, Sacramento, for appellant.

Wilke & Fleury, Sacramento, for respondent.

DEIRUP, Justice pro tem.

The plaintiffs have appealed from a judgment in favor of the defendants in an action for damages for fraud. Counsel for appellants concede that the findings are supported by evidence but contend that, as indicated by his written opinion, the trial judge required clear and convincing evidence rather than a mere preponderance of the evidence for proof of fraud, and that this constituted error. There is no basis for a discussion of this point, for we cannot take the opinion into account. "The findings and conclusions constitute the final decision of the court and an oral or written opinion cannot be resorted to for the purpose of impeaching or gainsaying the findings and judgment." *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 781, 163 P.2d 756, 759.

The judgment is affirmed. Appeal from order denying new trial dismissed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 855

In re DABNEY'S ESTATE.
Civ. 18249.

District Court of Appeal, Second District,
Division 1, California.

Jan. 24, 1951.

Proceedings in the matter of the estate of Louise E. Dabney, in which the Superior Court, Los Angeles County, entered orders for ratable distribution, and Clifford R. Dabney and Alice M. Dabney appealed. The District Court of Appeal, Drapeau, J., 225 P.2d 611, denied petition by Clifford R. Dabney and Alice M. Dabney for a writ of super-seedeas to stay orders for ratable distribution. A motion was filed to dismiss the appeals. The District Court of Appeal, Drapeau, J., held that where decision on the

motion might control decision of appeals on merits, that question would be disposed of, along with others in the appeals, after a review of the entire record, and with the aid of briefs and arguments on the merits.

Motion denied without prejudice.

Executors and administrators Ⓒ314(12)

Where decision on motion to dismiss appeals from probate court's orders for ratable distribution of estate, on ground that appellants were persons not interested in estate, might control decision of appeals on the merits, that question would be disposed of after a review of the entire record, and with aid of briefs and arguments on the merits. Probate Code, § 1010.

C. Paul Du Bois and John E. Sisson, Los Angeles, for appellants.

Dolley, Knight, Woods & Hightower, Los Angeles, for respondent executor.

DRAPEAU, Justice.

This is a motion to dismiss appeals. It is based upon the ground that appellants are not persons interested in the Estate of Louise E. Dabney, and are, therefore, not entitled to oppose or appeal from orders made in the Probate Court for ratable distribution.

This motion was pending, but was not included in the decision of this Court on an application for supersedeas, filed December 28, 1950, Cal.App., 225 P.2d 611. In view of asserted tax questions involved, it seemed advisable to expedite that matter.

The legal situation in this motion may be the controlling one in a decision of the appeals upon the merits: namely, whether persons seeking to recover an interest in properties held by the estate, and to establish such interest in actions in the Superior Court, are persons interested in the estate, within the meaning of Probate Code, sec. 1010.

This Court is of the opinion that it will be in the interests of justice to dispose of this question, along with others in the appeals, after a review of the entire record,

and with the aid of briefs and argument on the merits.

The motion is denied without prejudice to its renewal when the matter is presented on the merits.

WHITE, P. J., and DORAN, J., concur.



101 Cal.App.2d 856

KELLOGG et al. v. CURRY et al.

CURRY et al. v. KELLOGG et al.

Civ. 17608.

District Court of Appeal, Second District,
Division 3, California.

Jan. 24, 1951.

Action by Charles S. Kellogg, Ruth L. Kellogg, and Glenn K. Wise, as trustee for other two plaintiffs against William O. Curry, Sr., Alice M. Curry, and the Wise Real Estate Co., to quiet title to money. The first two named defendants filed a cross complaint against the plaintiffs and the other defendant to rescind an agreement of sale. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered a judgment for plaintiffs and first two named defendants appealed. The District Court of Appeal, Wood, J., held that in absence of any instructions in escrow agreement, upon failure of purchasers or vendors to perform instructions, vendors were not entitled to sum deposited with escrow by the purchasers.

Judgment reversed with instructions.

1. Escrows Ⓒ8(1)

If a buyer, having deposited money in escrow, fails to deposit balance in accordance with agreement, money he has deposited does not ipso facto become property of seller.

2. Vendor and purchaser Ⓒ335

Buyer's agreement that his money shall be paid to the seller for the deed is not an agreement that it shall be paid to the seller in case of the buyer's default.

3. Vendor and purchaser Ⓒ335

Where deposit receipt for the purchase of property provided for retention by the vendors of the money paid, upon failure to perform contract the sum deposited was not recoverable by the purchasers.

4. Escrows Ⓒ15

Where defendant deposited money with an escrow under an escrow agreement whereby plaintiffs were required to deposit their deed or a policy of title of insurance, upon failure of plaintiff to perform conditions of the escrow instructions, defendants were entitled to a return of their money deposited, even though defendants failed to carry out their part of escrow instructions.

5. Escrows Ⓒ8(2)

In action to quiet title to money held under escrow instructions, evidence sustained findings of trial court that defendants did not withdraw from escrow agreement because of fraud or fraudulent representations by plaintiffs.

John N. McKenna and Jacob Chaitkin, both of Pasadena, for respondents Charles S. Kellogg and Ruth L. Kellogg.

C. M. Linton, of Pasadena, for respondent Glenn K. Wise.

Emmett E. Patten and Glen A. Duke, both of Monrovia, for appellants.

PARKER WOOD, Justice.

Defendants appeal from judgment for plaintiffs in this action to quiet title to money.

On April 14, 1948, defendants, after having had conversations with Glenn K. Wise, a real estate broker who allegedly was agent for plaintiffs, agreed to purchase a house and lot for \$6,250 and on that day they deposited \$100 with the broker as part of the purchase price. On April 15, 1948, the record title to said property was in the name of the broker. On April 19, 1948, the defendants signed escrow instructions and entered into an escrow pertaining to said purchase of the property. The instructions stated, among other things, that defendants handed the escrow agent \$1,200 and they would pay \$5,000 on or before

the close of escrow, all of which the agent was authorized to use and deliver provided on or before 30 days from date instruments have been recorded entitling the agent to secure usual standard form policy of title insurance issued by Title Insurance & Trust Company with liability of \$6,250 on said property showing title vested in defendants. At the place on the printed form of instructions provided for the seller's signature the broker wrote as follows: "Glenn K. Wise as trustee for Charles S. Kellogg and Ruth L. Kellogg." Plaintiffs did not sign the instructions.

The court found that on said April 14th and 19th Wise was acting for plaintiffs as their agent and trustee; that defendants paid \$1,200 into escrow; that Wise was the owner of the escrow company and received the \$1,200 as escrow agent for the plaintiffs and defendants; that "at all times after April 14, 1948, and for more than 30 days after April 19, 1948, the sellers [plaintiffs] were ready, willing and able to perform said agreement of sale"; that on April 25, 1948, the defendants notified the plaintiffs that they refused to perform under said agreement of sale and purchase and that thereafter they failed and refused to perform said agreement.

The defendants filed a cross-complaint against plaintiffs and Wise wherein they sought to rescind the agreement of sale upon the ground that plaintiffs and Wise made false and fraudulent representations concerning the property. It was alleged therein, in part, that cross-complainants asked cross-defendants (1) whether the house was infested with termites, and (2) whether the garage was of sufficient size for cross-complainants' automobile; that cross-complainants stated to cross-defendants that the house and garage would have to be painted by the sellers in a workmanlike manner with first-class paint, and if it was not so painted the cross-complainants did not wish to buy the property. It was also alleged therein that cross-defendants "assured" cross-complainants that the house was free of termites, that the garage was large enough to accommodate cross-complainants' automobile, and that the building would be painted in a workmanlike manner

with good paint. It also was alleged therein that the house and garage were infested with termites; that the garage was about 2 feet too short to accommodate cross-complainants' automobile; that the paint applied to the house and garage was of inferior quality and the workmen who applied it were unskilled.

The court also found that none of the cross-defendants made any representations to cross-complainants as to the presence or absence of termites in any of the buildings on the property; that none of them made any representations to the effect that the garage would accommodate cross-complainants' automobile, or made any representations that "the house was to be painted in any other manner than it was painted or as the painting had been then completed." The court also found that the defendants withdrew from the escrow and refused to perform said agreement to purchase "for reasons stated by them that they no longer needed a house and had made other arrangements for living purposes," and that defendants did not withdraw from the escrow "because of fraud or fraudulent misrepresentations by anyone."

About two weeks after the 30-day escrow term had expired, the plaintiffs herein or Wise sold the property to other persons for \$6,500.

Appellants (defendants) contend that plaintiffs cannot quiet title to the money in escrow because they had no title to it. They argue that a deposit in escrow is conditional and title remains in the depositor until the conditions under which it was deposited have been fulfilled; that plaintiffs were not entitled to the money in escrow for the reason there was no forfeiture clause in the escrow instructions; and that since the property was resold to a third person within six weeks after this escrow was opened, for more than the contract price herein, the plaintiffs were not damaged and should not have the aid of the court to enforce a forfeiture.

[1-4] It was alleged in the complaint that on April 14, 1948, defendants, Mr. and Mrs. Curry, deposited with Wise (the agent

of plaintiffs) \$100 on account of the purchase price of the property, and that on April 19th they deposited in escrow the additional sum of \$1,100. The escrow instructions recited that the money deposited in escrow was deposited conditionally, and (as above stated) that the escrow agent was authorized to use and deliver it provided the conditions were performed. Under the standard forms of escrow instructions which provide for the exchange of money and a deed upon stipulated conditions, the buyer retains ownership of the money and the seller retains ownership of his deed and title to his property. The escrow holder acts as agent of the buyer as to the money and as agent of the seller as to the deed until the stipulated conditions have been met. When performance has been rendered by each party the escrow holder then becomes the agent of the seller as to the money and the agent of the buyer as to the deed. Failure of performance on the part of either party does not accomplish a transfer of title. If the buyer, having deposited money in escrow, fails to deposit the balance in accordance with the agreement, the money he has deposited does not *ipso facto* become the property of the seller. In *Hastings v. Bank of America*, 79 Cal.App.2d 627, 180 P.2d 358, the plaintiffs (sellers) sought unsuccessfully to quiet title to money deposited in escrow by the buyers of real property. The sellers therein extended the term of the escrow, and while the buyers were still endeavoring to raise the additional money required by the escrow the sellers sold and conveyed the property to a third person. The court said therein 79 Cal.App.2d at page 629, 180 P.2d at page 359. "The payment of that deposit and the delivery of the deed were mutually dependent upon each other. The title to the money remained in appellants, and after July 22, 1944 [the original expiration date of the escrow], they were entitled to withdraw it even though they were liable in damages for failure to complete the transaction as provided by the terms of the escrow. [Citing case.] The title to money deposited in escrow to be paid to the vendor of property does not pass until all conditions of the escrow have been ful-

filled." A buyer's agreement that his money shall be paid to the seller for a deed is not, of course, an agreement that it shall be paid to the seller in case of the buyer's default. Of course, an escrow agreement may incorporate additional provisions defining the rights of the parties with respect to the deposited money in the event of the buyer's default. The purposes of the widely used escrow arrangement would be largely defeated if the default of one party or the other would work a forfeiture of the property he has deposited into escrow, in the absence of an agreement that he should suffer that loss. To hold that the money in question here became the property of plaintiffs would amount to a rewriting of the agreement with respect to the sum of \$1,100. The plaintiffs did not perform the conditions of the escrow instructions on their part to be performed. They did not deposit their deed or a policy of title insurance as required by the instructions or at all. In view of the fact that the title to the property stood of record in the name of Wise, and that Wise purportedly was acting in several different capacities in the transaction, it was especially important and material herein that plaintiffs perform the conditions on their part to be performed. It is to be noted that plaintiffs did not sign any documents in connection with the transaction, and that Wise assumed to act as real estate agent for plaintiffs, as trustee for them in signing the escrow instructions, as escrow holder, and as an individual interested in the proceeds of the sale as a creditor of plaintiffs. Under such circumstances, in this proceeding in equity to quiet title, it cannot properly be said that it would have been a useless act for plaintiffs to perform the conditions required of them by the escrow agreement. The deposit receipt, given to defendants Mr. and Mrs. Curry on April 14th (prior to the escrow agreement of April 19th), provided for retention by the sellers of the money paid and also that one-half of the deposit should be applied on the real estate agent's commission but not to exceed the full amount of the commission, \$312.50. The sum of \$100, having been paid to the sellers on the contract,

was not recoverable by defendants. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 11, 12, 55 P. 713, 43 L.R.A. 199. The escrow instructions contained no provision with relation to the deposit of \$1,100 in the event of the buyers' default. That sum was not to be retained as liquidated damages or as security for any loss the seller might sustain, nor was there any agreement that it would be forfeited to the sellers. While such an agreement is not necessary to enable the sellers to retain the \$100 they received on the contract in the event of the buyers' default, they cannot lay claim to money deposited in escrow except upon the terms stipulated in the buyers' instructions. In the case of *Wilson v. Security-First Nat. Bank*, 84 Cal. App.2d 427, 190 P.2d 975, relied upon by plaintiffs herein, the seller had performed fully the conditions on her part to be performed. Also, it does not appear therein that the buyer proved that the seller's damage was less than the amount the buyer had paid. See *Baffa v. Johnson*, 35 Cal.2d 36, 40, 216 P.2d 13.

It was not alleged in the complaint that plaintiffs were the owners of the money on deposit, but it was alleged only that the money was being held in escrow and that defendants Mr. and Mrs. Curry claimed some interest in it inconsistent with the claims of plaintiffs. It was not alleged that plaintiffs deposited a deed into escrow or furnished a policy of title insurance as called for in the instructions, nor that they were ready, able and willing to render performance. The deposit receipt and the escrow instructions were incorporated in the complaint by reference. No facts were alleged in the complaint which would entitle plaintiffs to a judgment for money or to a decree quieting their title to the sum of \$1,100 on deposit.

[5] Plaintiffs failed to establish any right to the \$1,100. Defendants Mr. and Mrs. Curry, by their cross-complaint, sought a judgment for the return of their money and for other relief. They stated therein a cause of action for relief upon the ground of fraud, but the findings as to those allegations were against them, and the evidence was legally sufficient to sup-

port the findings. They were entitled, however, to judgment for the said \$1,100 as against the plaintiffs and cross-defendant Wise.

The judgment is reversed with instructions to the superior court to render judgment in favor of defendants and cross-complainants William G. Curry, Sr., and Alice H. Curry against plaintiffs and cross-defendants Charles S. Kellogg and Ruth L. Kellogg and against cross-defendant Glenn K. Wise for said \$1,100 and for costs incurred in the trial court. Appellants also to recover costs on appeal. The purported appeal from the order denying motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.



101 Cal.App.2d 744

PEOPLE v. HENSLEY.

Cr. 744.

District Court of Appeal
Fourth District, California.

Jan. 15, 1951.

Hiram Sherman Hensley, Jr., was charged in the Superior Court of San Diego County, John A. Hewicker, J., with a violation of section 288 of the Penal Code and a judgment was rendered ordering defendant to be committed to the Department of Mental Hygiene for placement at the State Hospital, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that if a doubt existed as to defendant's sanity at time of trial, that issue should have been determined in a separate proceeding and the criminal proceeding should have been suspended.

Judgment and order reversed with directions.

1. Criminal law §456

In criminal prosecution, where defendant pleaded not guilty by reason of insanity, admission of testimony of probation officer regarding defendant's mental faculties was not erroneous for alleged failure to suffi-

ciently show that probation officer was an intimate acquaintance of defendant.

2. Criminal law §625, 918(1)

Where trial judge had serious doubt as to sanity of defendant, but proceeded to make findings and an order in criminal action to effect that defendant was sane at time of offense charged in information but was presently insane and ordered defendant committed to Department of Mental Hygiene for placement at state hospital, procedure was improper and defendant was entitled to a new trial, and if a doubt as to his present sanity arose criminal proceeding would be required to be suspended and sanity issue determined independently. Pen.Code, § 1368 et seq.

Robert L. Barbour, San Diego, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 288 of the Penal Code on June 8, 1950. He pleaded not guilty and not guilty because of insanity. He withdrew his plea of not guilty, waiving a jury, and the cause proceeded to trial on July 25, 1950, on the remaining insanity issue.

Two doctors testified that in their opinion the defendant had such a diseased and deranged condition of his mental faculties on June 8, 1950, as to render him incapable of knowing the nature and quality of his acts, or of distinguishing between right and wrong in relation to those acts. On cross examination it was brought out that the opinion of each doctor was based upon one examination of the defendant, and the history given to him by the defendant himself; that the defendant claimed to have no recollection of what transpired at the time the alleged crime was committed; that he is suffering from "psychic equivalents", a type of epilepsy; that persons suffering from this type do not have convulsions but instead have psychic disturbances similar to amnesia; that during such

periods, which may last several minutes, they do not know what they are doing; that the defendant had suffered from this for many years and probably would be afflicted with it the rest of his life; that such attacks occur irregularly; and that they might become less frequent after proper treatment, but might occur even then. Both doctors said the defendant should have the benefit of "encephalographic studies".

The report of one of these doctors, who had been appointed by the court, was filed. This report states that he examined the defendant on July 6, 1950, at the county jail, and that he appeared intelligent, talked coherently and was able to give a lucid account of his past history. This history, as recited to the doctor, described an unhappy boyhood, four years' service in the Marines, work in aircraft factories and at March Field, and three and a half years' service in the Navy with a medical discharge on account of a hip injury received on ship-board. For a year and a half, beginning in 1946, he was a police officer in Riverside. He was married in 1938. He stated that he had peculiar spells from time to time which came on suddenly, lasted a few seconds and were gone. At such times while he was doing one thing he suddenly found himself doing something else, and he told of three such instances prior to 1945. Since 1945, he has been subject to occasional fainting spells, and gave two instances. With respect to the time of the alleged crime he said he awoke at 5:30 P.M., arose, shaved and dressed; that he then had fifteen minutes in which to report for work; that before reporting for work he went to the recreation hall and got his 7-year old daughter to take her home; that he remembers picking his daughter up, and the next thing he remembers he was standing in the door of his house; and that he reported for work as usual, getting there at 6:00 o'clock.

A probation officer testified that he had known the defendant since February, 1950, and that in the performance of his duties he had visited and interviewed him; that he had seen him on an average of twice a month during that period; that his

first interview lasted two or three hours and the other visits fifteen to twenty minutes; that the defendant expressed himself in good English and appeared rational; and that during this period he seemed to be aware of what he was doing. The defendant's wife testified that after his return from overseas he was nervous and short tempered and not able to keep a job; that he was morbid and depressed; and that she believed some of his acts during the past year were irrational.

The judge closely questioned the doctors and, after both sides had rested, expressed dissatisfaction with the evidence and stated that he would like to have "an electroencephalograph" which the doctors had said should be taken, as well as to see the records of the Veterans' Bureau. He continued the hearing but insisted upon an early date saying, "If he is insane I don't want to keep him confined to the county jail any longer than necessary."

A further hearing was held on August 4. Apparently, the electroencephalograph was filed. It was reported that the records of the Veterans' Bureau were unavailable and it was stipulated that these records would show nothing other than a physical disability. Thereupon the matter was submitted and the judge said that the two doctors had testified that the defendant "had a mental disability at the time this act took place and he has it at the present time"; that he would accept the testimony of the doctors that he is insane at the present time; and that he did not agree with the doctors as to his sanity at the time the offense was committed. After some further talk the judge said that he thought the only kind of an order he could make was to find the defendant sane at the time of the commission of the offense, and insane at the present time. He then said "I will find the defendant Hensley sane at the time the offense was committed and insane at the present time. He will be committed to the Mendocino State hospital, subject to the further order of the Court if he recovers his sanity."

On the same day, a formal order or judgment was filed which is headed "Judgment of present insanity and commitment

to State Hospital (Penal Code Sections 1367 to 1370, inclusive)". This order recites that the judge having heard the matter has found that the defendant was sane at the time of the offense charged in the information but that he was presently insane. It was then ordered that the defendant be committed to the Department of Mental Hygiene for placement at the Mendocino State Hospital; and that when the defendant has recovered his sanity he shall be brought before the Court "for such further proceedings as may be proper in the above entitled case." The defendant has appealed from that order or judgment, and from an order denying his motion for a new trial.

[1] It is first contended that the court erred in admitting the testimony of the probation officer since it did not sufficiently appear that he was an "intimate acquaintance". After studying the cases cited we find no error in this connection.

It is next contended that, aside from the presumption of sanity, there was no valid evidence that the defendant was sane at the time the offense was committed; that all of the admissible evidence, the testimony of the two doctors, conclusively shows that the defendant was insane at that time; that any presumption of sanity was overcome by the evidence; and that the finding that the defendant was sane on June 8, 1950, is entirely without support. It may be pointed out that the evidence to the effect that the defendant was insane at the time this offense was committed, is not very satisfactory. While the two doctors expressed such an opinion, their reasons for that opinion were far from satisfactory. According to their testimony the defendant was sane practically all of the time but subject to temporary short lapses for a few minutes at a time. They had no knowledge of his actual condition at the time of the offense, or as to whether he then had one of

his spells. They based their conclusion entirely on his self-serving statement that he did not remember what he had done during a period of less than fifteen minutes. While their evidence would support an inference that he could have had such a spell, it did not necessarily establish the fact that he did.

[2] A more serious matter is the fact that the record clearly discloses that the judge had a serious doubt as to the present sanity of the defendant, and that he had such a doubt some considerable time before he made any findings in the matter or made any order. Section 1368 of the Penal Code provides that when such a doubt arises the court must suspend all proceedings in the criminal prosecution and must order the question as to the defendant's present sanity to be determined in the manner outlined in the succeeding sections. Instead of complying with this section, the court proceeded to make findings and an order in the criminal action. The respondent argues that this entire proceeding was a hearing on the sanity question, and that it would have been a mere formality to order the separate hearing required by section 1368. However, this was a criminal proceeding involving the question of the defendant's sanity at the time of the offense and not at the time of the trial. The evidence was directed to the other question, and when a doubt as to the defendant's present sanity arose, the statutory requirement and provisions were not complied with in any respect. The defendant is entitled to a new trial, and if a doubt as to his present sanity should then arise the provisions of section 1368 et seq. should be followed.

The judgment and order are reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

GRIFFIN and MUSSELL, JJ., concur.

36 Cal.2d 683

ALLEN v. STATE BAR OF CALIFORNIA.

S. F. 18269.

Supreme Court of California, in Bank.

Feb. 2, 1951.

Petition by attorney for a writ of review of recommendation by Board of Governors of the State Bar that attorney be suspended from the practice of law for 60 days. The Supreme Court held that evidence justified attorney's suspension.

Petitioner suspended from practice of law for 60 days.

Attorney and client ⚡53(2)

In disciplinary proceeding against attorney, evidence justified attorney's suspension from practice of law for 60 days. Business and Professions Code, §§ 6067, 6068, 6103, 6106.

Robert W. Kenny, Los Angeles, for petitioner.

Aubrey N. Irwin, Glendale, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

In this disciplinary proceeding, the Board of Governors of the State Bar recommended that petitioner be suspended from the practice of law for 60 days.

In March, 1948, Temple of Yahweh, Inc., a corporation, was indebted in the sum of \$500 to Mr. & Mrs. Linster for money theretofore advanced by them. Mrs. Linster was the treasurer of the corporation. A mortgage on property situated in the city of Los Angeles, owned by the Temple Corporation, was executed by Mr. Crowell, its president, on behalf of the corporation, and recorded. Petitioner was attorney for the Temple, and was named as mortgagee and payee in a copy of a note for \$500 set forth in the mortgage. The Temple was not indebted to petitioner. Petitioner was named as mortgagee and payee without his knowledge, and at the request of the Linsters, as they did not want their names to appear of record in the transaction. They understood, however, that the note and mortgage were to protect their \$500 claim

against the Temple. Petitioner was away from Los Angeles at the time the mortgage was executed and he had no knowledge of the transaction until April or May of 1948, when, according to his testimony, he was advised of it by Crowell, who stated that both a note and mortgage had been executed naming petitioner as mortgagee and payee. Petitioner also testified that he did not know that the Linsters were the real beneficiaries of the note and mortgage until after this proceeding was instituted before the State Bar.

The Temple was involved in bankruptcy proceedings in March, 1948. A settlement was reached, whereby certain real property, including that embraced in the mortgage, was transferred by the Temple to the clients of L. H. Phillips, an attorney, and Phillips, clients agreed to pay all indebtedness against the property including the instant mortgage.

In November or December, 1948, Phillips communicated with petitioner by letter and telephone, stating that he desired to pay the mortgage and clear the property. He requested that "the note", plainly referring to the note which was given concurrently with the mortgage, a copy of which appeared therein, and the mortgage, together with an executed satisfaction, be delivered to him upon his payment of the \$500. The Linsters called at petitioner's office and he told them to bring the note and mortgage to him to deliver to Phillips. After a search, Mrs. Linster found the mortgage, but was unable to find the note. There was some discussion between Linster and petitioner, and Linster requested petitioner to prepare a substitute note. There is some conflict as to whose idea it was. At any rate, petitioner prepared one and Linster retired to the next room, and out of petitioner's presence, signed the Temple's name to it and Crowell's name as president of the Temple Corporation. Petitioner knew that Crowell was not in the next room at that time. He also knew that the note was not executed by Crowell. Petitioner delivered the mortgage, substitute note and satisfaction (the latter executed by himself) to Phillips and received \$500 which he handed

to Linster who paid him \$50 as his attorney's fee.

Phillips testified that he would not have paid the money if he had known that the note was not the original. Petitioner testified that he thought it was proper to make the substitute note and for Linster to sign Crowell's name to it inasmuch as he was the payee; that Linster had authority from the Temple to do it; that no alteration was made in the note and there was no question of the obligation of Phillips' clients, the purchasers of the property in the settlement agreement, to discharge the debt. He said he thought Phillips was not entitled to the note; that it should go back to the maker, but he also stated that he gave him the substitute note to satisfy his demand for the original note, and from the evidence it may be inferred, that Phillips demanded and thought he had received a note which was executed contemporaneously with the mortgage.

The findings of the local committee were in accordance with the above facts, except that: It was found that the Linsters did not know when the mortgage was executed; that it was for their protection (there is evidence to that effect); that petitioner told the Linsters that he could not find an original note and that he thought none had been executed. It was also found that petitioner in obtaining the \$500 " * * * led * * * Phillips, * * * to believe, and the latter did believe, that the note presented to him was the original note made at the time said mortgage was made and executed; that (petitioner) did not inform said L. H. Phillips that the note presented was not the original note or that it had been prepared as a substitute for the original note, or that the original note had not been signed, or that the original note had been lost."

Based on the findings it was concluded that petitioner had violated his oath and duties as an attorney (Bus. & Prof. Code, §§ 6103, 6067, 6068), and committed acts involving moral turpitude and dishonesty. (Bus. & Prof. Code, § 6106). The committee recommended public reprimand. The Board of Governors approved the commit-

tee's findings but recommended 60 days suspension.

Petitioner urges that no-one has suffered or will suffer any loss by reason of his conduct; that in order to clear the title to the property the mortgage had to be paid in any event, regardless of the note it secured and to that end he executed a satisfaction of mortgage; that Phillips has not offered to cancel the satisfaction; and that Phillips' clients interests were not affected as they were obligated to pay the mortgage regardless of the note. With reference to the possibility that the original note might turn up in the hands of a holder in due course to the embarrassment of Phillips' clients, petitioner asserts that such cannot happen as it would require petitioner's endorsement which has not been made, and it is not to be supposed he would endorse and try to collect it twice.

Assuming the soundness of the foregoing, nevertheless there might have been a claim by Phillips' clients that the mortgage was not an encumbrance that was covered by the assumption agreement unless it truly represented a debt, and without a note, there was no such debt. The case is closely analogous to *Hallinan v. State Bar of California*, 33 Cal.2d 246, 200 P.2d 787, where the attorney simulated his client's signature to settlement papers which were given to the attorney when the settlement was made, knowing the latter attorney believed the client had personally signed them. Discipline was held to be proper although the attorney had power of attorney to sign for his client and no loss was suffered thereby. We there said, 33 Cal.2d at page 249, 200 P.2d at page 789: "From the foregoing it is evident that petitioner practiced a deception upon Roche, that is, by leading Roche to believe that Hobart had personally signed the settlement papers and obtained an acknowledgment of that signature in an improper manner. Although he may have been legally authorized to simulate Hobart's signature under his power of attorney, rather than signing Hobart's name as principal, and his own name as attorney in fact, yet he should not have led Roche to believe that Hobart had personally signed, knowing that Roche expected and thought

he was getting Hobart's signature. Such conduct should not be condoned."

Therefore, it is ordered that petitioner be suspended from the practice of law for a period of 60 days, as recommended by the Board of Governors, commencing 30 days after this opinion is filed.



36 Cal.2d 666

LARSON et al. v. THORESEN et al.

L. A. 21206.

Supreme Court of California, in Bank.

Feb. 2, 1951.

Erik H. Larson and another brought an action against John F. Thoresen and others for partition of realty upon which the parties had erected a house and garage for purposes of sale. The Superior Court, Los Angeles County, Myron Westover, J., rendered an order in favor of defendants, and plaintiffs appealed. The Supreme Court, Shenk, J., held that the appeal should be dismissed since the trial court had failed to make the required findings of fact and conclusions of law upon which an order or judgment could be based as contemplated by statute.

Appeal dismissed.

Prior opinion, 219 P.2d 492.

1. Joint adventures ⇨4(1)

Where evidence clearly shows parties' intention to engage in joint enterprise for profit, principles governing joint ventures apply irrespective of how title to property is taken, and accordingly each co-adventurer or partner is trustee for other and neither may reap personal pecuniary advantage from use of partnership property.

2. Joint adventures ⇨5(1)

Where plaintiffs and defendants agreed to construct house and garage for sale purposes and to divide sale price equally after deduction of expenses, trial court in partition action should have applied governing principles in cases of joint venture in determining whether defendants should be charged for rent because of their

occupancy of garage and part of house as living quarters while they were working on house.

3. Partition ⇨73

In suit for partition of realty and of house and garage constructed thereon for sale by parties pursuant to joint venture agreement, where trial court ordered property sold without making finding as to rights of lien holders or providing terms of credit for sale or for referees to conduct sale and perform necessary preparatory acts, court's order improperly failed to dispose of all matters involved in application of governing code provisions, and order merely had effect of granting specific performance of agreement, rather than of accomplishing partition by sale. Code Civ. Proc. §§ 752 et seq., 752-801.15, 801.13.

4. Appeal and error ⇨783(1)

Where trial court in partition suit had failed to make required findings of fact and conclusions of law upon which order or judgment could be based as contemplated by statute, record did not present proper case for Supreme Court to make findings of fact contrary to, or in addition to, those made by trial court to end that cause might be finally disposed of without further proceedings in trial court, and appeal would be dismissed. Code Civ. Proc. §§ 752 et seq., 752-801.15, 801.13, 956, 956a.

Robert Wanamaker and Jacob Chaitkin, Pasadena, for appellants.

Lee J. Myers and Harold B. Cooper, El Monte, for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from an order directing the parties to make repairs to and to effect the sale of certain real property and for distribution of the proceeds.

Erik H. Larson and John F. Thoresen (referred to herein as plaintiff and defendant respectively) entered into a written agreement to purchase a building lot in El Monte, construct thereon a residence and garage, contribute equally to the cost, sell the property and share equally any profit

realized. The agreement also contemplated the contribution by each of personal labor and payment therefor at designated rates. The lot was purchased and title taken by the parties as tenants in common. On completion of the structures in October, 1947, the defendant and his family moved into the house and have since continued to occupy the premises. The property remained unsold.

On April 23, 1948, the plaintiff commenced the action for partition or sale of the property. Several alleged lien claimants were joined as defendants. In a first cause of action a partition of the property by a sale and equitable division of the proceeds after payment of amounts owing to lien claimants was requested. A second cause of action was based on allegations of the defendant's breach of contract by occupancy of the property without the plaintiff's consent and by delay and hindrance of the sale whereby the value was alleged to have declined to the extent of \$2,500. The plaintiff sought one-half of that sum as his share of the loss. An accounting of rents and profits based on the alleged reasonable rental value of \$150 per month and judgment for one-half thereof was sought by a third cause of action. A fourth cause of action was for damages for alleged waste committed to the extent of \$1,500 and judgment was asked for one-half that sum. In a fifth cause of action the plaintiff sought a declaration of the rights of the parties.

The defendant by answer placed in issue the allegations of all causes of action and alleged affirmatively that the delay in the sale of the property was caused entirely by the plaintiff. He also filed a cross-complaint seeking \$3,000 damages based on the plaintiff's alleged breach of contract by failure to pay his share of the construction costs, to place the property on the market, and to agree to the price or terms for the sale.

After a three day trial without a jury the court filed a document styled "Opinion and Order." No findings of fact and conclusions of law as such were filed. The opinion was an informal statement of some

allegations of fact in the pleadings and of evidence relating to efforts to sell the property, occupancy by the defendant, the plaintiff's delay in bringing the action until six months after his declared joint right to possession accrued, damage to the interior and exterior of the house, letters exchanged by the parties regarding offers and occupancy, and value depreciation. The court's conclusions were that the principal delay was caused by the plaintiff and that the property could not be partitioned without sale. The purported "Order" is that "the parties proceed vigorously at once" to sell the property at private sale for the best price obtainable but not for less than \$9,500, subject to confirmation by the court. The order includes allowances from the proceeds to the plaintiff to meet excess of his cash advances, labor contributed and taxes paid, and an amount to the defendant for services plus \$1,000 depreciation caused by the plaintiff's delays. Allowances were also made for expenses, commission on the sale, and counsel fees, the remaining proceeds to be equally divided between them. The court declined allowances for rent, declaring the parties' co-tenancy rights of possession equal; but in lieu of rent the defendant was directed to make certain repairs to the floor covering and to paint the inside trim. The court instructed that "if the parties conclude to paint the exterior to aid a sale, the cost" should be deducted from the proceeds of sale before division.

The plaintiff contends that the court has failed to comprehend the joint-venture nature of the agreement; that the "Opinion and Order" is ineffectual as findings of fact and conclusions of law; that the court failed to follow the provisions of the Code of Civil Procedure, sections 752-801.15, which govern partition, sec. 801.13, Code Civ.Proc. but purported to direct specific performance of the agreement. To meet these contentions in part the defendant has filed in this court a draft of proposed findings of fact. He requests this court to adopt those findings as a basis for affirmance pursuant to section 956a of the Code of Civil Procedure.

[1] Where the evidence clearly shows the parties' intention to engage in a joint enterprise for profit it has been held that the principles governing joint venture apply irrespective of how title to the property is taken. *McNab v. Mills*, 199 Cal. 231, 248 P. 657; *Bastjan v. Bastjan*, 215 Cal. 662, 12 P.2d 627; *Swarthout v. Gentry*, 62 Cal.App.2d 68, 144 P.2d 38. Each co-adventurer or partner is a trustee for the other and neither may reap a personal pecuniary advantage from the use of the partnership property. *Perelli-Minetti v. Lawson*, 205 Cal. 642, 647, 272 P. 573; *Nelson v. Abraham*, 29 Cal.2d 745, 751, 177 P.2d 931.

[2] The agreement of the parties is indisputable evidence of a joint venture or enterprise. It contains no provision that either might occupy the premises or that occupancy by either was a matter of right. The defendant attempted to show that occupancy was necessary to guard the property; but the court made no finding on that issue. The court should have made findings and resolved the issues by the application of the governing principles in cases of joint venture.

[3] The action for partition was proper since all of the equitable adjustments and claims of damage as between the partners as well as claims of lienholders could be disposed of by the application of the code provisions governing partition. *Perelli-Minetti v. Lawson*, *supra*, 205 Cal. 642, 272 P. 573; *Swarthout v. Gentry*, *supra*, 62 Cal.App.2d at page 84, 144 P.2d 38; *Parmelee v. Brainard*, 62 Cal.App.2d 182, 144 P.2d 381. By the conclusion that partition except through sale was not feasible, the court recognized the theory of the action as partition but proceeded to make an order which had the effect of granting specific performance of the agreement. The support for the finding that partition could be effected only through a sale is unquestioned. But it does not follow that the parties could accomplish partition by specific performance of their agreement. The

record shows the contrary, and necessitated partition through judicial action.

Since the action was essentially for partition according to the equities under the agreement, the procedural aspects were governed by sections 752 et seq. of the Code of Civil Procedure. The purported Opinion and Order contained no finding as to lienholders, provided no terms of credit on the sale, and included no provision for referees or a referee to conduct the sale and perform necessary preparatory acts. In addition to a failure to recognize the principles applicable to the parties' relationship, the court failed to dispose of all of the matters involved in the application of the governing code provisions. Cf. *Parmelee v. Brainard*, *supra*.

[4] It is obvious from the foregoing that the record does not present a proper case for this court to "make findings of fact contrary to, or in addition to, those made by the trial court" to the end that the cause may be finally disposed of "without further proceedings in the trial court" as provided by section 956a of the Code of Civil Procedure. Since that section was first construed and applied in *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, the function of the trial court as the normal and primary finder of the facts has been uniformly recognized. It was never intended that the appellate court should perform those functions in the first instance. Because of the failure to make required findings of fact and conclusions of law upon which an order or judgment could be based as contemplated by the statute, the appeal should be dismissed. Upon the dismissal the cause will be pending in the trial court as upon the close of the trial.

The application to have this court make findings of fact is denied. The appeal is dismissed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

36 Cal.2d 654

RABER v. TUMIN et al.

L. A. 21530.

Supreme Court of California, in Bank.

Jan. 30, 1951.

Action by Bertrand Raber against Saul Tumin and another to recover damages for injuries sustained while on business premises of named defendant at his invitation. The Superior Court of Los Angeles County, Joseph M. Maltby, J., granted defendants' motions for nonsuit and plaintiff appealed. The Supreme Court, Schauer, J., held that the evidence was sufficient to take case to jury under *res ipsa loquitur* doctrine as against both named defendant and his employee engaged in altering the premises.

Judgment reversed and cause remanded for a new trial.

Traynor and Edmonds, JJ., dissented in part.

Prior opinion 216 P.2d 167.

1. Trial ⇨165

The granting of motion for nonsuit is warranted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Trial ⇨142

Trial court is not justified in taking case from jury unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it upon appeal or trial court to set it aside as a matter of law.

3. Appeal and error ⇨927(3)

On appeal from an order of nonsuit, appellate court must view the evidence as though judgment had gone in favor of appellant and order a reversal if such judgment can be sustained.

4. Negligence ⇨134(5)

In action for injuries sustained by business invitee when ladder standing

against wall of store apparently fell, striking him, evidence warranted finding that lessee of store and his employee, engaged in altering the premises, had possession of the store and ladder and were exercising dominion over such property at time of accident.

5. Negligence ⇨32(2.8)

Electrical contractor who at lessee's request entered store to check for any necessary changes in the wiring was a "business visitor" toward whom lessee and his employee engaged in altering the premises were obliged to exercise ordinary care to keep premises in a reasonably safe condition or to warn of danger, and such duty extended to conditions which might have been found dangerous by exercise of reasonable care and was not limited to conditions actually known to be dangerous.

See publication Words and Phrases, for other judicial constructions and definitions of "Business Visitor".

6. Negligence ⇨121(2)

Where accident was of a kind which ordinarily does not occur in absence of negligence of someone, was caused by an agency or instrumentality within exclusive control of defendant, and was not due to any voluntary action or contribution by plaintiff, "*res ipsa loquitur*" doctrine is applicable.

See publication Words and Phrases, for other judicial constructions and definitions of "*Res Ipsa Loquitur*".

7. Negligence ⇨121(2)

The applicability of *res ipsa loquitur* doctrine depends on whether it can be said in the light of common experience that the accident was more likely than not the result of defendant's negligence.

8. Master and servant ⇨332(1)**Negligence ⇨136(14)**

Evidence as to circumstances under which business visitor was apparently struck by falling ladder as he was leaving store was sufficient to take action for resulting injuries to jury under "*res ipsa loquitur*" doctrine as against both lessee of store and his employee engaged in altering the premises.

9. Master and servant $\Rightarrow$ 330(1)

That plaintiff, by reason of the very circumstances under which he was injured, was unable to specifically identify, as between master and servant, the actively negligent person responsible for plaintiff's injury, did not deprive defendant of the aid of *res ipsa loquitur* doctrine in action against both master and servant for such injuries.

10. Evidence $\Rightarrow$ 5(2)

That a ladder, particularly one of considerable size and weight, cannot be made to stand upright against a wall on heavily waxed composition tile floor without some fastening or other special attachment, unless foot of ladder is almost touching wall so that ladder is standing almost vertically and thus in an inherently dangerous position from which it quite likely will topple forward at a small jar or vibration, is common knowledge.

11. Trial $\Rightarrow$ 142

Inconsistencies in permissible inferences from the evidence present issues of fact which must be resolved by findings and a judgment and not by an order of nonsuit.

Linnell & Smith and Charles T. Smith, Long Beach, for appellant.

Spray, Gould, Duckett & Bowers and Malcolm Archbald, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiff seeks to recover damages for personal injuries. Named as defendants are Saul Tumin, who was the lessee of a store in which the injuries were received, and Tumin's employe Endriss, a carpenter. At the close of plaintiff's case the court granted the defendants' motions for nonsuit, and plaintiff appeals. We conclude that as to both defendants the matter should have gone to the jury.

[1-3] The granting of a motion for nonsuit is warranted " * * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference

which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." (Card v. Boms (1930), 210 Cal. 200, 202, 291 P. 190; see also Golceff v. Sugarman (1950), 36 Cal.2d 152, 222 P.2d 665; Blumberg v. M. & T. Incorporated (1949), 34 Cal.2d 226, 229, 209 P.2d 1, and cases there cited.) "Unless it can be said as a matter of law, that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." (Estate of Lances (1932), 216 Cal. 397, 400, 14 P.2d 768.) In other words, while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained.

Stated in the light most favorable to plaintiff, the evidence may be summarized as follows:

Plaintiff, an electrical contractor aged 36, at defendant Tumin's request went at about one-thirty o'clock in the afternoon to a store in the City of Long Beach, which Tumin occupied as lessee, in order to check for any changes that might be necessary in the wiring. Inside the store plaintiff noticed defendant Endriss, an employe of Tumin, hammering on a partition which divided the front, or "show room," of the store from the rear part thereof. The showroom was between 16 and 17 feet wide with the front door approximately in the middle on the north side, and about 16 1/2 feet deep from the front, or north, wall, to the partition. After plaintiff and Tumin had talked together for about ten minutes someone from outside called to Tumin and he left the store; plaintiff,

who was standing "not very far from the center" of the showroom, turned to leave the store and "believes" that as he approached the front door he saw a ladder standing "almost vertically" upright against the front (north) wall at a point near the east wall; he was "very close to the front entrance when I got knocked out"; he does not "remember falling down"; he regained consciousness in the hospital. While in the store plaintiff saw no "holes in the floor" or debris or "obstructions of any kind" in his pathway; the floor "was not so slippery" that he "had difficulty holding" his feet on the floor; neither he, Tumin nor Endriss used the ladder while plaintiff was in the store; no one except plaintiff, Tumin, and Endriss was in the store; and during this period Endriss was standing on the floor while working.

Defendant Endriss testified that he had begun working in the store for Tumin on the Friday prior to the Monday on which plaintiff was injured; that in addition to demolishing the partition on which he was hammering, his work for Tumin was to include the setting of showcases and wall fixtures that Tumin "had coming from another store"; that his hammering on the partition, which was eight feet tall, caused it to "vibrate or to jump * * * some"; the floor, of composition tile, was slippery, heavily waxed, and he slid and slipped several times and fell down on it; when he entered the store the ladder, which was a ship's ladder eight feet long, with sides made of one by sixes and treads "possibly" of one by eights, had been lying horizontally on its edge leaning up against the west wall of the store; he did not "remember" using or observing anyone else use, the ladder; he heard, but did not see, plaintiff fall and discovered him lying near the east store wall with the ladder lying flat across his hips; plaintiff's head was approximately six feet west of the east wall and one foot south of the north, or front, wall, and his feet were near the east wall; at the time of the accident the light was very good and no one else was in the store. Endriss further testified as follows: "Q. In this accident, when you

were working for Mr. Tumin, you helped him move some showcases around, didn't you * * * A. Yes, that is true.

"Q. It wasn't simply carpenter work, it was some general handy man work, in addition to carpentering, although that was the principal detail? A. That is the line of our work naturally * * *.

"Q. Do you know whether or not on the day that Mr. Raber was injured, that there was any object of any kind or objects which were standing at any point in the easterly half of the front store room or show room? A. Not that I recall."

[4] The facts as to how and when and by whom the ladder was brought into the store, and as to by whom it was raised from a horizontal to a substantially vertical position, and who had charge of it, are not specifically shown, but we think the evidence hereinabove epitomized, considered with that hereinafter discussed, is sufficient to support a finding that defendants had possession of the store and of the ladder and that they were exercising dominion over such property.

According to defendant Tumin he had just signed the lease and taken possession of the store between 9 and 10 o'clock in the morning of the day the accident occurred, and at that time saw the ladder lying on the floor along the west wall of the store.

The doctor who examined plaintiff at the emergency hospital following the accident testified that plaintiff had suffered a fractured skull and that "I don't believe it would be speculation to say that this man lying there unconscious with abrasions on his head, and bleeding from his ear, that there had been a blow to the head." Plaintiff's wife testified that during the fourteen years of their marriage plaintiff "has been very healthy. He has never been sick."

[5] Plaintiff was a business visitor toward whom Tumin, together with the servant through whom he was acting in altering the premises, "was obliged to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn * * * of danger. The duty was

not limited to conditions actually known * * * to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care. [Citations.]” (Blumberg v. M. & T. Incorporated (1949), *supra*, 34 Cal.2d 226, 229, 209 P.2d 1.)

Plaintiff urges that the evidence justifies application of the *res ipsa loquitur* doctrine, and that the nonsuit was therefore improperly granted (see *Hinds v. Wheadon* (1942), 19 Cal.2d 458, 461, 121 P.2d 724; *Ybarra v. Spangard* (1944), 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258). Defendants’ position is that any judgment against them would be untenable because based upon nothing more substantial than speculation and guessing (see *Reese v. Smith* (1937), 9 Cal.2d 324, 328, 70 P.2d 933).

[6, 7] As declared in *Ybarra v. Spangard* (1944), *supra*, 25 Cal.2d at page 489, 154 P.2d 687, “The doctrine of *res ipsa loquitur* has three conditions: ‘(1) the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.’ (Prosser, Torts, p. 295.)” A more detailed explanation of the applications, limitations and effects of the doctrine may be found in *Dierman v. Providence Hospital* (1947), 31 Cal.2d 290, 295, 188 P.2d 12. It has also been more specifically pointed out that “the applicability of the doctrine of *res ipsa loquitur* depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their [defendants’] negligence. [Citations.] ‘Where no such balance of probabilities in favor of negligence can be found, *res ipsa loquitur* does not apply.’ (Prosser on Torts [1941], p. 297.)” (*La. Porte v. Houston* (1948), 33 Cal.2d 167, 169, 199 P.2d 665.)

[8] We are satisfied that a permissible view of the evidence here meets the several elements of the doctrine of *res*

ipsa loquitur as above depicted. Certainly the accident appears to satisfy the first requirement: an invitee in a showroom is not ordinarily, in the absence of someone’s negligence, struck on the head by a falling ship’s ladder; secondly, the evidence tends to show that the instrumentality—the ladder on the slippery floor in the showroom—was within the exclusive control of defendants.

[9] Although defendant Tumin testified that he had entered into possession of the premises only about four hours prior to the accident, Endriss stated that he himself had commenced “working on the job” of “demolishing” the partition for Tumin some three days earlier. It may thus be inferred that the defendants were not only in control of the store and of the ladder, but had had control for a sufficient period of time to have discovered, by the exercise of reasonable care, the fact that the floor was slippery and that the ladder was standing “almost vertically” up against the store wall, if indeed, the floor had not been polished, and the ladder had not been placed in its almost vertical position, by either or both of the defendants during their work about the premises. The fact that plaintiff is by the very circumstances under which he was injured unable to specifically identify, as between master and servant, the actively negligent person does not deprive him of the aid of the doctrine of *res ipsa loquitur*. (See *Ybarra v. Spangard* (1944), *supra*, 25 Cal.2d 486, 490, 154 P.2d 687; *Cavero v. Franklin General Benevolent Soc.* (1950), 36 Cal. 2d 301, 223 P.2d 471.)

From plaintiff’s testimony that he does not remember falling and that as he proceeded from near the center of the showroom to a point near the front door (which was approximately midway between the east and west walls) he “got knocked out”, considered with the further fact that plaintiff was found on the floor with the ladder lying across his body and suffering from injuries including a fractured skull which resulted from a blow to the head, together also with the other pertinent circumstances in evidence, it may be inferred that the ladder (which

had been standing near the east wall) fell and caused plaintiff's fall, rather than that plaintiff fell and caused the ladder to topple. In view of the slippery floor, the substantial weight of a man's body, the apparently substantial weight of the ladder, and its position across plaintiff's body, it cannot be said that plaintiff's position when found precludes the inferences above suggested.

As to the third element of *res ipsa loquitur*, above enumerated, the test is met in that the evidence tends to show that plaintiff had no contact with the ladder until it fell upon him as he was leaving the store.

[10] Under the circumstances related it appears that the "balance of probabilities" test has been met. It is a matter of common knowledge that a ladder, and particularly one of the size and apparent weight of that involved here, cannot be made to stand upright against a wall, on a heavily waxed composition tile floor, without some fastening or other special attachment, unless the bottom or foot of the ladder is at a point almost touching the wall itself, so that the ladder is actually "almost vertically" upright (as plaintiff's testimony suggest) and thus in an inherently dangerous position from which it quite likely will topple forward from the top at a small jar or vibration. Here it would seem that the owner of the ladder and premises, and the employe working therein, should have foreseen that vibration or a jar might be caused by traffic on the street outside the store, by the hammering of Endriss on the partition, or even by the tread of persons walking about the store, and that placing or leaving the ladder substantially upright on the slippery floor would be dangerous to persons lawfully upon the premises. Certainly it seems to us that the balance of probabilities here suggests negligence on the part of the person or persons responsible for the ladder and the slippery floor, rather than that the accident was unavoidable or due to negligence of the plaintiff. Defendants, not plaintiff, were in control of the premises.

[11] Defendants argue that the fact that the ladder was found across plaintiff's body at an oblique rather than a right angle to the wall against which it had been leaning establishes that it "must have toppled over sideways" rather than forward, and that "it is common human experience that a ladder * * * will not fall over sideways unless some outside agency supplies the moving force." However, the force of the contact between the falling ladder and plaintiff's head or other part of his body would in common experience cause deflection from the initial direction of fall, and hence defendant's argument, however plausible, is not as a matter of law compelling, and, therefore, cannot sustain the nonsuit. The fact that testimony tended to show that plaintiff was near the door in the middle of the front wall and that the ladder was upright near the east wall, but leaning against the front wall, likewise cannot support the nonsuit. Obviously the relative positions of the plaintiff and of the ladder were to some extent approximations, and inconsistencies in permissible inferences from the evidence present issues of fact which must be resolved by findings and a judgment rather than by an order of nonsuit.

The judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting and concurring).

I concur in the judgment insofar as it reverses the nonsuit in favor of defendant Tumin. The evidence is sufficient to warrant an inference that while plaintiff was walking across defendant Tumin's showroom on his way to the front door, a ladder fell away from the wall top end first, struck him on the head, and knocked him to the floor. Since a ladder would not ordinarily fall had it not been negligently placed or left in an unstable position, and since plaintiff himself did nothing to set it in motion, the doctrine of *res ipsa loquitur* may properly be invoked

to justify an inference of actionable negligence against the person who had control of the ladder and the premises where it was located. Defendant Tumin had such control. He was the lessee of the premises and was the only person apart from his employee, for whose conduct he was also legally responsible, who might either have placed the ladder in a dangerous position or failed to remove it from such a position after taking possession of the premises.

I cannot agree, however, that the doctrine of *res ipsa loquitur* should be invoked against defendant Endriss merely because he was one of the persons who could have placed or left the ladder in a dangerous position. The doctrine is based on probabilities. Defendant's control and the nature of the injury must be such that reasonable men can conclude that it is more probable than not that the cause of the injury was negligent conduct on the part of defendant. *La Porte v. Houston*, 33 Cal.2d 167, 169, 199 P.2d 665; *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 616-617, 140 P.2d 369; see *Prosser, Torts*, p. 297. If there is equal probability that the injury could have been caused by the negligence of any one of two or more persons, it is impossible to conclude that it was more probably caused by one than another, and the doctrine is inapplicable. *Hernandez v. Southern California Gas Co.*, 213 Cal. 384, 388, 2 P.2d 360; *Olson v. Whitthorne & Swan*, 203 Cal. 206, 208, 263 P. 518, 58 A.L.R. 129; *Zentz v. Coca Cola Bottling Co.*, 92 Cal. App.2d 130, 133-134, 206 P.2d 653; see, *Prosser, Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 196-198, and cases there cited.

Although the record is devoid of evidence from which it can be determined which of the defendants was at fault, the majority opinion holds that the "fact that plaintiff is by the very circumstances under which he was injured unable to specifically identify, as between master and servant, the actively negligent person does not deprive him of the aid of the doctrine of *res ipsa loquitur*." Under the rule so enunciated it is no longer necessary for a plaintiff to prove that it is more probable than not that he was injured as a result of defend-

ant's negligence; he need only prove that he suffered an injury of a kind that does not ordinarily occur in the absence of someone's negligence and that defendant was one of various persons who could have been negligent. Although such a rule is supported by *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687, 162 A.L.R. 1258, and *Cavero v. Franklin General Benevolent Soc.*, 36 Cal.2d 301, 223 P.2d 471, it is at war with the general principle that plaintiff must prove that defendant was negligent and that his negligence was the cause of the injury. Under the rule of the *Ybarra* case as here applied a plaintiff who has suffered an injury of a kind that ordinarily does not occur in the absence of someone's negligence may establish a cause of action against all persons who had an opportunity to cause the injury. A plaintiff, for instance, who is struck on the head by a flower pot falling from a multistoried apartment building may recover judgment against all the tenants unless the innocent tenants are able to identify the guilty one. See, *Ybarra v. Spangard*, 93 Cal.App.2d 43, 47-48, 208 P.2d 445.

Until the present decision, the rule of the *Ybarra* case has been confined to the factual situation there presented. In that case an unconscious patient suffered an unusual injury during the course of an operation, and the court held that he could invoke the doctrine of *res ipsa loquitur* against all persons who took part in his treatment while he was unconscious. It was careful to point out, however, that it was not undertaking "to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of *res ipsa loquitur* is invoked." *Ybarra v. Spangard*, 25 Cal.2d 486, 494, 154 P.2d 691. In the exploding bottle cases, that reasoning has not been applied, and it has uniformly been held that before he may have the benefit of *res ipsa loquitur*, the plaintiff must prove that the bottle was carefully handled after it left the control of the bottler. *Gorden v. Aztec Brewing Co.*, 33 Cal.2d 514, 517-518, 203 P.2d 522; *Zentz v. Coca Cola Bottling Co.*, 92 Cal.App.2d 130, 133-134, 206 P.2d 653; *McClelland v. Acme Brewing Co.*, 92 Cal.App.2d 698, 699-700, 207 P.2d

591. Under the reasoning of the majority opinion, plaintiff could invoke the doctrine of *res ipsa loquitur* against the bottler and any intermediaries without proving anything more than that he himself handled the bottle carefully.

The doctrine of *res ipsa loquitur* concerns a type of circumstantial evidence upon which plaintiff may rely to discharge his burden of proving that his injury was more probably than not the result of negligent conduct on the part of defendant. When, as in the Ybarra case, however, the court permits recovery against defendants who plaintiff has not proved more probably than not caused his injury, ostensibly by extending the doctrine of *res ipsa loquitur*, it is actually setting up a new rule of law affecting the burden of proof.

There are situations where, either by the application of a presumption or by shifting the burden of proof itself, it is reasonable to require of defendant an explanation if he is to escape a judgment against him. Thus, when bailed goods are lost or destroyed, it is reasonable to require the bailee to prove that the loss was not owing to his negligence. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 839-841, 205 P.2d 1037. Again, when a carrier has undertaken to carry a passenger safely it is reasonable to enforce that duty by requiring the carrier to explain an accident. (See, Prosser, *Res Ipsa Loquitur* in California, 37 Cal.L.Rev. 183, 185.) The relationship between an unconscious patient and those who have undertaken to treat him may also be one that justifies placing the burden of proof on the attendants if they are to escape liability for an unusual injury inflicted while the patient is unconscious. Only confusion can result, however, if rules designed to shift the burden of proof or the burden of going forward with the evidence are treated as rules governing the sufficiency of circumstantial evidence.

In *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91, the court avoided this confusion by a forthright recognition that when one of two negligent defendants injures the plaintiff and it is impossible for the plaintiff to prove which one, it is reasonable to put the burden on each defendant

of proving that it was not his negligence that caused the plaintiff's injury. In the present case, however, there is no evidence that both defendants were negligent. It is hardly reasonable to place on defendant Endriss the burden of proving that his negligence did not cause plaintiff's injury when his negligence has not been established. Moreover, there is nothing in the relationship between plaintiff and defendant Endriss that justifies shifting the burden of proof from one to the other. Both were on the premises for the purpose of assisting defendant Tumin to prepare for the opening of business. Neither had a duty to make the premises safe and neither had had anything to do with the ladder. They were substantially in the same position. If defendant Endriss must explain the injury that befell plaintiff, plaintiff would be under the same burden had the ladder fallen on Endriss. In other words, any plaintiff who suffers an injury of a kind that would not ordinarily occur in the absence of someone's negligence may recover judgment from any person who had an opportunity to cause the injury, even if he bears no special relationship to plaintiff that justifies placing the burden of proof on him.

The injustice of making an innocent person, who has not undertaken any special duty toward plaintiff, bear the burden of the latter's loss may be obscured in this case because there are only two defendants, one of whom was more probably negligent than not. The rule now stated in reliance upon the Ybarra case is not limited to such situations. In the Ybarra case there were six defendants and judgment was secured against all of them because none could account for the injury. *Ybarra v. Spangard*, 93 Cal.App.2d 43, 208 P.2d 445. A resourceful plaintiff could ordinarily find more than two defendants. There might be more than one employee; a plumber, a carpenter, a glazier, a painter, or an electrician might have been upon the premises and had an opportunity to place a ladder negligently; or a former tenant might have negligently left the premises in an unsafe condition. The plaintiff could sue all such persons, and once he had established that he suffered an injury that would not ordi-

narly occur in the absence of someone's negligence, the fact that he was "by the very circumstances under which he was injured unable to specifically identify * * the actively negligent person [would] not deprive him of the aid of the doctrine of *res ipsa loquitur*."

EDMONDS, J., concurs.



36 Cal.2d 631

TOWNSEND v. STATE BAR.

L. A. 21726.

Supreme Court of California, in Bank.

Jan. 23, 1951.

An attorney filed a proceeding to review recommendation of Board of Governors of the State Bar of California that attorney be suspended from practice for 30 days. The Supreme Court held that evidence was insufficient to warrant suspension.

Proceeding dismissed.

Attorney and client ☞53(2)

Evidence was insufficient to justify suspension of attorney from practice. Rules of Professional Conduct of State Bar, rule 9; Business and Professions Code, § 6000 et seq.

Crispus A. Wright and Vince Monroe Townsend, Jr., pro. per., Los Angeles, for petitioner.

James W. Hookstratten, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

The Board of Governors of the State Bar has recommended that Vince Monroe Townsend, Jr., be suspended from practice for a period of 30 days. Upon his petition, the proceeding is before this court for review.

Joseph B. Brown employed Townsend to protect his interests as an heir and otherwise in the estate of Elna Brown. The asserted misconduct is based upon the attorney's refusal to pay certain amounts collected by him from the executrix of the estate. By withholding a portion of these amounts, it is charged, he violated his oath and duties as an attorney at law and Rule 9 of the Rules of Professional Conduct of the State Bar.

There is no dispute as to the amounts collected by Townsend from the estate and he admits that he withheld them from his client. But he claims to have done so because of their disagreement concerning the amount to which he is entitled as attorney's fees.

At the outset of the attorney-client relationship, Brown paid Townsend \$50 and they entered into a contract whereby Townsend was to receive, in addition to that amount, 40 per cent of all property or money recovered by him from the estate.

Shortly thereafter, two checks, made payable to Brown and totaling the amount of two claims against the estate, were sent to Townsend. Brown went to Townsend's office, endorsed the checks and left them with him. The record shows no demand upon Townsend at that time for any part of the payment.

Thereafter, Brown complained to the State Bar, which made a preliminary investigation, with attorney and client present. Several months later, Townsend received a check for \$602.50, the amount allowed Brown for his interest in certain property. The check was payable to Brown and he refused to endorse it and to sign the legatee's receipt until there had been a decision in the disciplinary proceeding. However, after some explanations, Brown went to Townsend's office, signed the voucher and endorsed the check. At the same time, Brown returned the check which Townsend had given him some time before. The check for \$602.50 was deposited in Townsend's bank account pending the decision of the State Bar.

Upon this evidence the local committee found that at the time the will of Elna

Brown was presented for probate there was no agreement between Brown and the proponent of the will regarding repayment of the amount of the funeral expenses. When Townsend was retained by Brown, the findings recited, there was no conversation or understanding to the effect that the money collected on account of funeral expenses would be excluded from the provisions of the contingent fee agreement. A further finding was that Townsend did not retain the amount received by him as payment of Brown's claim for funeral expenses for the purpose of coercing and forcing Brown to pay him a fee. The conclusion reached by the committee was that Townsend had not violated his oath and duties as an attorney at law and it recommended the dismissal of the proceeding.

When the record was presented to the Board of Governors, they re-referred the matter to the committee with instructions to make additional findings of fact on each of the issues raised by the notice to show cause and the petitioner's answer thereto. Following further consideration of the evidence theretofore taken, the committee found: Townsend did not retain any money for the purpose of coercing or forcing Brown to pay the attorney's fees claimed by him. On the contrary, Townsend withheld the money because Brown refused to take less than 60 per cent of \$602.50 plus the full amount received in payment of the claims against the estate. Townsend offered to pay Brown 60 per cent of \$1,180 pursuant to their agreement but Brown refused to take anything less than 60 per cent of \$602.50 plus the full amount of the claims.

The Board of Governors, after consideration of the record found: Although Townsend never claimed more than 40 per cent of the amounts collected, he did not unqualifiedly tender or pay Brown any part

of the amount collected by him. Townsend held the whole amount for the purpose of coercing Brown to pay to petitioner the portion which was in dispute and which petitioner claimed pursuant to the retainer agreement. Upon these findings, the board recommended that petitioner be suspended from the practice of law for a period of 30 days.

Neither the recommendation of the board, nor the findings of fact upon which it is based, makes any reference to a violation of Rule 9 of the Rules of Professional Conduct which prohibits an attorney from commingling the funds of a client with his own money. Apparently, when Townsend testified that the bank account in which he deposited the executor's checks was maintained by him for money of his clients exclusively, the charge of violating Rule 9 was abandoned.

The petitioner contends that the record does not support the findings of fact of the Board of Governors. He insists that the record shows no evidence of professional misconduct nor any violation of the State Bar Act, Business and Professions Code, § 6000 et seq., or the Rules of Professional Conduct.

There is substantial evidence to support all of the findings of the local committee. The evidence does not compel the conclusion that Townsend took advantage of Brown by deliberately withholding his client's funds in an attempt to coerce payment of a fee. The committee's determination to the contrary appears to have been based upon a careful consideration of the rights of the respective parties and, upon re-referral, was affirmed. Considering the entire record, this court is disposed to accept the committee's findings and recommendation.

The proceeding is dismissed.

36 Cal.2d 646

TRUCK INS. EXCHANGE v. INDUSTRIAL ACC. COMMISSION et al.

Sac. 6140.

Supreme Court of California, in Bank.

Jan. 26, 1951.

Proceeding by the Truck Insurance Exchange, a corporation, against the Industrial Accident Commission of the State of California, to review a death benefit award in favor of Anna B. Groom, mother of Raymond Groom, deceased, who sustained injury and death on November 28, 1948, in course of his employment as a truck driver in logging business of his employer, Harry P. Sorenson. The Supreme Court, Spence, J., held that where insurer's agent had in past given insured actual notice of delinquencies in order to prevent cancellation and insurer's agent through inadvertence failed to give insured notification of delinquency so as to prevent cancellation, acts of insurer's agent created an estoppel against insurer's assertion of the efficacy of its cancellation notice, sent to insured and never received by him, but that deceased's mother was entitled only to her contribution to the burial expense.

Award modified in accordance with opinion, and as so modified award, affirmed.

Edmonds, J., dissented.

Prior opinion, 218 P.2d 593.

1. Workmen's compensation $\S$ 1426

In compensation proceeding, evidence established that it was insured's custom to rely on insurer's local agent to keep insured's insurance coverage in order and to give him personal notice if there was any danger of cancellation of his insurance policy by reason of an arrearage in premium payments.

2. Insurance $\S$ 378(1)

Knowledge of insurer's local agent concerning insurance dealings with insured, and practice of local agent of keeping insured's insurance coverage in order and giving him personal notice if there was any danger of cancellation of his insurance policy by reason of an arrearage in premium payments, was imputable to insurer, even though policy declared that notice to any agent or knowledge possessed by any agent should not effect a waiver or a change in any part of policy or estop in-

surer from asserting the right under its terms.

3. Workmen's compensation $\S$ 1067

Where insurer's agent had in past given insured actual notice of delinquency in order to prevent cancellation of compensation policy due to arrearages in payment of premiums, and due to inadvertence on part of insurer's local agent, notice of arrears was not given to insured, insurer was estopped from denying liability under policy, and insurer's liability was not affected by fact that on reinstatement of policy as of date of insured's receipt of delinquent premium payment, specific exclusion of coverage was noted for lapsed period.

4. Administrative law and procedure $\S$ 486
Workmen's compensation $\S$ 1752

Ultimate finding of Industrial Commission that insurer was insurance carrier for employer at time of accident, resulting in death of an employee, included subordinate finding that insurer was estopped from denying liability under policy with employer, although cancellation notice had been sent to employer and absence of an express subordinate finding did not affect validity of award as supported by ultimate finding.

5. Workmen's compensation $\S$ 1172, 1945

In compensation proceeding, where insured stipulated that, if liability was established, deceased's mother was entitled to her contribution to burial expense, which amount she fixed as \$69, and added that balance was to be paid by federal government, provision in award for any greater sum for such item of compensation was without support in record, and modification of award would be directed rather than annulment. Labor Code, $\S$ 4701(a).

Mullen & Filippi and W. N. Mullen, San Francisco, for petitioner.

Keith, Creede & Sedgwick and Scott Conley, San Francisco, amicus curiae, on behalf of petitioner.

T. Groezinger and Alfred C. Skaife, San Francisco, for respondents.

SPENCE, Justice.

This is a proceeding to review a death benefit award in favor of Anna B. Groom, mother of Raymond Groom, deceased, who sustained injury and death on November 28, 1948, in the course of his employment as a truck driver in the logging business of his employer, Harry P. Sorenson. The commission found that at the time in question petitioner was the insurance carrier for the employer. It is this latter finding that petitioner attacks, contending that its liability under the terms of its compensation insurance policy with the employer had been effectively terminated by the mailing of a notice of cancellation to him more than three weeks prior to the date of the injury. But, as the commission argues, there is uncontradicted evidence in the record of facts constituting an estoppel against petitioner's assertion of the efficacy of its cancellation notice, and upon that basis the commission's finding of liability in making its award against petitioner is not open to successful challenge.

It appears that for several years prior to the death of his employee, Sorenson had been carrying compensation insurance issued by petitioner on an annual basis. Premiums were payable in quarterly installments. Yearly renewals of the policy were in the form of a "declaration" to be attached to the basic insurance contract. Sorenson was in arrears in the payment of his third quarterly premium on his policy expiring September 25, 1948, but despite that delinquency petitioner issued a renewal policy on November 2, 1948, for the year commencing September 25, 1948, and mailed it to him at Clipper Mills, California, the address given by the insured on the prior policy. On November 3, 1948, petitioner mailed a notice of cancellation to Sorenson at the same address, setting forth the amount of his delinquency with regard to premiums earned under his prior policy, and that unless such due payments were received by it prior to November 16, 1948, the policy issued on November 2, 1948 would be cancelled as of November 16, 1948. It was also stated in the notice that "payment of premium after cancellation date will automatically reinstate your policy

as of the date we receive it." Because of Sorenson's various changes of address during the fall months in 1948 and the time lost in the forwarding of his mail until it finally reached him at Marysville, Sorenson did not receive either the renewal policy or the cancellation notice until December 1, 1948, three days after the death of the employee.

The insurance contract contained the following provision: "This policy may be cancelled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period. * * Notice of cancellation shall be served upon this employer as the law requires, but, if no different requirement, notice mailed to the address of this employer herein given shall be a sufficient notice. * * *"

There was considerable testimony before the commission directed to the dealings between Sorenson and the office of petitioner's agent, Fred Spiller, in Marysville with respect to the insurance coverage. Sorenson testified that he depended upon said agent to protect him against any cancellation; that the agent did not communicate with him in any way during the month of November, 1948, and prior to the 28th of November; that when he went to Spiller's office on November 29 to report the fatal accident, he was told that his policy appeared to be "in good shape," and that it was not until that afternoon that he first learned of the cancellation notice, when he was so advised by petitioner's agent following the latter's routine check with the home office in Los Angeles. Sorenson further testified that he had never received a cancellation notice from petitioner for non-payment of premium prior to the one here involved; that he did not keep any books or diary as to when payments would be due and just "left [his] insurance problems to Spiller's office, and depended on him, but [he] guess[ed] that isn't the proper thing to do, but it had worked out very satisfactorily, and [he] just depended on it that way"; that he didn't worry about a delinquent premium payment because he

"knew when it got down to where it had to be taken care of, that Mr. Spiller or his office would call [his] attention to it"; that he had "been behind" in payments at other times, "but Mr. Spiller always notified [him] so [he] got [his] premium in without the policy ever being cancelled"; and that on such occasions Spiller or his office would "get in touch with [him] personally."

Don Day, the manager of Spiller's office, testified that although a copy of the cancellation notice of November 3 from the head office had been received at the Marysville office, Sorenson had not been personally contacted in the usual way because the copy of the notice had been inadvertently placed in Sorenson's file without having been called to Day's attention; that he knew that "Sorenson [was] running around the country and having different addresses" by reason of the nature of his activities in the lumber business; that it was their method of communication to call certain business customers of Sorenson and learn what address would reach him; that they never worried when a letter sent to Sorenson might go around to three or four different addresses, because they "would get in touch with him if there was any urgent matter through one of his business connections."

Following his receipt of the cancellation notice and on December 8, 1948, Sorenson paid his delinquent premium and petitioner issued its "reinstatement endorsement" of the insurance policy, excluding the period of "November 16, 1948, to * * * December 8, 1948." This procedure was consistent with petitioner's regular practice of not according the policy any "retroactive" effect in fixing the reinstatement date for the insurance coverage.

Petitioner contends that the mailing of the cancellation notice to Sorenson operated to terminate its insurance liability under the renewal policy as of the effective cancellation date specified in the notice—November 16, 1948—and that Sorenson's delayed receipt of the notice could have no effect on the efficacy of the cancellation made in the manner prescribed by the terms of the insurance contract above quoted. An

examination of the authorities on this question reveals a sharp conflict. See Couch, *Cyclopedia of Insurance Law*, Vol. 6, § 1440, p. 5094; 29 *Am.Jur.* § 285, p. 264; *Sorensen v. Farmers Mutual Hail Ins. Ass'n*, 226 Iowa 1316, 286 N.W. 494, 123 A.L.R. 1008. However, assuming, without deciding, that petitioner is correct in its claim that the more recent and better reasoned cases support petitioner's position (see *Trinity Universal Ins. Co. v. Willrich*, 13 Wash.2d 263, 124 P.2d 950, 955, 142 A.L.R. 1; also, comment in *Naify v. Pacific Indemnity Co.*, 11 Cal.2d 5, 10, 76 P.2d 663, 115 A.L.R. 476), there remains the disputed point of whether petitioner is estopped in any event to rely on the validity of its cancellation notice to Sorenson. In view of our conclusion on this latter point, it becomes unnecessary to decide the former.

[1] While the commission did not make an express finding on the issue of estoppel, it did find that at the time of the employee's death petitioner was "the employer's insurance carrier." The record affirmatively shows that "a finding of coverage was made because the evidence showed that the action of the agent of the carrier created an estoppel." This evidence, as above reviewed, was uncontradicted and established that it was Sorenson's custom to rely on petitioner's local agent to keep his insurance coverage in order and to give him *personal* notice if there was any danger of cancellation of his insurance policy by reason of an arrearage in premium payments. Apparently petitioner's local agent did not trust the mail to reach Sorenson on matters requiring urgent attention, but traced his whereabouts as he moved about the country in the course of his business, through his various customers, and so made personal contact with Sorenson by telephone; and Sorenson relied on this practice over the years of his insurance dealings with petitioner. In fact, as above noted, the office manager for petitioner's local agent testified that such personal contact would have been made with Sorenson in the instant case had not the cancellation notice sent from the home office been overlooked as the re-

sult of being inadvertently placed in Sorenson's file in the local office, and so was not attended in the customary way.

[2,3] Petitioner argues that there was no evidence that it had knowledge of, or acquiesced in, the practice of its local agent to notify Sorenson personally of his delinquency in premium payments so he could protect himself from the loss of his insurance coverage. But the knowledge of petitioner's local agent concerning the insurance dealings with Sorenson is imputable to petitioner. *Eagle Indem. Co. v. Industrial Acc. Comm.*, 92 Cal.App.2d 222, 225-226, 206 P.2d 877; see, also, *Bankers Indemnity Ins. Co. v. Industrial Acc. Com.*, 4 Cal.2d 89, 92, 47 P.2d 719. And the force of this settled legal principle is not mitigated by a provision in the policy declaring that "notice to any agent or knowledge possessed by any agent * * * shall not effect a waiver or a change in any part of the policy or estop the Exchange from asserting any right under [its] terms * * *." *Eagle Indem. Co. v. Industrial Acc. Comm.*, supra, 92 Cal.App.2d at pages 227-229, 206 P.2d at page 880. Nor is the question of petitioner's insurance liability here affected by the fact that upon reinstatement of the policy as of the date of petitioner's receipt of the delinquent premium payment, specific exclusion of coverage was noted for the lapsed period of "November 16, 1948, to * * * December 8, 1948." That was a practice "automatically" enforced by petitioner in *all* cases of "payment of premium after cancellation date" as stated in the cancellation notice, and Sorenson's concurrence therein as a matter of routine procedure adopted by petitioner, and for the purpose of obtaining the continued insurance coverage required by law, has no other significance in the disposition of this particular insurance claim.

[4] As the record has been above reviewed, it is clear that the commission and petitioner were fully aware of Sorenson's claim as to the propriety of his reliance on the acts of petitioner's agent in creating an estoppel against petitioner's assertion of the effectiveness of its cancellation notice. Moreover, the commission, in line with the parties' presentation of this compensation

claim, undoubtedly had the right to consider the evidence on the issue of estoppel, which evidence consisted of the uncontradicted testimony of Sorenson as corroborated by Day, the office manager of petitioner's local agent. *Benner v. Industrial Acc. Comm.*, 26 Cal.2d 346, 349, 159 P.2d 24. Thus, the ultimate finding of the commission that petitioner was the insurance carrier for Sorenson at the time here in question includes the subordinate finding that petitioner was estopped from denying liability under the terms of its policy with Sorenson. The implied finding "results by necessary implication", *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 846, 147 P.2d 558, 561, and the absence of an express subordinate finding does not affect the validity of the award as supported by the ultimate finding. 24 Cal.Jur. § 207, p. 974, and cases there cited.

[5] However, petitioner further attacks the award with respect to its allowance of \$300 for burial expense, the statutory maximum (*Labor Code*, § 4701, subd. (a)), and the commission concedes the merit of this objection. Petitioner stipulated that, if liability was established, the deceased's mother was entitled to her contribution to the burial expense, which amount she fixed as \$69; and she added that the balance was to be paid by the federal government. Therefore, as the parties agree, the provision in the award for any greater sum for this item of compensation is without support in the record. Under such circumstances it is appropriate to direct the modification, rather than the annulment, of the award. 27 Cal.Jur. § 220, at p. 587; *O. L. Shafter Co. v. Industrial Acc. Comm.*, 175 Cal. 522, 527, 166 P. 24.

It is therefore ordered that the award be modified by the commission in accordance with the views herein expressed, and as so modified the award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

If, in this action, the insurer is estopped to deny liability, the specific provisions of a contract are of no effect. To avoid can-

cancellation of a policy of insurance pursuant to its express terms, all that the insured needs to show is the failure to receive the notice of cancellation and his reliance upon the local agent to tell him he had not paid the premium.

Sorenson is presumed to have known the conditions of his policy. *Rice v. California-Western States Life Ins. Co.*, 21 Cal. App.2d 660, 670, 70 P.2d 516. As the consideration for assuming the liability imposed upon him by law, it required the payment of a premium. In clear and unequivocal language it stated that, if the premium was not paid, the policy could be cancelled by "notice mailed to the address of this employer herein given." The policy also provided that "notice to any agent or knowledge possessed by any agent * * * shall not effect a waiver or change in any part of the policy or estop the Exchange from asserting any rights under [its] terms * * *."

Under these circumstances, Sorenson had no legal right to rely upon the alleged practice of the local agent to notify him of delinquencies. It is firmly established that "[O]ne relying on a plea of estoppel must have been ignorant of the true state of facts * * *." *Moss v. Underwriters' Report, Inc.*, 12 Cal.2d 266, 273, 83 P.2d 503, 506; *Killian v. Conselho Supremo, etc.*, 31 Cal.App.2d 497, 499, 88 P.2d 214; *Rice v. California-Western S. L. I. Co.*, supra, 21 Cal.App.2d at p. 669, 70 P.2d 516; *Maggini v. West Coast Life Ins. Co.*, 136 Cal. App. 472, 29 P.2d 263; 10 Cal.Jur., pp. 636, 637; 10 R.C.L. pp. 696, 697. Otherwise stated, it must be shown that the party asserting the estoppel was not only destitute of all knowledge of the true facts, but of the means of acquiring such knowledge. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 366; *Moriarty v. California Western States Life Ins. Co.*, 22 Cal.App.2d 260, 268, 70 P.2d 684. Obviously, when the insured knows that his policy may be cancelled by notice mailed to him at the address which he gave for that purpose, he has knowledge of the true facts.

Sorenson further knew that notice to the local agent could not change the terms of

the policy. He also knew he had no legal basis for relying upon the past acts of the agent. This is apparent from his testimony that he " * * * guess[ed] it isn't the proper thing to do." He did not pay the consideration for the insurance provided by the contract but is now given its benefits notwithstanding his default.

I would annul the award against Truck Insurance Exchange upon the ground that the insurance provided by its contract had been cancelled before the date of the fatal accident.



102 Cal.App.2d Supp. 935

PEOPLE v. INTERNATIONAL STEEL CORP. et al.

C. A. 2654.

Appellate Department, Superior Court,
Los Angeles County, California.

Jan. 25, 1951.

The International Steel Corporation, one Hochman and one Olmstead, were convicted in the Justice's Court of Compton Township, Ralph C. Dills, Jr., on charges of violating provisions of the Health and Safety Code, relating to the reduction of air contamination and the control of smog, and they appealed. The Superior Court, Appellate Department, Shaw, P. J., held that the control of smog is proper subject of the police power, and that evidence sustained the conviction as to the defendant corporation and Hochman, but was insufficient to sustain conviction of defendant Olmstead, secretary of the corporation.

Judgment against defendants International Steel Corporation and Hochman affirmed, judgments against the defendant Olmstead, reversed and cause remanded for new trial.

1. Criminal law — 13

Provision of Health and Safety Code, that a person shall not discharge into the atmosphere from a single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is as

dark or darker in shade than that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or of such opacity as to obscure any observer's view to a degree equal or greater than does smoke so described sets forth an ascertainable standard of guilt and is not fatally uncertain, by reason of its reference to the Ringelmann Chart for the description of the forbidden air contaminant. Health and Safety Code, §§ 24198, 24199, 24208, 24242, 24253; Civ. Code, § 3538.

2. Administrative law and procedure ⇨414
Statutes ⇨51

A statute may refer to and adopt, for an expression of legislative intent, a statute, or rules or regulations of another state or of the United States.

3. Criminal law ⇨13

A statute may refer to and adopt, for description of a prohibited act, an official publication of any United States board or bureau established by law, such as the United States Bureau of Mines.

4. Criminal law ⇨304(10)

The courts take judicial notice of the official acts of the United States Bureau of Mines, and private citizens who are concerned with them are also charged with notice of them. Code Civ.Proc., § 1875, subd. 3.

5. Constitutional law ⇨70(1)

The drawing of the line between permission and prohibition is largely a matter of legislative discretion, the exercise of which will not be reversed by courts unless abused.

6. Constitutional law ⇨208(1)

The line between permission and prohibition must be drawn somewhere or there can be no classification, and if classification is reasonable in its over-all operation, it is not to be stricken down because of its application to a particular case that may lie just inside its borders.

7. Constitutional law ⇨208(10)
Health ⇨21

Provision of Health and Safety Code prohibiting any person from discharging

into the atmosphere from any single source of emission whatsoever, any air contaminant for a period or periods aggregating more than three minutes in any one hour which is as dark or darker in shade than that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, is not unreasonable and discriminatory on alleged ground that under it one who discharges an air contaminant only slightly below prescribed limit of color, or opacity is exempt from prohibition even though if he continues his operations long enough, he will discharge more contaminant into air. Health and Safety Code, § 24242.

8. Constitutional law ⇨208(1)

The legislature is not bound, in order to make its action valid, to extend its regulation to all cases which it might possibly reach but may confine its restrictions to those classes of cases where the need is deemed to be clearest.

9. Constitutional law ⇨48

There is a strong presumption in favor of validity of a legislative classification.

10. Constitutional law ⇨48

When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and burden of showing arbitrary action rests upon one who assails classification.

11. Constitutional law ⇨208(10)
Health ⇨21

Provision of Health and Safety Code, that a person shall not discharge into the atmosphere from any single source of emission whatsoever, any air contaminant for a period or periods aggregating more than three minutes in any one hour, which is as dark or darker in shade than that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or of such opacity as to obscure any observer's view to a degree equal to or greater than does such smoke, and exempting certain agricultural operations or use of orchard heaters not producing more than a specified amount of smoke, operates

uniformly and is based on a valid classification. Health and Safety Code, §§ 24242, 24251.

tion in which he is not personally a participant.

12. Criminal law Ⓒ480

In prosecution for violation of air contamination statute, witnesses' testimony that they had attended school established by air pollution control district where they were trained to "read smoke" by aid of Ringelmann Chart, which chart was also basis for determining permissible density of smoke and by that and other experience witnesses acquired ability to estimate opacity and color of smoke such as they testified to with reference to Ringelmann Chart without actually using chart, was sufficient to justify ruling that they were competent to testify as experts, and if there was any doubt as to adequacy of their training, it was not enough to require exclusion of their testimony, but would only go to its weight and credibility. Health and Safety Code, § 24242.

13. Criminal law Ⓒ1159(4)

Weight and credibility to be given testimony of expert witnesses is for trier of facts and not for appellate court.

14. Health Ⓒ41

Evidence sustained conviction of defendant corporation and defendant officer and manager, for violation of air contamination statute. Health and Safety Code, § 24242.

15. Health Ⓒ41

Evidence was insufficient to sustain conviction of secretary of corporation, for violation of air contamination statute, in absence of showing that secretary had any control over operation which resulted in discharge of smoke complained of. Health and Safety Code, § 24242.

16. Corporations Ⓒ302

The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact business of corporation upon his independent volition and judgment.

17. Corporations Ⓒ369

An officer of a corporation is not criminally answerable for any act of a corpora-

Henry C. Huntington and Max Tendler, Los Angeles, for appellants.

W. E. Simpson, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty. and Ralph F. Bagley, Deputy Dist. Atty., Los Angeles, for respondent.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Los Angeles, amicus curiae.

SHAW, Presiding Judge.

The defendants, a corporation and two natural persons, were convicted on charges of violating section 24242 of the Health and Safety Code, which is a part of the law for the formation of air pollution control districts, enacted in 1947 (Stats.1947, Chap. 632, pp. 1640-1651) as an addition to the Health and Safety Code, for the purpose of reducing air contamination, popularly known as "smog." Defendants appeal from the judgments, and in support of the appeals contend that the prohibitory provisions of this law are unconstitutional and void for various reasons, that the evidence does not support the findings of guilt, and that the court erred in rulings on evidence. We have concluded that the control of "smog" is a proper subject of the police power, that the prohibitions of the statute herein mentioned violate none of the constitutional provisions referred to, that the evidence supports the finding of guilt, except as to the secretary of the corporation, defendant Olmstead, that no errors in ruling on evidence appear, and the judgments must be affirmed except as to Olmstead.

[1] The general purpose of the law above mentioned, as appears from sections 24198 and 24199 of the Health and Safety Code, is to reduce air contamination where it exists, "in order to safeguard life, health, property and the public welfare and to make possible the comfortable enjoyment of life and property." Section 24253 makes it a misdemeanor to violate any part of the article which contains section 24242, and the latter section provides that: "A person shall not discharge into the atmosphere

from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is: (a) As dark or darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or (b) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section."

This provision is attacked on the ground that it sets forth no ascertainable standard of guilt and is fatally uncertain, by reason of its reference to the Ringelmann Chart for the description of the forbidden air contaminant. The complaint here specified smoke as the air contaminant discharged, so we limit our further discussion to smoke.

[2] The term "air contaminant" is defined by section 24208 to include smoke and a variety of other specified emanations. All that is needed further for certainty in section 24242, as it applies here, is some means of determining the density or opacity of smoke that is forbidden. "That is certain which can be made certain" (Civil Code, sec. 3538). This rule is as applicable to statutes as to other expressions of ideas. A statute may refer to and adopt, for an expression of the legislative intent, a statute, or rules or regulations of another state or of the United States. In *re* Burke, 1923, 190 Cal. 326, 328, 212 P. 193; *Brock v. Superior Court*, 1937, 9 Cal.2d 291, 297, 71 P.2d 209, 114 A.L.R. 127; In *re* Kinney, 1921, 53 Cal.App. 792, 794, 200 P. 966; *Greene v. Town of Lakeport*, 1925, 74 Cal. App. 1, 9, 239 P. 702. In *Arwine v. Board of Medical Examiners*, 1907, 151 Cal. 499, 503, 91 P. 319, and *Ex parte Gerino*, 1904, 143 Cal. 412, 419, 77 P. 166, 66 L.R.A. 249, the court upheld a provision of statute adopting as the standard of efficiency to which medical schools should conform the standard prescribed by an association of such schools—even an after-adopted standard.

[3, 4] We think it is equally permissible for a statute to refer to and adopt, for description of a prohibited act, an official publication of any United States board or

bureau established by law, such as the United States Bureau of Mines. The publications of that bureau are as readily available for examination by those seeking information on the effect of the statute as were the statutes and regulations, references to which were approved in the cases just cited. It is no more necessary here than it was in those cases that provision be made for free or other public distribution of the matter referred to. The courts take judicial notice of the official acts of the Bureau of Mines Code of Civil Procedure, sec. 1875, subd. 3; see also *Livermore v. Beal*, 1937, 18 Cal.App.2d 535, 540-542, 64 P.2d 987; *Williams v. City & County of San Francisco*, 1938, 24 Cal.App.2d 630, 633, 76 P.2d 182; *Arnold v. Universal Oil Land Co.*, 1941, 45 Cal.App.2d 522, 529, 114 P.2d 408, and private citizens who are concerned with them are also charged with notice of them. *Arnold v. Universal Oil Land Co.*, supra, 45 Cal.App.2d at page 530, 114 P.2d at page 412.

While, as already stated, the courts take notice of the Ringelmann Chart, our notice in this case is fortified by a copy which was introduced in evidence and is in the record. It is a plain white piece of paper divided into four sections, numbered from 1 to 4 and each about $5\frac{3}{4} \times 8\frac{3}{4}$ inches in size. On each of these sections is printed a series of intersecting heavy black lines of uniform width for each section, with the lines growing progressively wider from section 1 to section 4, until on section 4 the black covers much more than half of the surface. This chart refers to Bureau of Mines Information Circular No. 6888, a copy of which is also in the record. From the chart and this circular, it appears that the chart is to be posted at a distance of 50 feet from the observer. When so posted the black lines and the white spaces merge into each other, by a process of optical illusion, so as to present the appearance of a series of gray rectangles of different color densities, No. 4 being the densest. Estimates of the density of smoke may be made by glancing from this chart so displayed to smoke, and picking out the section on the chart which most nearly resembles the smoke. This mode of meas-

uring the density of smoke has been in use, it appears, for over fifty years. This affords a reasonably certain mode of determining and stating the density and opacity of smoke, and we think that the statute adopting it is not lacking in certainty.

[5-7] It is also urged that the statute is unreasonable and discriminatory because under it one who discharges an air contaminant only slightly below the prescribed limit of color or opacity is exempt from the prohibition even though if he continues his operation long enough he will discharge more contaminant into the air than one who continues for only a short time beyond the three-minute minimum. This is only another way of saying that the line between permission and prohibition is drawn in the wrong place or that no such line can be drawn. But the drawing of such a line is very largely a matter of legislative discretion, the exercise of which will not be reversed by the courts unless abused. As the court said, upholding a statute against a similar attack, in *Ferrante v. Fish & Game Comm.*, 1946, 29 Cal.2d 365, 374, 175 P.2d 222, 227, "the line must be drawn somewhere or there can be no classification and the courts have recognized that if the classification is reasonable in its over-all operation it is not to be stricken down because of its application to a particular case that may lie just inside its borders." Upholding a city ordinance establishing a district in which undertaking establishments were permitted and prohibiting them elsewhere, the court said, in *Brown v. City of Los Angeles*, 1920, 183 Cal. 783, 789, 192 P. 716, 718: "The mere fact that outside of the permissive district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of that line." See also *In re Herrera*, 1943, 23 Cal.2d 206, 213, 143 P.2d 345. The principles declared in these cases are applicable here and impel us to uphold the statute against this objection.

[8-10] Further objection to the statute is based on section 24251, Health and Safety Code, which provides that section 24242 does not apply to certain agricultural operations or the use of orchard heaters not producing more than a specified amount of smoke. It is contended that this provision prevents the law from having a uniform operation, makes it a special law and constitutes an arbitrary discrimination, in violation of several constitutional provisions referred to. The decisions on these and cognate questions are well nigh innumerable, and we do not find it necessary to review them here. We have, however, considered those cited by defendants, and others, and conclude that the statute is not vulnerable to this attack. The effect of section 24251 is that the prohibitions of section 24242 do not extend to the described agricultural operations, or the specified orchard heating. But the legislature may make a reasonable classification, founded upon some natural, constitutional or intrinsic distinction. *Leland v. Lowery*, 1945, 26 Cal.2d 224, 232, 157 P.2d 639, 175 A.L.R. 1109; *People v. Western Fruit Growers*, 1943, 22 Cal.2d 494, 506, 140 P.2d 13; *In re Herrera*, supra, 1943, 23 Cal.2d 206, 212, 143 P.2d 345; *Takahashi v. Fish and Game Comm.*, 1947, 30 Cal.2d 719, 727, 185 P.2d 805. The legislature is not bound, in order to make its action valid, to extend its regulation to all cases which it might possibly reach, but may confine its restrictions to those classes of cases where the need is deemed to be clearest. *Leland v. Lowery*, supra; *Powers Farms v. Consolidated Irrig. Dist.*, 1941, 19 Cal.2d 123, 131, 119 P.2d 717; *In re Girard*, 1921, 186 Cal. 718, 723, 200 P. 593. There is a strong presumption in favor of the validity of a legislative classification. *County of L. A. v. Southern Cal. Tel. Co.*, 1948, 32 Cal.2d 378, 389, 392, 196 P.2d 773; *Takahashi v. Fish and Game Comm.*, supra, 30 Cal.2d at pages 727-728, 185 P.2d at pages 810-811; *In re Herrera*, supra. "When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classifica-

tion." *People v. Western Fruit Growers*, supra, 22 Cal.2d at page 507, 140 P.2d at page 20; to same effect, *Leland v. Lowery*, supra.

[11] Agricultural operations are usually carried on in rural districts, where there is not such a concentration of many establishments in small areas as is often found in urban or suburban areas, and do not usually result in excessive production of smoke. Orchard heating in California is done for only a few days in the course of a year. The legislature may have regarded these facts of common knowledge as affording a reasonable basis for the exclusions made in section 24251. It may also have investigated and discovered other facts, not negated by anything before us, tending to show the comparative harmlessness of the operations excluded and the difficulty which agricultural operators would have in minimizing such harm as their operations bring about. In view of the presumption in favor of the validity of its action, as declared in the cases above cited, we are not justified in upsetting its decision.

[12, 13] Three witnesses testified regarding the smoke discharged from defendants' place of business on the occasions specified in the complaint, and its degree of density and opacity as compared with the Ringelmann Chart. Defendants complain that these witnesses showed no qualifications sufficient to enable them to give expert testimony on this subject, and that their observations were not sufficient because they had no Ringelmann Charts with them when those observations were made. Assuming that the comparative density and opacity of the smoke is a matter for expert testimony only, we see no error in the rulings of the court admitting in evidence and refusing to strike the testimony of these witnesses. The air pollution control district established under the statute in Los Angeles County maintained a school where its inspectors were trained to "read smoke," as they called it, by the aid of the Ringelmann Chart, and after they became experienced they no longer needed to look at the chart. The witnesses just mentioned attended this school before

making the observations to which they testified, and by that and other experience acquired the ability to estimate the opacity and color of smoke such as they testified to with reference to the Ringelmann Chart without actually using the chart. Their testimony was sufficient in these respects to justify the ruling of the court that they were competent to testify as experts. See *Hutter v. Hommel*, 1931, 213 Cal. 677, 681, 3 P.2d 554; *Darling v. Pacific Elec. Ry.*, 1925, 197 Cal. 702, 714, 242 P. 703. If there was any doubt as to the adequacy of their training, it was not enough to require the exclusion of their testimony, but would go only to its weight and credibility, which are not matters for consideration here. See *Cloud v. Market St. Ry. Co.*, 1946, 74 Cal.App.2d 92, 100, 168 P.2d 191.

[14-17] As to defendant Hochman and the defendant corporation, we are satisfied that the evidence is sufficient to support the convictions. We come to a different conclusion regarding defendant Olmstead. The place where the smoke was discharged was operated by the defendant corporation and the smoke was discharged in the course of and as a part of its operations in burning automobile bodies, of which it appears defendant Hochman was in charge as an officer and manager. But as to defendant Olmstead, it appears only that he was secretary of the corporation, and that he had a conversation with an inspector of the air pollution control district and wrote him a letter showing that he had knowledge of these burning operations and that the corporation desired and expected to stop these operations soon. There is nothing to show that he had any control over these operations. The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his independent volition and judgment. 6A Cal.Jur. 1162; and see *Walsh v. American Trust Co.*, 1935, 7 Cal.App.2d 654, 659, 47 P.2d 323. "An officer of a corporation is not criminally answerable for any act of a corporation in which he is not personally a participant." *People v. Campbell*, 1930, 110 Cal.App.Supp. 783, 789, 291 P. 161, 163; *Otis v. Superior Court*, 1905, 148 Cal. 129, 131, 82 P. 853;

to same effect, *People v. Doble*, 1928, 203 Cal. 510, 517, 265 P. 184.

The judgments against defendants International Steel Corporation and Hochman are affirmed. The judgments against the defendant Olmstead are reversed and the cause is remanded to the Municipal Court for a new trial as to him.

BISHOP and STEPHENS, JJ., concur.



36 Cal.2d 634

RICHTER v. WALKER et al.

Sac. 6000.

Supreme Court of California, in Bank.

Jan. 26, 1951.

Paul Richter brought an action against Donald Walker, Ona Walker, and others, to foreclose a claimed mechanic's lien for labor performed and materials furnished under an oral contract to drill a water well on the land of the named defendants. The Superior Court, Tehama County, Herbert S. Gans, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The Supreme Court, Schauer, J., held, *inter alia*, that findings sustained judgment.

For prior opinion see 213 P.2d 53.

1. Appeal and error ⇨1071(1)

Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what court intended, and if there are findings sufficient to support the judgment, they are not vitiated by the unintelligibility of others.

2. Appeal and error ⇨934(2)

Any uncertainty in findings will be construed so as to support judgment rather than defeat judgment.

3. Appeal and error ⇨1071(1)

Even where findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and mate-

rial and the findings incapable of being harmoniously construed.

4. Appeal and error ⇨1071(1)

General findings that all allegations or denials of a pleading are true except those as to which the court makes a specific finding are upheld if by reference to pleading the import of the findings is reasonably certain.

5. Appeal and error ⇨1071(6)

While full findings are required upon all material issues a judgment will not be set aside on appeal because of failure to make an express finding upon an issue if a finding thereon, consistent with judgment, results by necessary implication from express findings which are made.

6. Appeal and error ⇨931(1)

In determining sufficiency of evidence to support findings, all substantial conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold findings if possible.

7. Contracts ⇨322(3)

Mechanics' liens ⇨281(1)

In action to foreclose mechanic's lien for labor performed and materials furnished under oral contract to drill a water well on defendants' land, wherein defendant cross-complained for breach of contract, evidence sustained finding that plaintiff did not drill the well in a good and workmanlike manner.

8. Courts ⇨106

Where trial court wrote an opinion and then reconsidered the matter upon additional evidence and prepared a subsequent opinion, and rendered its findings and conclusions, the original opinion was rendered ineffective.

9. Appeal and error ⇨1008(1)

Trial ⇨387(1)

The formal findings and conclusions of trial court constitute decision of trial court and are controlling.

10. Appeal and error ⇨1011(1)

Finding of trial court based on conflicting evidence will not be overthrown on appeal.

11. Mechanics' liens ⇨290(4)

In action to foreclose a mechanic's lien for labor performed and material furnished under oral contract to drill a water well on defendants' land, finding that when drilling had ceased defendants requested plaintiff to correct defective condition of well and gave plaintiff plenty of time to improve well would be construed to mean that request was made after pump was installed, so that finding was supported by evidence.

12. Mechanics' liens ⇨290(2)

In action to foreclose mechanic's lien for labor performed and materials furnished under oral contract to drill a water well on defendants' land, wherein defendant cross-complained for breach of contract, findings sustained judgment disallowing lien because plaintiff had not performed contract and such work as was done was not done in good or workmanlike manner, notwithstanding some findings were equivocal.

13. Mechanics' liens ⇨281(1)

In action to foreclose mechanic's lien for labor performed and materials furnished under oral contract to drill a water well on defendants' land, evidence sustained findings that plaintiff failed to perform contract, that his work was not done in a workmanlike manner, that the well was valueless to any portion of defendants' land and did not constitute any improvement, and that sale of a pump and motor to defendants was separate from contract for drilling of well.

14. Mechanics' liens ⇨93

Where plaintiff failed to perform contract to drill a well on defendants' land which would provide adequate water for defendants' purposes, and work done by plaintiff added no value to defendants land and was of no value to defendant, claim of lien was properly denied.

15. Mechanics' liens ⇨230

A tender by defendant to plaintiff of full amount adjudged to be due plaintiff for labor performed and materials furnished under oral contract to drill water well on defendants' land would extinguish mechan-

ic's lien if allowed in action to foreclose alleged mechanic's lien.

16. Interest ⇨31, 39(1)

Sales ⇨32(1), 187

A plaintiff who sold water pump and motor to defendant was entitled to payment for pump under record not later than three days after delivery of pump to defendant and was entitled to interest at legal rate of seven percent per annum on price of pump from date payment was due to date of entry of judgment against defendant for price of pump. Civ.Code, §§ 1762, 3287, 3302.

Curtiss E. Wetter and Rawlins Coffman, Red Bluff, for appellant.

Alfred E. Frazier, Red Bluff, for respondents.

SCHAUER, Justice.

Plaintiff sued to foreclose a claimed mechanic's lien for \$3,187.22, with interest, for labor performed and materials furnished assertedly under an oral contract to drill a water well on the land of defendants Donald Walker and Ona Walker. These defendants joined issue denying that plaintiff had performed his contract, and cross-complained for damages for breach of contract. The trial court determined that plaintiff had not performed the contract, that such work as was done had not been done in a good or workmanlike manner, and disallowed the lien; it did, however, allow plaintiff the sales price of a pump and motor sold to defendants (\$1,350.50), deducting therefrom \$653 which defendants had expended in an attempt to improve the well. Plaintiff, who appeals, contends that the evidence does not support the findings nor the findings the judgment. We have concluded that there is ample evidence to support the findings and that the findings, liberally construed, sustain the judgment.

Plaintiff alleges in his complaint that in March, 1947, he and defendants entered into an oral contract for the drilling of a well and the installing of a pump on defendants' property in Tehama County;

that he commenced work and first furnished material in connection therewith on the same day; and that he completed the work on June 27, 1947.

Defendants in their answer allege that in October, 1945, they entered into an oral contract with plaintiff whereby he agreed to drill a well on the premises to a depth of 200 feet, if necessary, and "that such well would produce Six Hundred (600) gallons of water per minute"; it was further understood and agreed that defendants would seek to procure a government loan for the financing of the well. Defendants admit that plaintiff entered upon drilling operations on March 15, 1947, but allege that he failed to complete the well in accordance with specifications or in a workmanlike manner, and that, as a proximate result of the carelessness, inefficiency and negligence of plaintiff the well, as left by plaintiff, produced no more than 150 gallons a minute; that the pump installed by plaintiff was not the proper pump for the kind of well produced and was inefficient and too expensive for economical operation; that plaintiff was "fully informed and advised and knew that the defendants were engaged in dairy business and other farming operation," were contemplating extensive leveling work and were in need of the water in the quantity contracted for; that the well as constructed by plaintiff was "of absolutely no value whatever to the defendants and for the defendant to continue their farming operations, they will have to drill an entirely new well." Defendants then cross-complained, seeking damages of \$12,653 for plaintiff's alleged breach of contract.

The trial court's findings, although not as specific or certain as could be desired, do determine that plaintiff agreed, in October, 1945, to drill the well at a cost of \$5.00 a foot, furnish the casing therefor, and supply a proper pump and motor; such findings also determine that "it was further agreed that said well would be drilled to a depth of two hundred feet if necessary to provide adequate water for the purposes of said Donald Walker [defendant] and that Paul Richter [plaintiff] would drill

said well in a good and workmanlike manner and that said Paul Richter guaranteed the quality of his workmanship * * *. [T]hat said Paul Richter commenced work * * * pursuant to said oral contract on or about March 15, 1947, and thereafter drilled a hole in the premises of said Donald Walker and inserted certain casing therein, and thereafter * * * about March 22, 1947, completed all of his work concerning the said premises of Donald Walker; * * * supplied to the said Donald Walker and Ona Walker a certain Fairbanks-Morse pump and motor at an agreed price of \$1350.50, and that the said sale of said pump and motor at said price was separate and distinct from the contract for the drilling of the said well. * * * That it is true that the said Paul Richter did not drill said well in a good or workmanlike manner, and * * * said well was and is defective; * * * Paul Richter, was fully informed and advised concerning the requirements of volume of water from said well to make said well economic and practicable and the amount of water so required was between four hundred fifty and five hundred gallons per minute; * * * that if said well had been drilled in a good and workmanlike manner, it might have produced the volume of water required; * * * that said well as drilled * * * failed to produce more than one hundred fifty gallons per minute, and it is true that such failure is partly due to the bad and unworkmanlike manner of drilling performed by the said Paul Richter; * * * that as produced by the said Paul Richter, the well is of slight or very little value to the defendants * * * and is of only slight value to the said premises * * * and does not constitute any improvement whatever to said premises.

"That it is true that immediately after the said Paul Richter ceased drilling operations at said well, he was informed by the cross-plaintiffs of the defective condition of said well and was given ample opportunity to improve said well and correct any errors made, but * * * thereupon failed and refused to do anything further concerning said well; * * * that after the repeated refusal of the said Paul Richter

to improve said well or to make any effort to improve said well, the cross-plaintiffs * * * undertook to make improvements and expended the sum of Six Hundred Fifty-three Dollars * * * therefor. * * * [I]t is true that said well is valueless to any portion of the said premises.

"* * * [T]hat defendants * * * are indebted to the plaintiff * * * in the sum of * * * \$1350.50 * * * purchase price for said * * * pump; that * * * cross-defendant, Paul Richter, is indebted to the defendants and cross-plaintiffs * * * in the sum of * * * \$653.00 * * * expended * * * to improve the said well.

"Except as otherwise specifically found, none of the allegations of the plaintiff's complaint are true, and all of the allegations and denials of the * * * Answer and Cross-complaint as amended are true."

Upon the findings the court concluded that plaintiff was not entitled to a lien but was entitled to recover \$697.50 with costs, and judgment was rendered accordingly. Plaintiff's main contentions are that there is not substantial evidence to support certain of the material findings, hereinafter particularly identified, and that the findings do not sustain the judgment rendered.

[1-6] As to the principles governing appellate courts in considering the adequacy of findings to dispose of issues and support a judgment it is a general rule that "Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended; and if there are findings sufficient to support the judgment, they are not vitiated by the unintelligibility of others. Any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it." (24 Cal. Jur. 965, § 201.) Even where findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and material and the findings incapable of being harmoniously construed. (See 24 Cal. Jur. 967, § 202, and cases there cited; see also 10 Cal. Jur. Ten Year Supp. 712,

§ 202 and cases cited.) Furthermore, general findings that all the allegations or denials of a pleading are true except those as to which the court makes a specific finding, are upheld if by reference to the pleading the import of the finding is reasonably certain. (See 24 Cal. Jur. 987, 988, § 214, and cases cited; see also cases cited in 10 Cal. Jur. Ten Year Supp. 717, 718.) It is also to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made. (See 24 Cal. Jur. 974, § 207, and cases cited.) And, of course, as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged into uphold the findings if possible. (Crawford v. Southern Pac. Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183; Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; see also Powell v. Pacific Electric Ry. Co. (1950), 35 Cal.2d 40, 216 P.2d 448.)

[7] Specifically, plaintiff contends that the evidence does not support the finding that he did not drill the well in a good and workmanlike manner; his position is that the failure of the well was not due to his activity or lack of activity but rather to the lack of water in the ground. Treating first the necessarily implied finding that there was ample water underground, the record shows the following: Mr. Halle, an engineer with the Farmers Home Administration whose job it is to approve expenditures of government loan funds for various water facilities projects and who had inspected the Walker property and well, testified that in his opinion, based on inspection of wells in the surrounding community and his experience, if a well were properly drilled at the point where plaintiff drilled the well "he should get a well there that would deliver around between four hundred and five hundred gallons a minute at a lift not to exceed ninety feet"; and

that he, the witness, would be willing to recommend to the government and to defendants the drilling of another well to obtain the water desired. There is other and detailed testimony in the record concerning the wells in the area and while, as remarked by the judge, "there are wells and wells," nevertheless wells in the area producing water from about the same depth are a strong indication of its presence throughout the immediately surrounding area. Furthermore, plaintiff's employe, the driller of the well, remarked to a government clerk that "if the well had been drilled properly and had been taken care of afterwards properly * * * Mr. Walker would have had all the water he needed." The evidence which has been set forth is ample to support the finding, necessarily implied from the express findings above quoted, that there was sufficient water underground at the point of drilling to make a properly drilled and completed well produce water sufficient to supply defendants' needs.

As to the finding that the plaintiff did not drill the well in a good and workmanlike manner, the record shows the following: Plaintiff commenced drilling on March 15, 1947; on March 22, when the depth of 173 feet was reached the drilling was stopped because, according to the defendant Walker's testimony, the plaintiff and his driller represented to him that "there was enough water [at this depth] and that he should quit drilling." The pump which was to be installed in the well had not arrived so plaintiff "sealed and capped" the well and did nothing further until June 24 when the pump was received and installed. As found by the court the maximum amount of water per minute which the well would produce was only 150 gallons instead of the 450 to 500 gallons needed by defendants and required "to make said well economic and practicable."

Mr. Halle, the government civil engineer, testified that an essential part of a good and workmanlike job of drilling a well is the practice of "developing the well." "Developing a well means to remove fine materials * * * like clay or fine sand,

which are found in water bearing strata, to remove those to the point where a larger area will deliver water to the perforations in your casing * * * *the usual practice is to within a few days to bring in a pump and pump the well*, develop the well, clean the well out by pumping * * * (Italics added.) Others testified to similar "standard" practices in the drilling of wells.

Mr. Halle further stated that to permit "a well to stand for a considerable period of time, say up to three months after drilling and before pumping," as was done here, is dangerous in that the fine materials which are allowed to remain become "very dense and because of their density obstruct the flow of water." Halle did not believe plaintiff had "done a good job out there * * * [Plaintiff] didn't clean the well out" after finishing drilling and "didn't put a test pump on * * * [to] determine what the characteristics of the well was, so that a proper pump and motor could be put in there to operate it to the maximum efficiency."

Driller Ackley, plaintiff's employee, testified that the defendants' well in the present case was not pumped immediately after drilling; it was not pumped until more than three months later, i.e., June 24, when the pump which the parties had agreed to install in the well for permanent use arrived. Plaintiff Richter's explanation for his failure to have the well "developed" immediately after drilling and for not using a test pump to determine the characteristics of the well was that not only was it beyond the scope of the contract but that defendant Walker, when he had an opportunity to order the use of a test pump, refused to expend an additional \$140 to secure one. However, the findings of fact do not support plaintiff in this explanation. The court impliedly found that a good and workmanlike performance of the contract by plaintiff should have included developing of the well. Plaintiff did warrant that he would do a good and workmanlike job, and from the evidence related above the trier of fact could well determine that proper procedure, as part of the job of drilling a well, called for pumping to

"develop" the well without delay, and also testing to determine the characteristics of the well. This being true, the defendant was under no obligation to advance an additional \$140 to induce plaintiff to do what he was already obligated to do.

[8,9] Plaintiff seeks to fortify his position that the evidence does not warrant the finding that he did not do a workmanlike job by pointing to certain statements contained in a written "opinion" of the trial court. That opinion, however, assuming but not suggesting that it might otherwise have significance, was rendered ineffective by the fact that the court reconsidered the matter upon additional evidence, prepared a subsequent opinion, and thereafter rendered its findings and conclusions. The formal findings and conclusions constitute the court's decision and are controlling. (*Strudthoff v. Yates* (1946), 28 Cal.2d 602, 615, 170 P.2d 873; *Peebler v. Olds* (1945), 71 Cal.App.2d 382, 389, 162 P.2d 953; *Stone v. Los Angeles County Flood Control Dist.* (1947), 81 Cal.App.2d 902, 907, 185 P.2d 396.)

[10] Plaintiff also challenges the subject finding by pointing to his own testimony that he did a good job and to testimony of certain other witnesses, both of plaintiff and defendants, to the effect that at various times these persons stated, "it looked like the finest well in the country to me," "I thought he had a good well," etc. It is clear, however, that such testimony merely creates a conflict in the evidence. Under those circumstances, as previously pointed out, a finding will not be overthrown on appeal.

[11] Plaintiff further contends that the finding that when drilling had ceased defendants asked plaintiff to correct the condition and gave him plenty of time to improve the well, and that plaintiff refused, is not supported by the evidence. However, plaintiff himself testified: "He [Walker] told me [Richter] that that was not enough water * * * Q. He asked you to try to correct it several times, didn't he? A. Yes, he did, but I also asked him for the amount of money due me."

Plaintiff now contends that the finding was not correct in that it states that the requests were made "when drilling was ceased," when actually the request was not made until after the pump had been installed. According to defendant, he did question plaintiff about the testing and pumping of the well immediately after drilling. In any event, such a narrow construction of the language used, as that now urged by plaintiff, does not appear to be reasonable or to have been contemplated by the parties. As to the layman defendants it is hardly to be thought that a mere viewing of the capped well would have revealed its defects; they could only judge by the results after a pump—temporary or permanent—was installed; the phrase "when drilling was ceased" must be construed to include that time.

There is a conflict in the evidence as to the terms of the contract with regard to the supplying and installing of the pump. Defendants' position is that plaintiff was to supply a "proper pump" for the well produced; plaintiff's position was that the contract expressly called for the installation of a 15 horse power pump, to cost \$1,350.50. The trial court found that plaintiff agreed "to supply a proper pump and motor complete * * * at an agreed price of \$1350.-50." The pump supplied was, because of the low capacity of the well, much too powerful; it was, as plaintiff points out, not necessarily a "proper pump" for this well. While this may be true, the finding may nevertheless stand, for the terms of the contract did contemplate a well producing at least 450 gallons a minute and, for the well anticipated, the pump was "proper." Plaintiff, in any case, should not be allowed to complain of this discrepancy for he was awarded the full price of the pump. There is evidence in the record to sustain defendants' version of the contract, and there is also evidence, as stated previously, that the drilling of a well, and the installation of a pump, in a workmanlike manner, necessarily involves the installation of a proper pump; i e., one that conforms to the characteristics of the well. Under this view of the case, plaintiff would

not have been entitled to even the cost of the pump, which he was awarded.

[12] Plaintiff further contends that the findings are vague, conflicting, argumentative and cannot sustain the judgment. As noted earlier, the trial court found that "if said well had been drilled in a good and workmanlike manner, it *might have* produced the volume of water required," that its failure to produce was "*partly due* to the bad and unworkmanlike manner of drilling performed," and that said well is of "slight or very little value to the defendants," "is of *only slight* value to the said premises," and "does not constitute *any improvement whatever* to said premises." (Italics added.) It must be agreed that the findings do appear somewhat equivocal. However, the court did find squarely that plaintiff had agreed to drill to a depth of 200 feet "if necessary to provide adequate water for the purposes of said Donald Walker"; that plaintiff "was fully informed and advised concerning the requirements of volume of water * * * and the amount * * * was between four hundred fifty and five hundred gallons per minute; * * * that said well as drilled * * * failed to produce more than one hundred fifty gallons per minute" and that "it was and is defective"; that plaintiff was informed of the defective condition and "given ample opportunity to improve said well * * * but * * * failed and refused to do anything further"; that he had guaranteed good workmanship but that his workmanship was not good; and that "said well is valueless to any portion of the said premises." We are satisfied that, viewed favorably to sustaining the judgment, the equivocal findings cannot be held to so vitiate the unequivocal findings as to make the judgment untenable. It is also to be noted that the general finding that "Except as otherwise * * * specifically found, none of the allegations of the plaintiff's complaint are true, and all of the allegations and denials of the defendants and cross-plaintiffs' Answer and Cross-complaint as amended are true,"

affords further support for resolving equivocal ambiguities in the findings in favor of defendants.

[13-15] The claim of lien filed by plaintiff alleges that plaintiff and defendants Donald and Ona Walker entered into an oral contract for the drilling of the well, installation of casing and furnishing of a pump and that the contract "provided in substance that * * * Richter should provide the necessary equipment and drill said well as deep as may be necessary to obtain an adequate supply of water," etc. From what has heretofore been said it appears that the court found (and on the record the findings cannot be challenged successfully) that plaintiff failed to perform his contract, that his work was not done in a workmanlike manner, that the well "is valueless to any portion" of the premises, "does not constitute any improvement whatever" and that the "sale of said pump and motor at [an agreed price of \$1,350.50] * * * was separate and distinct from the contract for the drilling of the said well." Since plaintiff did not perform his contract, since the work done added no value to the premises and was of no value to defendants, and since the sale of the pump and motor was independent from the well drilling contract, it appears that the claim of lien was correctly denied. Furthermore, it is undisputed that at some time since rendition of the judgment, defendants have tendered to plaintiff the full amount adjudged to be due. Such tender would have extinguished a lien if it had been previously allowed. (See *Kaufman v. All Persons, etc.* (1911), 16 Cal.App. 388, 402, 117 P. 586; *Bogue v. Roeth*, (1929), 98 Cal.App. 257, 261, 276 P. 1071; *Wagner v. Shoemaker* (1938), 29 Cal.App. 2d 654, 657, 85 P.2d 229; see also *Sondel v. Arnold* (1934), 2 Cal.2d 87, 89, 39 P.2d 793; 16 Cal.Jur. 323, § 24.)

[16] In connection with plaintiff's contention that he should have had judgment for the full amount sued for, plaintiff urges that he was entitled to interest thereon from June 27, 1947,¹ the date he asserts he

1. Three days after delivery of the pump.

was entitled to "full payment" from defendants. As already mentioned, the trial court found that the sale of the pump to defendants was separate and distinct from the contract for the drilling of the well. It is provided in section 1762 of the Civil Code that "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." The trial court made no specific finding as to the time plaintiff became entitled to payment for the pump, or that the parties had agreed on the matter; neither have we discovered nor have defendants pointed to evidence in the record specifically concerning the date payment was to have been made (other than in relation to defendants' contention that no payment whatever would become due until plaintiff installed a "proper pump" in a "good and workmanlike well," a contention on which the trial court found against defendants). It necessarily follows, we think, from the code section quoted and from the express findings which determine the date of installation of the pump, that plaintiff became entitled to payment for it not later than June 27, 1947, and it further follows (in the absence of a showing of the date on which the \$653 offset accrued) that he is entitled to interest (see Civil Code secs. 3287, 3302) at the legal rate of 7% per annum on the price of the pump (\$1,350.50) from that date to the date (September 13, 1948) of the entry of the judgment of the trial court herein. We find no necessity for modifying the findings of fact.

The judgment is modified to provide that plaintiff receive interest at the rate of 7% per annum on the sum of \$1,350.50 from June 27, 1947, to September 13, 1948, and as so modified is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

**SUTTER BASIN CORP., Limited,
v. BROWN et al.**

Civ. 7792.

District Court of Appeal,
Third District, California.

Jan. 31, 1951.

Rehearing Denied Feb. 26, 1951.

Hearing Granted March 29, 1951.*

Petition by the Sutter Basin Corporation, Ltd., a corporation, to compel Hanlon Brown, as county treasurer of Sutter County, to cancel a call issued by him upon all landowners owning land in a reclamation district for payment of an installment on the assessment. The owners of 90% of the outstanding bonds of the district were also named as respondents. The District Court of Appeal, Peek, J., held that where landowner agreed to pay whatever was necessary to meet the principal and interest maturities on a bond issue, subsequent amendment of statute accelerating the time for payment, changing the method of payment and giving additional security to bondholders was an invalid impairment and change of original contract and was inoperative.

Writ issued.

1. Waters and water courses ⇨230

Upon the issuance of reclamation bonds, a contract was formed between the property owner and the bondholder.

2. Constitutional law ⇨143

The laws in existence at the time of the issuance of reclamation bonds, enter into and become a part of the contract to such an extent that the obligation of the contract cannot thereafter be impaired or fulfillment of bond obligation hampered or obstructed by a change in laws.

3. Constitutional law ⇨143

Where landowners as part of bond issue agreed to pay whatever was necessary to meet the principal and interest maturities, subject to a credit of whatever funds were then available in the bond account and the bondholders agreed accordingly, subsequent statute accelerating the time payment on bonds, changing the method of payment and giving additional security to the bondholders amounted to an impairment of the contract and was invalid to change the obligation originally set forth. Pol. Code, § 3480.

* Subsequent opinion 253 P.2d 649.

4. Constitutional law ⇨43(1)

Provisions of a constitutional nature intended for the benefit or protection of a party may be waived by him by a course of conduct evidencing the intention to waive such provisions.

5. Constitutional law ⇨43(1)

In proceeding to compel a county treasurer to cancel a call for an assessment upon land, evidence failed to establish that any conduct on part of petitioner's counsel worked an estoppel that would deny the petitioner the right to assail the unconstitutionality of certain legislation regulating the payment of bonds upon reclamation district. Pol. Code, § 3480.

6. Constitutional law ⇨43(1)

To work an estoppel that will deny the right to assail unconstitutional legislation, there must be clear evidence showing that the party sought to be estopped aided in procuring legislation and derived benefit therefrom, and that to set it aside would work a hardship or injustice on others who are misled to their prejudice into believing that the legislation was valid.

Wright & Garrett, Los Angeles, for petitioner.

Lloyd E. Hewitt, D. A. of Sutter County, Yuba City, Bruce F. Allen, Cupertino, Downey, Brand, Seymour & Rohwer, Sacramento, for respondents.

PEEK, Justice.

This is a petition for a writ of mandate directed against Hanlon Brown, as County Treasurer of Sutter County, to compel him to cancel a call issued by him on October 1, 1949, upon all land owners owning land subject to a bond assessment in Reclamation District No. 1500 for the payment of an installment on the said assessment; and to direct him to estimate the amount of the installment due on the said assessment in accordance with the provisions of Section 3480 of the Political Code as that section read in 1930. Also named as respondents are the owners of ninety per cent of the outstanding bonds of the district.

In 1919 said district levied an assessment designated as Assessment No. 1 upon all lands in the district. The assessment was bonded in 1920 pursuant to Section 3480. In 1930, the bonds issued in 1920 being in default, refunding bonds were issued under the provisions of Section 3480(a) of the Political Code.

Section 3480 of the Political Code, as it read in 1930, provided in part as follows:

"Bond fund. All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury to the credit of the bond fund of such reclamation district, and shall be used exclusively for the payment of principal and interest of said bonds issued on such assessment, and of the principal and interest of any refunding bonds issued thereon.

* * * * *

"Estimate of amount to pay interest and principal. At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof * * *."

From the stipulation of the parties as to certain facts it appears that many of the land owners in said district have paid their portion of said assessment in full by the surrender of bonds purchased at a substantial discount. It further appears from said stipulation that there is now on hand in the bond fund approximately \$710,000.00, which is available for payment of maturing interest and principal on refunding bonds and that there is an additional amount of approximately \$160,000.00 which has not been transferred to the fund. Substantially all of the moneys so held by the district have been derived from farming operations on lands previously sold to the district to satisfy the lien of unpaid calls issued against said lands under Assessment

No. 1 or are proceeds from the sale of lands by the district.

To satisfy the installment of principal and interest due and payable on January 1, 1950 respondent treasurer issued a call for an installment on said Assessment No. 1 in the amount of \$29,397.12 of which \$12,757.35 was assessed against petitioner. The amount of said call was computed under the provisions of Section 3480 of the Political Code as amended in 1949, the pertinent portions thereof reading as follows: "At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof, *excluding therefrom any funds in the treasury deposited therein pursuant to Section 3466a of this code or derived from the sale of lands by the county treasurer as trustee of the district under the provisions of this section or Sections 3466a and 3480a of this code* and the expenses of the county treasurer hereinafter provided and shall add thereto 15 percent of such aggregate sum to cover possible delinquencies * * *." (Emphasis added.)

The petitioner contends that since under said section 3480 as it read prior to 1949 it would not have been called upon to pay the call due January 1, 1950, and since it is conceded that there was sufficient cash in the bond fund available for the payment of principal and interest then due on the bonds remaining outstanding, that therefore the 1949 amendment of section 3480 excluding from computation in determining the amount of installment due on the assessment, all monies derived from sale or crop rentals of delinquent lands, effects an invalid impairment of the obligations of the contract existing between the bondholders and the landowners in the district.

We cannot agree with respondents' answer to petitioner's contention that there is no impairment of contract since the legislation in question concerns only the state and the landowner and hence involves no contractual right; and that insofar as the bondholder-landholder relationship is con-

cerned there is no change in the obligation whatever. In other words, it is respondents' argument that petitioner herein is involved only as a landowner in the district and not as a party to a contract with the bondholders.

[1, 2] There can be no question but that upon the issuance of the bonds there was formed a contract between the property owner and the bondholder. County of Los Angeles v. Rockhold, 3 Cal.2d 192, 44 P.2d 340, 100 A.L.R. 149; San Diego County v. Childs, 217 Cal. 109, 17 P.2d 734; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962. Equally well established is the rule that the laws in existence at the time of the issuance of the bonds, under the authority of which the bonds were issued " * * * enter into and become a part of the contract to such an extent that the obligation of the contract cannot thereafter be impaired or fulfillment of the bond obligation hampered or obstructed by a change in such laws. * * * Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are therefore inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment." County of San Bernardino v. Way, 18 Cal. 2d 647, 661, 117 P.2d 354, 363. The court therein, further quoting with approval from the case of Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 71 U.S. 535, 550, 18 L.Ed. 403, held that it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided " 'no substantial right secured by the contract is thereby impaired' ". The court, however, made no attempt to fix definitely the line between alterations of the remedy, which would be deemed legitimate, and those which, under the form of modifying the remedy, would impair substantial rights—its conclusion being merely that " 'Every case must be determined upon its own circumstances' ". (Italics added.)

In view of the numerous discussions wherein the reviewing courts of this state have exhaustively treated the problem of impairment as it arose in cases not wholly unlike the present it would seem unneces-

sary for this court to prolong unduly our discussion of the question as applied to the facts herein. Illustrative of the cases holding that the legislation therein attacked effected an invalid impairment of the bond contract, art,

(1) *Copeland v. Raub*, 36 Cal.App.2d 441, 97 P.2d 859—cutting down the method of satisfaction of the payment of an assessment; (2) *McCormack v. Houston*, 84 Cal.App.2d 665, 191 P.2d 569—establishing a reserve fund for bondholders where none was provided for in the original contract; (3) *Shouse v. Quinley*, 3 Cal.2d 357, 45 P.2d 701—allowing a mode of payment different from that envisioned by the original contract; (4) *Hershey v. Cole*, 130 Cal. App. 683, 20 P.2d 972—diminishing the time within which to make assessment payments; (5) *Warden v. Barnes*, 111 Cal. App. 287, 295 P. 569—charging a party \$1.00 not chargeable under the original contract; (6) *Security Trust & Savings Bank v. City of Los Angeles*, 120 Cal.App. 518, 7 P.2d 1061—adding to the fund from which bonds are payable; (7) *Sammon v. Wing*, 105 Cal.App. 689, 288 P. 711—requiring bondholders to make a demand on property owners not required at the time the contract was made.

Of the cases referred to, the one which appears to be most similar to the present is that of *Hershey v. Cole*, supra. There the bonds which were issued under the same Political Code section as is here in question were made payable in ten equal annual installments. The act then contained no provision allowing the land owner to prematurely discharge the assessments against his land. By a subsequent amendment to the act a land owner was given the privilege of removing the lien of his assessment by delivery for cancellation of any bonds payable out of the assessment. This court in that case held that the amendment could not be given such a retroactive effect as would increase the annual installments which the respective land owners might be required to pay or diminish the time in which to make his payments, even though such land owners might be remotely benefitted by the lessened interest charge.

In determining the question so presented the court reiterated the general rules heretofore mentioned and further observed that when a land owner goes to the polls and votes for the particular bonds in question he obligates himself to pay the assessment in the manner provided and "his part of the obligation is thereby fixed" and that "it can neither be limited nor increased during the lifetime of the bonds for the issuance of which he has voted." While on the other hand a bondholder who has purchased a bond based upon the assessment accepts that bond upon the same basis and his "right is to have collected from each land owner the annual percentage of the assessment as specified in the bond—no more and no less." [130 Cal.App. 683, 20 P.2d 980.]

[3] Applying what this court said in the *Hershey* case to the facts presented in the instant case it appears that here a land owner in accordance with the bond contract agreed to pay the amount as found by the county treasurer to be "necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof". Sec. 3480. In other words the land owner agreed to pay whatever was necessary to meet the principal and interest maturities, subject to a credit of whatever funds were then available in the bond account and a bondholder agreed accordingly. The obligations of both parties having been fixed at the time of the issuance of the bonds, their "obligations cannot be increased or lessened."

It necessarily follows that when the legislature adopted the 1949 amendment to section 3480 it thereby (1) accelerated the time payment insofar as petitioner herein is concerned, since, under the statutes effective in 1930, no call could issue to it unless the bond fund were insufficient to service current maturities of both bond and interest. Thus, to give retroactive effect to the 1949 amendment would be to force petitioner to pay an amount at this time which would not now be payable under the 1930 contract. (2) It changed the method of payment since under the statutes effective in 1930 bondholders were to be

paid from the moneys on hand in the bond fund if the fund were sufficient for that purpose. (3) It gave additional security to the bondholders not agreed upon nor a part of the bond contract at the time of the issuance of the bond, since by giving retroactive effect the bondholders would be paid from assessment calls regardless of the sufficiency of the bond fund, and therefore such fund would remain intact with a consequent resultant increase in the bondholders' offer of security.

Respondents' argument in answer to petitioner's contentions is in effect that even though it could be held that the 1949 amendment to section 3480 did effect an unlawful impairment of the bond contract nevertheless by virtue of an appearance by petitioner's counsel before committees of both Houses of the Legislature, petitioner's right to raise the constitutional question herein posed was thereby waived. The basis of respondents' argument is that petitioner's counsel in said appearance advocated the adoption of the particular amendment to section 3480 here in issue.

Petitioner does not deny that its counsel appeared before such legislative committees but it does deny that said counsel urged the adoption of said amendment to section 3480. In this regard petitioner contends that the statements of its counsel constituted merely an advocacy of amendments relative to the sale of delinquent lands in the district and that at no time did its counsel advocate that the moneys in the bond fund be excluded from the treasurer's estimates. We are persuaded, from our examination of the stipulation of facts on file herein, that petitioner's statement and interpretation of the facts are correct.

[4-6] It is true that provisions of a constitutional nature intended for the benefit or protection of a party may be waived by him by a course of conduct evidencing the intention to waive such provisions, that is, participating in the procurement of the

passage of the legislation by acts of ratification or approval after its passage or by accepting benefits thereunder. However, as previously stated we find no evidence of like activities on the part of petitioner's counsel. We are convinced that the rule as enunciated in the case of *Board of Levee Commissioners of Fulton County v. Johnson*, 178 Ky. 287, 199 S.W. 8, 17, and cases therein cited, should apply to the present situation. There it was held that: "To work an estoppel that will deny the right to assail unconstitutional legislation, there must be clear evidence showing that the party sought to be estopped aided in procuring the legislation and derived benefit therefrom, and that to set it aside would work a hardship or injustice on others who were misled to their prejudice into believing that the legislation was valid".

Lastly, respondents argue that if it should be held that the 1949 amendment to section 3480 impaired petitioner's obligation under the contract then there would result a clear violation of numerous constitutional guarantees. In addition, respondents further argue that this court should decide whether or not the unpaid portion of petitioner's assessment will be extinguished if and when the outstanding bonds have been fully paid and cancelled without petitioner's assessment having been called. We do not consider that such matters are properly before the court for decision in this proceeding, and nothing said herein is to be construed as determinative thereof. If and when the bonds are paid, there should remain unpaid assessments on petitioner's land, then whether or not petitioner can be compelled to pay such assessments is a question which properly can be determined at that time.

Let the writ issue.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 53

DE VALL v. DE VALL

Civ. 4159.

District Court of Appeal
Fourth District, California.

Jan. 26, 1951.

Hearing Denied March 26, 1951.

Guy B. DeVall brought action against Jane F. DeVall for divorce on ground of extreme cruelty, wherein the defendant filed a cross-complaint seeking a divorce on the same ground. From adverse judgments of the Superior Court of Orange County, Raymond Thompson, J., the plaintiff appealed. The District Court of Appeal, Griffin, J., held that final divorce decree entered prior to ultimate disposition of husband's motion for new trial and prior to expiration of time for appeal from judgment entered thereon was improper under statute.

Final divorce decree reversed, and order based on new trial proceedings affirmed.

1. Divorce ⇐162

Final divorce decree entered prior to ultimate disposition of proceedings on husband's motion for new trial and prior to expiration of time for appeal from judgment entered thereon was improper in view of statute prohibiting entry of final judgment until after motion for new trial or appeal from interlocutory judgment had been finally disposed of. Civ. Code, § 132.

2. Divorce ⇐151

Where new trial was granted in part in divorce action, with limitation that further evidence was to be received only on question of amount of money claimed to have been paid by husband to wife during the period in question, and as to her disposition of that money, question as to whether findings of fact, conclusions of law, and decrees made were fatally defective for failing to specify therein the acts or conduct constituting husband's alleged cruelty established at trial in first hearing was not before trial court for consideration under its limited order granting new trial.

3. Divorce ⇐151

Where trial court granted husband's motion for new trial in part, including therein the further right to consider issue

of whether attorney's fees should be allowed to wife's counsel, in addition to order directing husband to pay wife \$200 on account of attorney's fees, order awarding wife \$1,000 was authorized as the balance suggested in first order granting attorney's fees pendente lite.

4. Divorce ⇐223, 286

The fixing of attorney's fees and wife's expenses of divorce suit is largely within discretion of trial court and only a plain abuse of that discretion is subject to correction by an appellate court.

5. Divorce ⇐223

Evidence failed to establish that trial court abused its discretion in fixing balance of fees for wife's attorney in divorce action at \$1,000 in addition to amount of \$200 received on account pendente lite.

Guy B. DeVall, in propria persona.
Osborne, Solomon & Fitts, Laguna Beach, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant Guy B. DeVall filed this action for divorce on the ground of extreme cruelty and alleged certain property to be community property. His wife, Jane F. DeVall, appeared and by way of cross-complaint charged appellant with extreme cruelty and asked for custody of the three minor children, alimony, and an award of the community property. She alleged the property described by appellant to be her separate property. The trial court found in favor of respondent and cross-complainant on the main issues, awarded her custody of the children and allowed, as "alimony in gross" the sum of \$5500 "to be a lien upon" the Laguna Beach property, title to which is held by the parties as tenants in common, and in addition ordered monthly payments of \$200 for support of the children. This latter amount, together with the sum of \$400, theretofore ordered paid as alimony *pendente lite*, were declared to be a lien upon the Sunset Boulevard property, title to which was similarly held by the parties. In addition, the court

ordered appellant to pay \$320 storage charges on certain furniture. The court then found to be community property certain personal property and divided it proportionately between the parties. It then found that the interest of each party in the real property described was the separate property of each and that the wife had insufficient funds to support herself and children. An interlocutory decree of divorce was entered accordingly on July 20, 1948. On a motion for new trial appellant claimed that during their married life he had given his wife large sums of money, approximately \$100,000, and that when she testified at the trial that she presently had no money, she wilfully deceived the court. The motion for new trial was granted in part, with the limitation that further evidence was to be received only on the question of the amount of money claimed to have been paid by the appellant to his wife during the period in question, and as to her disposition of that money, and for the purpose of reconsidering the question of attorneys' fees for counsel for the respondent.

Further evidence was received on the limited question and after a full hearing the court, on October 14, 1949, signed a written order or "Judgment on the New Trial", that the previous interlocutory decree entered therein remain in effect, and it therein fixed attorneys' fees for the wife at \$1000 and signed findings accordingly. No appeal was taken from the interlocutory decree of divorce originally entered. On October 14, 1949, the court, on its own motion, granted a final decree of divorce to the wife dissolving the bonds of matrimony and therein ordered that the provisions of the interlocutory decree as to alimony, custody and support of the minor children be held binding on the husband, "as if herein set forth in full". On October 21, 1949, the husband filed a notice of appeal from the "judgment * * * entered * * * on October 14, 1949". On October 25, he filed another notice of appeal from the judgment entered on October 17, 1949. And on October 25, he filed another notice of appeal from the judgment entered on

October 17, 1949. Separate filing fees were paid on each occasion. The record does not disclose the date of entry of these several orders or judgments. We will assume that the notice of appeal covered the judgment and order entered on the new trial and the final decree of divorce. The appeal is based on the clerk's transcript, the reporter's transcript of the proceedings had on the motion for new trial, and the exhibits filed in such proceedings.

Several attorneys represented Mr. DeVall at different intervals during the proceedings. Appellant appeared in propria persona in this court and personally argued the claimed merits of this appeal.

[1] His first contention is that the trial court erred in entering the final decree of divorce prior to the ultimate disposition of the proceedings on the motion for new trial and prior to the expiration of the time for appeal from the judgment entered thereon.

In reply to this contention respondent argues that since the trial judge ordered that its ruling on the new trial made the provisions of the interlocutory decree of divorce effective from the date of its entry, and that since appellant did not appeal from the interlocutory decree, he is barred from attacking it, and that the court properly entered a final decree based thereon. We see no merit to respondent's argument. Section 132 of the Civil Code provides in part that when one year has expired after the entry of such interlocutory judgment, the court may enter the final judgment granting the divorce, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed.

A similar question was thoroughly discussed in *Cory v. Cory*, 71 Cal.App.2d 309, 162 P.2d 497, and after citing decisions bearing thereon, the court held that the final decree must be reversed on appeal if such decree was made and entered prior to the disposition of an appeal from an order granting the interlocutory judgment. In

effect, the interlocutory decree in the instant action, pertaining to the disposition of the property and the order for payment of alimony, was set aside by the limited order granting the motion for a new trial. The endeavor to make the order entered, as a result of the hearing on the new trial, effective as of the date of the signing of the interlocutory decree, was unauthorized. As may be noted, the interlocutory decree was entered on July 20, 1948, and it was not until October 14, 1949, that the trial court entered its judgment on the new trial. If respondent's argument were correct, the time for appeal from the interlocutory judgment, in this respect, would have expired. The only means by which the provisions of the interlocutory decree pertaining to the property rights could be attacked would be by appeal from the order or judgment made on the new trial which directly involved those provisions of the interlocutory decree. The conclusion reached in *Webster v. Webster*, 216 Cal. 485, 14 P.2d 522, and *Ritter v. Ritter*, 103 Cal.App. 583, 284 P. 950, in reference to section 132 of the Civil Code is applicable here. There it was held that the entry of a final decree of divorce while an appeal was pending from a portion of the interlocutory judgment was improper. We therefore conclude that the entry of the final decree in the instant action was premature and improper. The proper procedure in respect to the final decree and its appropriate provisions, *after the questions pending on appeal have been finally determined*, is pointed out in *Newell v. Superior Court*, 27 Cal.App. 343, 149 P. 998, i. e., that if the portion of the interlocutory decree determining the property rights of the parties is fully affirmed on appeal, upon entering its final decree the trial court should dispose of the property according to the determination finally expressed in the interlocutory decree.

[2] It is next argued that the findings of fact, conclusions of law, and the decrees herein made, are fatally defective for failing to specify therein the acts or conduct constituting the alleged cruelty established at the trial in the first hearing. This question was not before the court for considera-

tion under the limited order granting a new trial. *Karallis v. Shenan*, 97 Cal.App. 2d 280, 217 P.2d 436. See, also, *LaMar v. LaMar*, 30 Cal.2d 898, 900, 186 P.2d 678.

Grouping other contentions, they involve the claim that the evidence received on the new trial hearing conclusively shows: (1) that respondent received large sums of money for the benefit of the community for which she failed to account; (2) that the evidence conclusively shows appellant's inability to pay the alimony and support money awarded; (3) that the evidence shows respondent was able to contribute to her own support; (4) that the court failed to consider the joint liability of each for certain taxes imposed; (5) that the court was without power to compel appellant to pay the storage bill on the community furniture; and (6) that the provisions of the interlocutory decree, as reimposed by the order on the new trial, in respect to the support of the children, were oppressive.

Without setting it forth in detail, suffice it to say, the evidence introduced on the subjects permitted to be considered or discussed, and which is partially disclosed under the next proposition, was sufficient to support the findings in respect thereto. It is apparent that some of these contentions were not permitted to be raised under the limited order under consideration. *G. Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 667, 143 P. 1025; *Deyoe v. Superior Court*, 140 Cal. 476, 486, 74 P. 28; *Bauer v. Bauer*, 81 Cal.App. 414, 416, 253 P. 969; *Bohnert v. Bohnert*, 91 Cal. 428, 27 P. 732; *Robinson v. Robinson*, 79 Cal. 511, 21 P. 1095.

[3] The last proposition is whether the court erred in decreeing that appellant pay respondent's attorney's fees amounting to \$1000. The argument is that the award was based on past services and not on prospective services to be rendered *pendente lite*. The further objection is advanced that the evidence conclusively shows that the wife had control of sufficient property to pay her own attorney's fees. In support of these propositions he cites such authorities as *Warner v. Warner*, 34 Cal.2d 838, 215 P.2d

20; sec. 137, Civ.Code; and 1 Cal.Jur. p. 989, sec. 43.

It appears from the record, as augmented by order of this court, that there was an original application for attorney's fees, costs and alimony *pendente lite* made by respondent; that after hearing, on October 18, 1946, the trial court made its order that plaintiff pay defendant "\$200 on account of attorneys' fees—payable within 30 days hereof and balance, if any, pursuant to determination at time of trial". The record also shows that the trial court granted appellant's motion for new trial in part and included therein the further right to consider the issue of whether additional attorney's fees should be allowed. As a part of the order, based on the new trial proceedings, the court awarded defendant \$1000, which amount, we assume, was the balance suggested in the first order granting attorney's fees "*pendente lite*". Under these facts the instant case would be removed from the application of the rule stated in the authorities cited by plaintiff. *Hunsberger v. Hunsberger*, 99 Cal.App. 130, 277 P. 1092; *Thomas v. Thomas*, 66 Cal. App.2d 818, 153 P.2d 389; *Rose v. Rose*, 109 Cal. 544, 42 P. 452; *Schluter v. Schluter*, 130 Cal.App. 780, 20 P.2d 723; *Wood v. Wood*, 126 Cal.App. 237, 14 P.2d 584; *Farrar v. Farrar*, 41 Cal.App. 452, 456, 182 P. 989; *Newlands v. Superior Court*, 171 Cal. 741, 154 P. 829.

[4, 5] The fixing of attorneys' fees and the wife's expenses of suit is largely within the discretion of the trial court and only a plain abuse of that discretion is subject to correction by an appellate court. *Stewart v. Stewart*, 156 Cal. 651, 105 P. 955. The evidence shows that the home on Sunset Boulevard in which appellant was living, had an estimated value of \$35,000. In addition to other properties appellant was awarded the photography business, which comprised several studios, and from which he obtained his main income. Respondent testified at the last hearing that the only money she then had was \$12. Appellant testified that he had earned from the busi-

ness and turned over to respondent a sum in excess of \$125,000 during the war period. Mrs. DeVall denies that she received that sum for herself but only received from him a stipend of about \$250 per month for living expenses. Appellant also testified that he had expended on his own behalf, over \$5000 in the employment of attorneys. Under such circumstances, it cannot be said that an allowance of \$1000 for the services of respondent's attorney was unreasonable. Expert accountants, who were employed to audit the books, testified to the receipt of many thousands of dollars by the parties hereto from the business operated by them and that considerable sums were expended by way of expenses. There was no direct evidence that the wife retained any portion of those sums for herself. Counsel for respondent received \$200 on account of attorney's fees "*pendente lite*" and, according to his statement, he spent \$135 in excess of that amount as costs. The record on appeal is quite voluminous and indicates the necessity of more than usual court appearances in the trial court, office consultations, and labor in defending the several proceedings instituted by appellant. Under the evidence and circumstances presented it cannot be said that the court abused its discretion in fixing the balance of attorney's fees at \$1000. *Rose v. Rose*, 109 Cal. 544, 42 P. 452; *Westphal v. Westphal*, 122 Cal. App. 388, 10 P.2d 122; *Smith v. Smith*, 94 Cal.App. 172, 270 P. 995; *Bastjan v. Bastjan*, 215 Cal. 662, 12 P.2d 627; *Busch v. Busch*, 99 Cal.App. 198, 278 P. 456; *Loeb v. Loeb*, 84 Cal.App.2d 141, 190 P.2d 246; *Gebhardt v. Gebhardt*, 69 Cal.App.2d 723, 160 P.2d 177; *Heck v. Heck*, 63 Cal.App. 2d 470, 147 P.2d 110; *Smith v. Smith*, 85 Cal.App.2d 428, 193 P.2d 56.

The final decree of divorce is reversed. The order based on new trial proceedings, including the order for payment of additional attorney's fees, is affirmed. Respondent to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

102 Cal.App.2d 60

PEOPLE v. BROWN.

Cr. 4515.

District Court of Appeal, Second District,
Division 1, California.

Jan. 29, 1951.

Barbara Brown was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., for possession of morphine, and she appealed. The District Court of Appeal, Drapeau, J., held that absence of defendant on her hearing for probation and sentence, the forfeiture of bail, the issuance of bench warrant, and defendant's absence five days later was not a sufficient showing of diligence to secure presence of defendant as would warrant pronouncement of judgment and sentence in absence of defendant.

Judgment reversed with directions.

1. Poisons ☞9

Evidence whether a defendant accused of possession of morphine was aware of concealment of morphine under rubber mat in defendant's automobile in front of seat which defendant had just been occupying was for jury. Health and Safety Code, § 11500.

2. Criminal law ☞987

A defendant absconding or running away from court after learning jury's verdict thereby waived his common-law right to be personally present for pronouncement of judgment of corporeal punishment.

3. Constitutional law ☞270

Due process of law does not forbid a state to direct pronouncement of judgment in a criminal case when a defendant absconds and is not in court at the time set for sentence. Pen. Code, § 1193; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

4. Criminal law ☞987

The absence of defendant on her hearing for probation and sentence, the forfeiture of bail, the issuance of bench warrant, and defendant's absence five days later was not a sufficient showing of diligence to secure presence of defendant as would warrant pronouncement of judgment

and sentence in absence of defendant. Pen. Code, § 1193.

5. Criminal law ☞987

Diligent effort must be made to find defendant and reason for defendant's absence must be shown to permit pronouncement of judgment in absence of defendant. Pen. Code, § 1193.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was accused of possession of a preparation of morphine, in violation of Section 11500, Health and Safety Code. Trial by jury was waived, and the case submitted to the Court on the reporter's transcript of testimony at the preliminary examination, and defendant's testimony at the trial.

The trial judge convicted defendant. This was February 24, 1950. She was permitted to remain on bail. Hearing on her application for probation, and for pronouncement of judgment, was set for March 29, 1950. On that date defendant did not appear. Bail was forfeited, and bench warrant issued for her apprehension.

The case was then continued to April 3, 1950. At that time the following occurred:

"The Court: People against Barbara Brown.

"Mr. Robinson: Your Honor, I am unhappy. We haven't received any more information from Miss Brown since the time she 'phoned us from San Francisco. Mr. Lavine asked me to come in and ask you to know that.

"The Court: As the situation now stands, the bench warrant is out. It is in the hands of the Sheriff. We will just mark this off calendar then.

"Mr. John J. Hill, Deputy Public Defender: Pardon me. If your Honor please, I appeared as a courtesy to absent counsel

the last time. I call your Honor's attention—

"The Court: That is right. I understand. I remember, Mr. Hill. This was for judgment and sentence.

"Let the record show pursuant to Section 1193 of the Penal Code the Court finds that reasonable diligence has been exercised to procure the presence of the defendant; that the defendant is a defaulter and her presence has not been procured, and the Court finds that it is in the interest of justice that judgment be pronounced in her absence.

"For the crime of violation of Section 11500 of the Health and Safety Code of the State of California, upon which the defendant has been found guilty, there being no legal cause why sentence should not now be pronounced, it is the judgment and order of this Court that the defendant be confined in the Institution for Women at Tehachapi, California, for the term prescribed by law. It is ordered that the commitment be prepared and presented to the Sheriff, along with the bench warrant which is now in his hands."

The record does not show what, if anything, occurred on the occasion referred to by Mr. Hill.

Defendant bases her appeal upon two grounds: First, that the evidence was insufficient to justify the court's verdict; and secondly, that it was error to sentence her *in absentia*.

[1] The first ground may be readily disposed of. The record shows that defendant owned the automobile in which morphine was found; that the morphine was concealed under a rubber mat in the automobile in front of the seat which she had just been occupying. Whether she was aware of the presence of the drug was a question of fact for the determination of the trial court. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433.

The manner of pronouncement of judgment presents an interesting question.

[2] At common law it was the rule that the defendant had to be personally present when judgment of any corporeal

punishment was pronounced. 15 Am.Jur. 113; 24 C.J.S., Criminal Law, § 1574, P. 78; *People v. Giles*, 70 Cal.App.2d Supp. 872, 161 P.2d 623. But it was held that a defendant waived his right to be personally present when he absconded or ran away from the court after learning of the verdict of the jury. *People v. Weinstein*, 298 Ill. 264, 131 N.E. 631; see Note, 14 L.R.A., N.S., 603.

Our Penal Code, Section 1193, was amended in 1931, modifying the requirement that the defendant must be personally present as follows: "unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his absence".

Defendant contends that that part of the Code section violates the 14th amendment to the United States Constitution and Art. I, sec. 13 of the Constitution of the State of California.

The amendment was approved by our Supreme Court in *People v. Williams*, 24 Cal.2d 848, 151 P.2d 244.

[3] Due process of law does not forbid a state to direct pronouncement of judgment in a criminal case when a defendant absconds and is not in court at the time set for sentence.

This leaves but one question remaining to be considered: Was there sufficient showing of diligence to secure the presence of the defendant?

[4] All that appears here is that defendant was not present on her hearing for probation and sentence; that her bail was forfeited and bench warrant issued; that five days later she again was not present; whereupon, judgment was pronounced. For all that the record shows, the defendant may have been kept away from court by some untoward circumstance beyond her control.

[5] In such cases as this the record must show that diligent effort has been made to find the defendant, and the reason for his absence.

The judgment is reversed, with directions to the trial court to determine whether a proper showing of diligence has been made to secure the presence in court of the defendant, and whether it is in the interest of justice to pronounce judgment in her absence; or, if defendant has been apprehended, to arraign her for, and to pronounce judgment.

WHITE, P. J., and DORAN, J., concur.



102 Cal.App.2d 100

**TRAVELERS INS. CO. et al. v.
HODGE et al.
Civ. 17705.**

District Court of Appeal, Second District,
Division 1, California.
Jan. 31, 1951.

Action by the Travelers Insurance Company and others, against C. S. Hodge and others, for declaratory relief. The Superior Court, Los Angeles County, William S. Baird, J., rendered an adverse judgment, and named defendant appealed. The District Court of Appeal, Hanson, Justice pro tem., held that evidence was sufficient to support finding that passenger and driver at time of automobile accident, were both employees of named defendant owner.

Judgment affirmed.

Declaratory judgment ⚔ 347

In action by insurers for declaratory relief against insured owner of automobile, driver, and injured passenger, evidence was sufficient to support finding that driver and passenger at time of automobile accident, were employees of owner.

Max E. Gilmore, Hollywood, for appellant.

Schell & Delamer, Los Angeles, for respondents.

HANSON, Justice pro tem.

The only question which this suit was brought to determine was whether or not one Steffler was an employee of appellant Hodge at the time he was injured while riding in an automobile owned by Hodge but being driven by one Irby with the permission of Hodge.

The trial court ruled that Steffler was an employee of Hodge and as a consequence of this ruling the respondents as insurers under a property damage and public liability policy issued to Hodge were absolved by the terms thereof from all liability to defend Hodge or to pay any part of any judgment which might be rendered in an action instituted by Steffler against Hodge and Irby.

The insurers instituted their action for declaratory relief not only against their assured, the appellant Hodge, but also against Irby as the driver of the automobile and against Steffler who as a passenger therein was injured.

At the conclusion of the testimony the trial judge found that at the time of the accident Steffler and Irby were both employees of Hodge and that each of them was acting within the scope and course of business of such employment. The appeal from the judgment perfected in this court is by Hodge alone who contends that the evidence was insufficient to sustain the judgment that Steffler was his employee.

As the rule which governs an appellate court in reviewing a trial court's judgment which it is claimed is not sustained by the evidence is exceedingly well established, we refer only to one of the latest cases on the subject, that of *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835, as our guide and authority without quoting from it or from any other case. We turn at once to a recital of the essential facts.

The National Literary Association named but not served as a party defendant along with Hodge and Irby in the suit instituted by Steffler is engaged in the business of procuring subscriptions to some 60 odd national magazines. Under the contracts it has with these magazines it is permitted to retain as its commission a substantial por-

tion of the regular annual subscription price of these magazines for subscriptions obtained by it. In the furtherance of its business it engages individuals on a commission basis to aid it in procuring subscriptions. According to the only written contract introduced in evidence between the association and Hodge such individuals thus directly engaged by it are denominated as "dealers." It is plain from the contract that the dealers are independent contractors and not employees of the association. They are privileged to engage in any business they choose which does not compete with the association and may operate anywhere in the United States. Moreover, they are privileged to engage other individuals to assist them either as their own employees or as independent contractors.

The testimony of Hodge is that he was orally engaged by the association in 1946, prior to the written contract, to engage "solicitors" to procure subscriptions for the association and to assign such solicitors to work under the direction of a "manager," the latter being a person Hodge had recommended and the association had appointed in that capacity; that the association required a would-be subscriber should pay a certain minimum amount on his subscription to be collected by the solicitor. Until the subscriber paid up his subscription in full he was not entitled to receive the magazine for which he subscribed. The minimum amount was designated as "front money" by the association; it was the duty of all the solicitors working as a "crew" with the manager to turn all moneys received on subscriptions during the day over to the manager; that the manager each morning transported the members of his crew from his "headquarters" to the territory he desired them to canvass; that he parcelled out the blocks or streets each solicitor might work; that the manager also worked as a solicitor along with his crew; that at the end of the day the manager again transported the crew to his headquarters; that the solicitors then turned over to the manager the signed subscriptions and moneys collected along with their written "certificates of authority" authorizing them to so-

licit magazine subscriptions for the National Literary Association. These certificates were returned to the solicitors out on the "territory" selected by the manager each morning when they went to work; that it was the duty of the manager to mail to the association all signed subscriptions procured by the solicitors along with a check for any excess of moneys collected over and above the front money; that each solicitor was entitled to receive from the manager for his services a commission of 50% of the front money; that the manager was entitled to retain the balance of the front money collected by the solicitors and 100% of the front money collected directly by him from subscribers he personally procured.

Hodge further testified that, by his oral contract with the association, his compensation for the services he rendered in procuring and recommending managers and in procuring and assigning solicitors to the managers was a percentage of the business done by each manager and his crew of solicitors. There is no evidence that a manager could appoint or discharge a solicitor other than the testimony of Hodge who testified the manager could discharge a solicitor. On the other hand the manager Irby testified he was invested with no such authority either from Hodge or from the association. While the evidence disclosed that the solicitors out on a territory were subject to the orders of the manager, there is no evidence they were engaged by him or were his employees, unless in the case of Irby it may be said he was a joint-adventurer with Hodge.

Hodge testified he was not only entitled to assign solicitors to a manager, but also to reassign them to other managers. Hence it appears Hodge controlled the number and personnel of each crew. Hodge out of his own funds purchased and loaned automobiles without charge to the managers he had recommended and who he says were appointed by the association. He did this he says because his commissions depended on the volume of the business done by the manager and his crew. In his endeavor to procure solicitors Hodge ran ads in the newspapers at his own expense, interviewed

the applicants and if he chose, engaged them as solicitors and assigned them to a manager.

No representative of the association testified in court or by deposition as to relations existing between the association and Hodge, Irby, and Steffler. However, there was introduced into evidence, as above stated, a written contract entered into between the association and Hodge on April 17, 1948. Hodge testified his work for the association was along the same lines *both before and after* he entered into that contract. The contract, however, which names Hodge as dealer does not create any relation of employer and employee but makes Hodge an independent contractor. It gives him the authority to solicit subscriptions for the magazines represented by the association with the right to retain the front money on each subscription and to receive from the association 35% of the subscription in excess of the front money when it is received by the association. It provides the dealer may delegate his authority to anyone he chooses to employ or to anyone with whom he desires to contract for the purpose of soliciting additional subscriptions, but as to such persons the dealer shall be liable to the association for "balance moneys" collected and not remitted. The contract gives Hodge no authority to employ anyone in behalf of the association.

Irby testified, and Hodge did not deny, that he first went to work in February, 1946, as an employee of Hodge in a crew managed by Hodge; that later he took over a crew of his own after a discussion with Hodge as to the share which each of them would receive from the earnings of this crew and that he thereafter continued as the manager of a crew and that it was while he was so working the accident occurred.

Without detailing further the facts, it is evident that the trial judge was justified from the testimony so far narrated to draw the inference, despite Hodge's testimony, that Hodge's relation to the association never had been other than as set forth in the written contract. On that basis he was entitled to conclude that Hodge as an independent contractor employed Irby and Steffler, one as a manager, and the other as a

solicitor of one of his crews. The power and authority which Hodge possessed as an employer he necessarily could delegate to Irby and as a consequence require Steffler to obey Irby's instructions without any specific instructions or orders from Hodge. Another inference the trial court was entitled to draw was that Hodge and Irby were joint-adventurers with respect to the crew Irby managed. If that was the court's view Steffler was an employee of both Hodge and Irby.

Additional facts tending to show that Hodge controlled the activities of Steffler through his employee or joint-adventurer Irby need not be recited. They only add up to a further showing that the trial court was correct in its decision.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



101 Cal.App.2d 819

PALMER v. PALMER et al.

Civ. 4155.

District Court of Appeal,
Fourth District, California.

Jan. 22, 1951.

Rehearing Denied Feb. 17, 1951.

Hearing Denied March 22, 1951.

Ivan L. Palmer brought an action against Hazel M. Palmer for divorce, and to set aside a conveyance executed by defendant Hazel M. Palmer to J. D. Weatherly and Margaret Weatherly. The Superior Court, of Riverside County, O. K. Morton, J., rendered judgment for plaintiff in his divorce action, and for defendants, J. D. Weatherly and Margaret Weatherly, on his count to set aside the conveyance, and plaintiff appealed from whole of judgment entered in favor of defendants Weatherlys, and from that part of judgment of divorce which related to disposition of funds received by wife from sale of realty to her codefendants. The District Court of Appeal, Mussell, J., held that evidence sustained finding that realty and personalty involved was separate property of

defendant Hazel M. Palmer, and that defendants Weatherlys acted in good faith in purchasing the property.

Judgments affirmed.

1. Evidence Ⓒ474(19)

Where property was purchased by wife during husband's absence and husband knew nothing about personalty, and had not seen realty or personalty for year and a half, and property was sold as a unit, refusal to permit husband to give his opinion of value of personalty was not error. Civ.Code, § 164.

2. Husband and wife Ⓒ262(1)

In action by husband to set aside a conveyance of realty and personalty by defendant wife, where wife obtained realty by a deed which named her as grantee, and recited that purchaser was a married woman who purchased premises as her sole and separate property, and agreement of sale which preceded deed to wife also named her as purchaser of property as her sole and separate property, presumption arose that realty was the wife's separate property. Civ.Code, § 164.

3. Husband and wife Ⓒ262(1), 264

Presumption that property acquired by wife was her separate property was a form of evidence and could be controverted by other evidence, direct or indirect, but unless so controverted, court was bound to find according to presumption. Civ.Code, § 164.

4. Evidence Ⓒ89

It is for a court to determine whether or not evidence offered in opposition to a presumption is sufficient to overthrow the presumption.

5. Appeal and error Ⓒ1009(2)

Husband and wife Ⓒ264

In action by husband to set aside a conveyance of realty and personalty by defendant wife, evidence supported finding that realty and personalty involved was wife's separate property, and finding was binding upon the Court of Appeal. Civ. Code, § 164.

6. Sales Ⓒ244(3)

Vendor and purchaser Ⓒ244

In action by husband to set aside a conveyance of realty and personalty by de-

fendant wife, evidence supported finding that defendants who purchased property acted in good faith.

7. Husband and wife Ⓒ6(3), 8

A transfer of property by one spouse in fraud of rights of other will not be set aside against rights of a transferee who has acted in good faith and paid a valuable consideration for transfer, even though consideration may not have been adequate.

8. Husband and wife Ⓒ267(8)

Where husband for five years permitted personalty to remain on realty which stood of record in his wife's name as her sole and separate property, and personalty was in wife's exclusive possession and control, wife's transfer of personalty to transferee who acted in good faith and paid a valuable consideration would not be set aside. Civ.Code, § 164.

Wing, Wing & Brown, Banning, for appellant.

Best, Best & Krieger, Riverside, for respondents Weatherly.

MUSSELL, Justice.

Action for divorce and to set aside a conveyance executed by defendant Hazel M. Palmer.

The complaint in plaintiff's action for divorce included a count in which it was alleged in substance that the defendant Hazel M. Palmer, prior to the filing of the action, in an attempt to defraud plaintiff, sold and conveyed the home and household furnishings of the spouses to defendants Weatherly for an inadequate consideration; that the Weatherlys were not bona fide purchasers of the property and had constructive knowledge of plaintiff's community interest therein. The summons was published as to the defendant wife and she defaulted in the action. The trial court gave judgment to plaintiff in the divorce action and found in favor of the Weatherlys as to the included count in the complaint. Separate judgments were entered, following which plaintiff appealed from the whole of the judgment entered in favor of the Weatherlys and from that part of the judgment of divorce which related to

the disposition of funds received by the wife from the sale of the property to her codefendants.

It is stated in plaintiff's opening brief that the principal purpose of the appeal from the judgment in favor of plaintiff is "to preserve jurisdiction and to distribute community property of the parties equitably in the event the finding of the trial court that the home was the separate property of the defendant wife is held to be without evidentiary support and the adjudication that respondents Weatherly were bona fide purchasers is reversed."

The primary question for our determination is whether the evidence is sufficient to support the findings and judgment as to the defendants J. D. and Margaret Weatherly.

Plaintiff and Hazel M. Palmer were married in 1938. At that time, and at all times since, plaintiff was and has been on active duty in the Navy and necessarily did not reside with his wife most of the time. In 1943, while plaintiff was on duty in the Aleutian zone, the defendant Hazel M. Palmer entered into a contract to purchase the real property situated in Banning, California, which was later sold by her to the Weatherlys. The contract of purchase contained a recital that the purchaser was a married woman and was purchasing the premises as her sole and separate property. The deed which was executed to Hazel M. Palmer on October 10, 1943 and recorded at about the same date, also recited that the property was conveyed to her as her "sole property." The property involved consisted of approximately one acre of ground improved by two rental units with furnishings, equipment and tools. Plaintiff assisted in the construction of improvements on the premises at various times after 1943 and when away on duty, sent his wife approximately \$300 per month.

On December 28, 1948, Mrs. Palmer contacted defendant Weatherly in an effort to sell the property involved and both parties inspected it together. Mrs. Palmer told Weatherly that her husband was in the Navy; that they were having marital difficulties and that she had purchased the

property from funds earned by her operating a nursing home thereon. On the day following this occasion, Weatherly consulted his attorney and was shown the agreement of sale and purchase in which the wife appeared as vendee, the deed to the property to the wife, dated October 10, 1943, and the preliminary title report, dated December 21, 1948, containing a note that the property could be conveyed by Hazel M. Palmer's signature alone. Weatherly was also shown a policy of title insurance which showed title in the same manner. He also saw the map book in the assessor's office showing that the property was assessed to Mrs. Palmer and he was told by her that she was either divorced or separated from her husband.

Weatherly then offered \$8,000 for the real and personal property and Mrs. Palmer refused to accept that amount. The next day, December 30th, Mrs. Palmer came to Weatherly's office and told him she would accept the offer and Weatherly stated that it was still open, provided he could examine the contents of the houses. That evening Weatherly again inspected the premises and had a conversation with a Mrs. Kelly, one of the tenants, concerning which there is testimony that Mrs. Kelly said "Something strange was going on and if anyone is going to sell the property, he had better look out because there is going to be trouble." In this connection, Mrs. Kelly testified that Weatherly stated that he was not interested in the personal affairs of the Palmers.

On December 31st, Weatherly and Mrs. Palmer met in Riverside and entered into an escrow agreement, a deed and bill of sale were executed by Mrs. Palmer and on January 3, 1949, the deed from Mrs. Palmer to Weatherly was recorded and the purchase price was paid to Mrs. Palmer less certain deductions made for the trust deed then on the property and for a tractor which was on the premises.

[1] Plaintiff first argues that the trial court erred in refusing to permit him to give his opinion of the value of the personal property in the two rental units involved. This testimony was rejected on the theory that the plaintiff was not fa-

miliar with the property and did not know its condition. The record indicates that a portion of the furniture was purchased by Mrs. Palmer during her husband's absence; that he knew nothing about it and that he had not seen the property for approximately a year and a half. We see no error in the ruling of the court in this respect in view of the fact that the property was sold as a unit and that evidence was introduced by a witness for plaintiff, who testified that he appraised the property in January of 1949 at the sum of \$11,701.90.

It is next argued that the court erred in finding that the property was the separate property of the wife. As noted, it was acquired by defendant Hazel M. Palmer, over five years before the transaction complained of, by a deed which named her as the grantee "a married woman, as her sole and separate property." This deed was preceded by an agreement of sale which also named her as purchaser "as her sole and separate property."

[2-4] Section 164 of the Civil Code provides " * * * but whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property". The presumption is that the property being so acquired was the separate property of the defendant Hazel Palmer. The presumption itself is a form of evidence. It may be controverted by other evidence, direct or indirect, but unless so controverted the court or jury is bound to find according to the presumption and it is for the court to determine whether or not the evidence against the presumption is sufficient to overthrow it. *Stafford v. Martinoni*, 192 Cal. 724, 738, 221 P. 919; *Nichols v. Mitchell*, 32 Cal.2d 598, 605, 197 P.2d 550.

[5, 6] In the instant case the trial court made the specific finding that the real and personal property involved was the separate property of the defendant Hazel M. Palmer. This finding was supported by competent evidence and is binding upon us. Section 164 of the Civil Code provides that the presumptions therein mentioned are conclusive in favor of any person

dealing in good faith and for a valuable consideration with such married woman and the trial court found that the defendants Weatherly "purchased said property from defendant Hazel M. Palmer in good faith and for a valuable consideration, to wit: \$7,875." It is apparent that a valuable consideration was given for the property in question and we find no evidence in the record indicating the "absence of good faith" on the part of the defendants Weatherly. Plaintiff's contention in this connection that defendant Weatherly was guilty of bad faith because of alleged constructive knowledge of the claimed community character of the property is untenable. The documents exhibited to Weatherly showing the condition of the title were sufficient to justify him in the belief that the defendant Hazel M. Palmer was the owner and authorized to sell it. The trial court found that the Weatherlys were acting in good faith. This finding was supported by substantial evidence and will not here be disturbed.

[7, 8] Plaintiff argues that the presumption in section 164 of the Civil Code does not apply as to the personal property consisting of the household furnishings. However, the general rule is that a transfer of property by one spouse in fraud of the rights of the other will not be set aside as against the transferee who has acted in good faith and paid a valuable consideration for the transfer, even though such consideration may not be adequate. The plaintiff permitted the personalty to remain on the property which stood of record in his wife's name as her sole and separate property for over five years. He left it in her exclusive possession and control. In this connection the record indicates that as between Mr. and Mrs. Palmer, she pointed out to Mr. Weatherly certain property which belonged to her husband, including a \$125 tractor, which resulted in a decrease of that amount in the purchase price.

The judgments are affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

BRAVERMAN v. ROSENTHAL.

Civ. 18169.

District Court of Appeal, Second District,
Division 2, California.

Jan. 26, 1951.

As Corrected Feb. 8, 1951.

Hearing Denied March 26, 1951.

George Braverman sued William Rosenthal, individually, and doing business as the Shoe Mart, to recover for breach of an oral contract of employment for one year. The Superior Court of Los Angeles County, C. C. McDonald, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that that evidence sustained the trial court's finding that plaintiff had been discharged without cause.

Affirmed.

Wilson, J., dissented in part.

1. Pleading ⇨129(1), 377

Every material allegation of a complaint not controverted by answer must, for purposes of action, be taken as true, and no evidence need be introduced in support of such allegations. Code Civ.Proc. § 462.

2. Evidence ⇨265(8)

In action to recover damages for breach of oral contract of employment, where it was alleged in complaint that period of employment was for one year, and defendant admitted in his answer that plaintiff was employed as store manager for period alleged in complaint, admission constituted sufficient evidence to sustain trial court's finding that defendant had employed plaintiff for such period, and such admission was conclusive and required no evidence to support it.

3. Pleading ⇨36(1)

An admission in the pleadings forbids consideration of evidence which tends to refute admitted fact, and any discussion of evidence in such cases is irrelevant and immaterial. Code Civ.Proc. § 462.

4. Master and servant ⇨40(3)

In action to recover for breach of oral contract of employment, direct testimony by plaintiff that his compensation was to be \$100 per week plus 1% of gross

business done each month, supported trial court's finding to that effect.

5. Appeal and error ⇨1008(1)

In action to recover for breach of contract of employment, where there was evidence to support trial court's finding that plaintiff, as store manager, was to be paid \$100 per week plus 1% of gross business done each month, contrary testimony apparently disbelieved by trial court would have to be disregarded by appellate court.

6. Master and servant ⇨40(1)

In action by store manager to recover for breach of contract of employment, where gross sales figures showed that volume of business done by defendant store owner had remained constant, inference could be drawn that defendant had not lost business as result of plaintiff's alleged mismanagement.

7. Master and servant ⇨40(3)

In action by store manager to recover for breach of contract of employment, evidence sustained trial court's finding that plaintiff had been discharged without legal justification.

H. S. Dottenheim, Beverly Hills, for appellant.

Levy, Bernard & Jaffe and F. Filmore Jaffe, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of \$2,326.99 and costs entered after trial before the court without a jury in an action to recover damages for breach of an oral contract of employment for one year.

Facts: Defendant employed plaintiff to be the manager and buyer of his shoe store for the period of one year commencing on the 27th day of August, 1948, at a salary of \$100 per week plus a sum equal to 1% of the gross business conducted each calendar month. On or about the 30th day of December, 1948, defendant without cause discharged plaintiff and refused to pay further salary or commission.

Questions: First: Was there substantial evidence to sustain the trial court's findings (a) that plaintiff was employed for a period of one year, and (b) that a compensation of \$100 per week plus 1% of the gross business conducted by plaintiff each month was due and owing him?

This question must be answered in the affirmative. The complaint alleged in paragraph III as follows:

"On or about the 27th day of August, 1948, plaintiff and defendants entered into an oral agreement, in the County of Los Angeles, State of California, wherein and whereby defendants employed the plaintiff for a period of one year and the plaintiff agreed to enter into the employment of the defendants for said period of one year as store manager and buyer and manager of the shoe salesmen employed by defendants. Pursuant to said agreement, plaintiff entered into the employment of defendants as store manager and buyer and manager of the shoe salesmen on, to-wit, the 27th day of August, 1948, and continued as such manager and buyer and manager of said salesmen in the employ of defendants to and including the 30th day of December, 1948, and fully and fairly performed all of the terms and conditions of said employment and of said agreement on his part to be performed."

Defendant's answer in paragraph I reads as follows:

"Answering paragraph III of plaintiff's complaint, defendant denies both generally and specifically each and every allegation therein contained, except that defendant admits that plaintiff was employed as a store manager for the periods as alleged."¹

[1] (a) Every material allegation of a complaint not controverted by the answer must for the purposes of the action be taken as true and no evidence need be introduced in support of such allegation. (Sec. 462, Code Civ.Proc.; *Morris v. Warner*, 207 Cal. 498, 506, 279 P. 152; *Driver v. International Air Race Ass'n*, 54 Cal.App.2d 614, 620, 129 P.2d 771.)

[2, 3] Therefore since defendant admitted in his answer that plaintiff was

employed as a store manager for the period alleged in the complaint, and the complaint alleged that the period of employment was for one year after August 27, 1948, this admission constituted sufficient evidence to sustain the trial court's finding that defendant had employed plaintiff for such period.

Since the pleadings admitted that the contract had been made, such admission was conclusive and required no evidence to support it. An admission in the pleadings forbids the consideration of evidence which tends to refute the admitted fact. Any discussion of the evidence is therefore irrelevant and immaterial. (*Dressler v. Johnston*, 131 Cal.App. 690, 695, 21 P.2d 969.)

(b) Plaintiff gave direct testimony that his compensation was to be \$100 per week plus one percent of the gross business done each month.

[4, 5] This evidence supports the trial court's finding upon this issue. Contrary testimony apparently disbelieved by the trial court must be disregarded by this court.

Second: *Was there substantial evidence to sustain the trial court's finding that plaintiff was discharged without legal justification?*

This question must also be answered in the affirmative. Defendant testified that he discharged plaintiff because he bought thousands of dollars worth of stock which was of no value; that he opened the store later than was customary; and that he did not take care of the customers in a proper manner.

[6] Plaintiff testified that he worked six days a week, four days from 9:00 a. m. to 9:00 p. m., and two days from 9:00 a. m. to 6:30 p. m.; that defendant never complained with regard to the merchandise he purchased; and that the gross sales amounted to \$51,038.45 for the period from August 28, 1948 to December 31, 1948, or a period of four months, while defendant's gross sales for a period of six months, from January 1, 1949 to June 30, 1949, amounted to only \$76,600.76. These figures show that the volume of business done by defendant

1. It is to be noted that defendant's attorney of record in this appeal did not prepare the answer.

remained constant, and the inference may be drawn that defendant did not lose business as a result of plaintiff's mismanagement. In addition, in October, 1948, defendant tendered to plaintiff a written contract of employment for a period of one year.

[7] The trial court was justified in taking these facts into consideration and its finding that plaintiff was discharged without cause finds substantial support in the evidence.

Affirmed.

MOORE, P. J., concurs.

WILSON, Justice (dissenting).

I concur in the judgment but not in the manner in which the first interrogatory is answered in the opinion of Mr. Justice McComb.

I prefer to affirm the judgment on the firm basis of the facts as shown by the evidence, which sustain the findings and judgment, and not upon the ground that the admissions in the answer necessitate an affirmance—a theory different from that upon which the case was tried in the lower court. This court has repeatedly declared that where a case is tried on the theory that a material issue has been raised by the pleadings, a contention of the parties made for the first time on appeal that there was no such issue will not be entertained. *Grimes v. Nicholson*, 71 Cal.App.2d 538, 543, 162 P.2d 934; *Priebe v. Sinclair*, 90 Cal.App.2d 79, 87, 202 P.2d 577; *Nuttman v. Chais*, 101 Cal.App.2d 476, 225 P.2d 660; *Sparks v. Sparks*, 101 Cal.App.2d 129, 225 P.2d 238, 244.

The paragraph of the complaint quoted in the majority opinion contains two separate allegations: (1) that plaintiff and defendant entered into an oral agreement whereby plaintiff was employed for one year, and (2) that pursuant to such agreement plaintiff was employed from August 27, 1948, until December 30 of the same year. The answer admits that plaintiff was employed for the period alleged in the complaint and denies the remainder of the paragraph. The only construction that can be placed on the answer is that it

denies that the parties entered into a contract of employment for one year but admits the actual employment for the time alleged.

That the parties so construed the answer is evidenced by the fact that plaintiff and defendant were both examined and cross-examined concerning the making of the oral contract of employment and the conversations and negotiations leading to it. Had it been the theory of the litigants that the answer admitted the contract of employment there would have been no necessity for such evidence and the only issue to be tried would have been whether there had been good cause for plaintiff's discharge prior to the expiration of one year. There is ample substantial evidence in the record to sustain the findings and judgment in favor of plaintiff and I concur in the judgment on that ground.



102 Cal.App.2d 87

GAETA v. GAETA.

Civ. 18143.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1951.

Hearing Denied March 29, 1951.

Michael Gaeta brought action against Anna N. Gaeta for divorce, wherein defendant filed a cross-complaint seeking divorce. The Superior Court of Los Angeles County, Clarence E. Johns, J., entered an interlocutory judgment granting defendant a divorce on cross-complaint and dividing community property of the parties, and the defendant appealed from that portion of the interlocutory judgment relating to division of the community property. The District Court of Appeal, Wilson, J., held that where wife was granted divorce on ground of extreme cruelty, trial court abused its discretion in granting wife less than one half of the community property and requiring wife to contribute out of community funds toward payment of attorneys fees for both parties and costs.

That portion of judgment appealed from reversed with directions.

1. Divorce $\S$ 252, 286

Where divorce is granted on ground of extreme cruelty, the innocent party must be awarded more than one half of the community property, and failure of trial court so to divide it is an abuse of discretion requiring reversal.

2. Divorce $\S$ 221, 252

Where wife was granted divorce on ground of extreme cruelty, wife was entitled to an award in an amount in excess of one half of the community property and to have an allowance made to her of amount contributed by her out of her community interest toward payment of attorneys' fees for both parties and costs.

Arthur E. Boyd, Jr., Los Angeles, for appellant.

R. C. W. Friday, Los Angeles, for respondent.

WILSON, Justice.

Defendant was granted an interlocutory decree of divorce on her cross-complaint on the ground of cruelty. The community property of the parties was divided and awarded as follows: to defendant property which the court found to be of the value of \$11,500, and to plaintiff a parcel valued at \$20,000. Attorneys' fees of both parties and court costs were ordered to be paid out of the remaining portion of the community property and the residuum divided equally between the parties. Defendant has appealed from those portions of the interlocutory judgment (1) awarding specific property to plaintiff, (2) directing the equal division between the parties of the community property remaining after the above stated division.

[1,2] By the judgment not only did the wife contribute out of the community funds toward the payment of her own and her husband's attorneys' fees and costs but she received far less than one half of what remained. When a divorce is granted on the ground of extreme cruelty the innocent party

must be awarded more than one half of the community property and the failure of the court so to divide it is an abuse of discretion requiring a reversal. *Arnold v. Arnold*, 76 Cal.App.2d 877, 883-885, 174 P.2d 674; *Falk v. Falk*, 48 Cal.App.2d 762, 770, 120 P.2d 714.

That portion of the judgment appealed from is reversed with directions to award defendant an amount in excess of one half of the community property, and in so doing to make allowance to her of the amount contributed by her out of her community interest toward the payment of attorneys' fees for both parties.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



101 Cal.App.2d 825

SOHN v. KITTEL et al.

KITTEL v. TIESLAU et al.

Civ. 14457, 14458.

District Court of Appeal, First District,
Division 1, California.

Jan. 23, 1951.

Hearing Denied March 22, 1951.

Action by C. A. Sohn against Joseph J. Kittel, and wife to quiet title to property. Separate action by Joseph J. Kittel against A. A. Tieslau, and wife for unlawful detainer. The two actions were consolidated for trial and considered together on appeal. The Superior Court in and for the County of Alameda, Thomas J. Ledwich, J., entered judgment for Kittel in both actions and Sohn and the Tieslaus appealed. The District Court of Appeal, Peters, P. J., held that the evidence sustained findings of trial court that the purchaser at trustee's sale did not purchase the property as an agent for the former owner but purchased for and on his own behalf, and that there was no agreement, oral or otherwise, that the purchase was to be made on behalf of the former owner.

Affirmed.

1. Trusts ☞89(1)

Evidence sustained findings of trial court that purchaser at trustee's sale did not purchase the property as agent for the former owners but purchased for and on his own behalf, and that there was no agreement oral or otherwise, that the purchase was to be made on behalf of the former owners.

2. Appeal and error ☞1010(1)

The findings of a trial court based upon substantial evidence, are binding upon the District Court of Appeal and cannot be disturbed.

3. Evidence ☞383(7)

Where deed of trust executed by mortgagor expressly provided that any trustee's deed issued pursuant thereto should be conclusive proof of the recitals which it contained, and mortgagor attended the foreclosure sale, recitals in trustee's deed showing various steps taken in foreclosure proceedings, including the service, were conclusive. Civ. Code, § 2924; Code Civ. Proc. § 692, subd. 3.

H. J. Kleefisch, San Francisco, for appellants.

Simeon E. Sheffey, San Francisco, for respondents.

PETERS, Presiding Judge.

By action 1 Civ. 14,458 C. A. Sohn sought to quiet her title to a certain residence located in Oakland against the claims of Joseph J. Kittel and his wife, while in action 1 Civ. 14,457 Kittel sought, through the medium of an unlawful detainer action, to recover possession of the same piece of property from A. A. Tieslau and Clara Tieslau, his wife, together with damages for the wrongful detention. The two actions were consolidated for trial and have been briefed and considered together on appeal. Sohn and the Tieslaus appeal from the judgments in favor of the Kittels, and from the additional findings made after entry of the judgments.

The basic problem involved is whether Kittel, who is the record owner of the property by reason of having purchased

it at a trustee's sale, is the owner of the property, or whether he in fact purchased it pursuant to an agreement with the Tieslaus to purchase it on their behalf. Sohn is a grantee of the Tieslaus, having received a deed from them after the foreclosure. If they lost their title by reason of the foreclosure, Sohn's claims are without merit.

The property involved was purchased with the community funds of the Tieslaus in 1942, title being taken in the name of Clara Tieslau. She claims it as her separate property, and the trial court found it was her separate property. Thereafter, and until the time of trial, the Tieslaus resided on the property. In August of 1946, Mrs. Tieslau borrowed \$17,500 from the Bank of America, which debt was secured by a first deed of trust on the property. The money secured from this loan was used by Tieslau in his business.

Tieslau was engaged in business in a partnership entitled A. A. Tieslau & Son. He had known Joseph Kittel for ten or twelve years, and had had several business transactions with him. Admittedly Kittel, on several occasions, loaned Tieslau or the partnership various sums of money, unsecured. In 1946, the partnership became heavily involved, and in March of 1947 it became involved in an involuntary bankruptcy proceeding.

According to the testimony of Kittel, the partnership owed him about \$9,000 in September of 1946. At that time Tieslau was badly in need of funds to pay certain outstanding checks, labor claims, and insurance premiums. Kittel, according to his testimony, which was believed by the trial court, refused to advance any more money without security, and suggested a mortgage on the house. Under these circumstances, in the fall of 1946, Kittel advanced an additional \$2,500 to Tieslau, and other sums, and the Tieslaus gave him a \$12,000 second mortgage on the property, which was recorded.

In the meantime the Tieslaus had defaulted in their payments to the Bank of America on the first deed of trust. Notice of default was served, and on June 12, 1948, the

property was sold at a trustee's sale. Kittel was the only bidder, and, through his agent Walden, bid \$30,000 for the property. The property was sold to Kittel for that sum. At that time the debt to the Bank of America approximated \$20,000. On the day of sale, Kittel paid \$3,000 on the purchase price, and a short time later borrowed \$17,500 from the Western Mortgage Company on the security of the house, and paid that on the purchase price. The balance of the purchase price of \$30,000 he "paid" by cancelling his second mortgage. A trustee's deed, dated June 14, 1948, naming Kittel and his wife as grantees (which deed was delivered to Kittel in August, 1948), was executed and delivered to the Kittels. This is the source of their title.

On September 7, 1948, Mrs. Tieslau executed a quitclaim of the property to C. A. Sohn and delivered the deed to her pursuant to an oral agreement that Sohn would finance the litigation to recover the property from the Kittels, and, if successful, the property would be sold, Sohn would be refunded her costs and expenses, and the balance divided equally between Sohn and Mrs. Tieslau. That is source of Sohn's claim of title.

After the foreclosure sale in June of 1948, the Tieslaus remained in possession and occupancy of the property. Admittedly, the payments due from Kittel to the Western Mortgage Company started in October of 1948, and amounted to \$140 per month. Admittedly, starting in October of 1948, and for four months thereafter, the Tieslaus paid to Kittel the sum of \$140 per month, and, in December of 1948, the Tieslaus made the tax payment then due on the property. This litigation was commenced by Sohn filing her quiet title action on February 7, 1949.

The Kittels, of course, established a prima facie case by proving that they purchased the property at the trustee's sale. It was the theory of the Tieslaus that Kittel purchased at that sale as their agent and on their behalf. They offered evidence that undoubtedly would have supported findings in accordance with this theory, if such evidence had been believed by the

trial court. But, on conflicting evidence, the trial court found against this agency theory. It found that Kittel did not purchase the property as agent for the Tieslaus but purchased for and on his own behalf, and that there was no agreement, oral or otherwise, that the purchase was to be made on behalf of the Tieslaus. The only major question presented on these appeals is as to the sufficiency of the evidence to support these findings.

The Tieslaus' theory of the facts is that the \$12,000 second mortgage given to Kittel was "a phony mortgage," given in anticipation of the possibility of the bankruptcy of the partnership, to "protect" Mrs. Tieslau's interests in the property against the claims of Mr. Tieslau's creditors; that the only money that Kittel has in the property, so far as Mrs. Tieslau is concerned, is the \$3,000 down payment made at the trustee's sale; that the "phony" second mortgage was secured by Kittel pursuant to a scheme whereby he could thus salvage the debts owed him by the partnership from Mrs. Tieslau's separate property; that after the bank recorded a notice of default on the deed of trust the Tieslaus attempted to secure a loan to pay off the bank, and, in this connection, enlisted the services of Kittel. Tieslau testified that the loan of \$17,500 to Kittel by the Western Mortgage Company was arranged by him and his agent, and that Kittel simply picked up the letter of commitment from the Western Mortgage Company to finance the purchase. The Tieslaus also testified that after the trustee's sale they paid the \$140 a month due on the Western Mortgage Company loan to Kittel, who paid it to the loan company, and also paid the December, 1948, installment of taxes at Kittel's request. This, they claim, supports their contention that Kittel bought the property in at the trustee's sale pursuant to an oral agreement to protect Mrs. Tieslau's interests, and on behalf of the Tieslaus. While, no doubt, this evidence of the monthly payments supports the inference that the mortgage of Western Mortgage Company was, as between Kittel and the Tieslaus, the debt of the Tieslaus, such inference is by no means inevitable.

Kittel testified that the payments were for rent or on other indebtedness due to him. He testified that immediately after the trustee's sale he told the Tieslaus that the property was his, but that if it could be sold for more than he had in it, the surplus he would give to the Tieslaus as a gift. Kittel unequivocally denied all of the major portions of the other testimony of the Tieslaus. He testified that he would never have advanced the last \$2,500 to the partnership without security, and that the security offered was a second mortgage on the house; that he purchased the property at the trustee's sale on his own account to protect his second mortgage, which he claimed was valid. He directly denied that he acted as the agent of the Tieslaus in making the purchase. This testimony is corroborated in vital particulars by Max Walden, a real estate broker, who made the bid at the trustee's sale on behalf of Kittel. Walden testified, as did Kittel, that immediately after the sale he and Kittel visited the purchased property and met the Tieslaus. During the ensuing conversation Mrs. Tieslau referred to the house as "my house." Walden testified that Kittel thereupon unequivocally told Mrs. Tieslau that the house no longer belonged to her but belonged to him, and that Mrs. Tieslau replied "I realize that and I appreciate all you have done for us," whereupon Kittel then made his offer to give the Tieslaus all over \$30,000 that might be realized from a sale of the property. Kittel testified to the same effect. Mr. and Mrs. Tieslau testified that at this conversation Kittel said he had "saved" the property for them by buying it at the trustee's sale. Kittel denied making this statement. The trial court obviously believed Kittel and his witnesses and disbelieved the Tieslaus.

Walden also testified that it was he who negotiated the loan from the Western Mortgage Company for Kittel; that an agent of Tieslau had tried to negotiate such a loan, but the company had refused to lend money to Tieslau; that he, Walden, was paid a commission by the Western Mortgage Company of \$175 for negotiating the loan to Kittel.

The Tieslaus place much reliance on a letter sent them by Kittel, dated November 2, 1948, which was several months after the trustee's sale, in which Kittel itemized the sums due to him from the Tieslaus, showing a net balance, including the Western Mortgage Company loan, of \$28,282.93. In this letter Kittel credited the Tieslaus with the various monthly payments of \$140 made by them to Kittel. The Tieslaus claim that this letter demonstrates that after the trustee's sale Kittel was holding title to the property for the Tieslaus subject to the indebtedness owed him. While the letter is consistent with this interpretation, it is by no means inconsistent with the testimony of Kittel that he purchased the property to protect his second mortgage, and that if he ever got out of it what he had in it, he would turn over any excess, as a gift, to the Tieslaus.

[1,2] Thus, on all essential points, there was a direct conflict of testimony. The trial court, who saw, heard, and observed the witnesses, elected to believe Kittel and his witnesses and to disbelieve the Tieslaus and some of their witnesses. The case is peculiarly a factual one. The findings of the trial court, based as they are on substantial evidence, are binding on this court and cannot be disturbed. In support of the trial court it should be mentioned that Mr. Tieslau's explanation of what he termed the "phony" mortgage was fantastic, while Mrs. Tieslau was impeached by a demonstration that she had testified at the bankruptcy proceedings directly contrary to what she testified to on this trial as to her relationship with Mrs. Sohn. These were undoubtedly factors that induced the trial court to disbelieve these witnesses.

[3] The Tieslaus, in the Kittel v. Tieslau action, contend that the complaint in that action was defective because it does not allege that they were given notice of the foreclosure sale as is required by section 2924 of the Civil Code and section 692, subd. 3, of the Code of Civil Procedure. The evidence shows that Tieslau attended the foreclosure sale and that both Tieslaus knew of the foreclosure proceedings. In

addition, the deed of trust executed by the Tieslaus expressly provided that any trustee's deed issued pursuant thereto should be conclusive proof of the recitals which it contained. The trustee's deed contains full recitals of the various steps taken in the foreclosure proceedings, including service. These recitals are conclusive. *Pacific States S. & L. Co. v. O'Neill*, 7 Cal.2d 596, 599, 61 P.2d 1160.

The judgments and orders appealed from are affirmed.

BRAY and WOOD, J. (FRED B.) JJ., concur.



102 Cal.App.2d 44

TICE et al. v. KAISER CO., Inc.

Civ. 4144.

District Court of Appeal, Fourth District,
California.

Jan. 26, 1951.

Anna Pearl Tice and others brought action against the Kaiser Company, Inc., a Nevada corporation, to recover for alleged wrongful death of Roy Alfred Tice, deceased. The Superior Court of San Bernardino County, Martin J. Coughlin, J., rendered an order granting the defendant a new trial, and the plaintiffs appealed. The District Court of Appeal, Griffin, J., held that new trial was properly granted.

Affirmed.

1. Appeal and error ⇨933(1), 977(3)

When a new trial is granted, the presumption is in favor of the order granting new trial and against judgment, and an appellate court will not interfere with the order in absence of showing of manifest or unmistakable abuse of discretion. Code Civ.Proc. § 629.

2. New trial ⇨72

A trial judge has the right and the duty to grant a new trial, when, in his opinion, weight of the evidence is contrary

to the finding of the jury. Code Civ.Proc. § 629.

3. Appeal and error ⇨933(1)

On appeal by plaintiffs from order granting defendant a new trial, the District Court of Appeal was required to review the evidence in the light most favorable to support the order. Code Civ.Proc. § 629.

4. New trial ⇨70

In action for death of iron worker, who was crushed by crane, while engaged in riveting together structural steel of new craneway extension, evidence on questions of negligence and contributory negligence was such as to justify trial court in granting defendant a new trial. Code Civ.Proc. § 629.

5. Appeal and error ⇨977(3)

Where trial court did not abuse its discretion in granting defendant a new trial, such determination was conclusive. Code Civ.Proc. § 629.

6. Trial ⇨194(19)

In action for death of iron worker, who was crushed by crane, while engaged in riveting together structural steel of new craneway extension, question whether iron worker was a business invitee at time and place of accident, was question of fact for jury to determine, and therefore giving of instruction that evidence established that iron worker was a business invitee, was error.

7. Trial ⇨234(7)

In action for death of iron worker, who was crushed by crane, while engaged in riveting together structural steel of new craneway extension, giving of instruction that the law presumed that iron worker in his conduct at time of and immediately preceding accident was exercising ordinary care and was obeying the law, was error under the evidence.

8. Death ⇨58(1)

In order to be entitled to presumption that deceased exercised use of due care, party relying on presumption must first establish a sphere or field within which the presumption may operate. Code Civ.Proc. § 1963, subd. 4.

9. Death ☞58(1)

Whether evidence introduced in death action establishes a field or sphere in which presumption that deceased exercised due care may operate, is, in the first instance, a question for the court. Code Civ.Proc. § 1963, subd. 4.

10. Death ☞58(1)

Disputable presumption that a decedent exercised due care is dispelled, has no probative value, and disappears from the case when the litigant relying on the presumption introduces evidence contrary to the facts presumed. Code Civ.Proc. § 1963, subd. 4.

11. Death ☞104(1)

An instruction concerning presumption that a deceased exercised due care should not be given in a death action, where evidence introduced by plaintiff discloses the acts and conduct of the injured party immediately prior to or at time in question. Code Civ.Proc. § 1963, subd. 4.

12. Judgment ☞199(3.15)

Where a cause of action was stated in death action, and it could not be held, as a matter of law, that there was no evidence of negligence on the part of defendant, and it could not be held, as a matter of law, that deceased was guilty of contributory negligence contributing proximately to his death, court properly denied defendant's motion for judgment notwithstanding verdict.

Arthur Garrett, Los Angeles, for appellants.

Swing & Gillespie, San Bernardino, for respondent.

GRIFFIN, Justice.

The heirs of Roy Alfred Tice, deceased, plaintiffs and appellants, brought this action against defendant and respondent Kaiser Company, Inc., a Nevada corporation, for his wrongful death. The complaint alleges that on June 27, 1947, at Fontana, the deceased met his death as a result of being struck by a bridge crane, negligently operated by defendant. The answer of the Kaiser Company, Inc., which corporation

operates a steel mill where the accident happened, admitted the employment of the crane operator, W. H. Machin, one of the defendants named herein (The cause of action against him was subsequently dismissed by plaintiff); denied negligence, pleaded contributory negligence of the deceased, unavoidable accident, and assumption of risk. Trial by jury resulted in a verdict against defendant for \$45,000. Thereafter, a motion for judgment notwithstanding the verdict was made and denied, reserving the right to apply for a new trial under sec. 629 of the Code of Civil Procedure, and the authority of Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692.

[1,2] A motion for new trial on the ground of insufficiency of the evidence and on the further ground of giving of erroneous instructions requested by plaintiffs was granted. On this appeal we will first consider the court's ruling that, according to the weight of the evidence, it was insufficient to support the verdict. In considering this question we are immediately confronted with the settled rule that when a new trial is granted, the presumption is in favor of the order granting the new trial and against the judgment. *Scott v. Renz*, 67 Cal.App.2d 428, 154 P.2d 738. An appellate court will not interfere with the trial court's order in the absence of a showing of manifest or unmistakable abuse of discretion. It is not only the right, but the duty of the trial judge to grant a new trial when, in his opinion, he believes the weight of the evidence to be contrary to the finding of the jury. Trial judges have been commended, rather than condemned, for their actions in granting new trials under these circumstances. See, *Sassano v. Roulard*, 27 Cal.App.2d 372, 374, 81 P.2d 213; *Green v. Soule*, 145 Cal. 96, 103, 78 P. 337; *Lewis v. Southern California Edison Co.*, 116 Cal.App. 44, 53, 2 P.2d 419; *Waid v. Smith*, 87 Cal.App.2d 32, 195 P.2d 862; *Imperial-Yuma Production Credit Ass'n v. Shields*, 74 Cal.App.2d 932, 935, 169 P.2d 671; and *Clippinger v. Reiss*, 17 Cal.App.2d 604, 62 P.2d 418, 420, wherein it is said: " * * * a trial court is not only authorized, but is under a duty, to grant a new trial whenever in its opinion the evidence

upon which the former decision rests is insufficient to justify the decision, and * * * its action in granting a new trial on this ground is discretionary to the extent that, if any appreciable conflict exists in the evidence, the court's action may not be disturbed on appeal." See, also, *Sweeley v. Leake*, 87 Cal.App.2d 636, 640, 197 P.2d 401; *Dempsey v. Market Street Ry. Co.*, 23 Cal.2d 110, 142 P.2d 929; *Hendricks v. Pappas*, 82 Cal.App.2d 774, 187 P.2d 436.

Counsel for plaintiffs, in his brief, has referred to portions of the evidence which, standing alone, might have supported the jury's verdict. Counsel for defendant have set forth, in minute detail, the evidence produced which might well show a lack of negligence on the part of defendant, and might well show that the deceased was guilty of such contributory negligence on his part as would preclude a recovery.

[3] Viewing the evidence in the light most favorable to support the trial court's order, which we must do, the evidence shows the following resume of facts. On October 9, 1945, defendant Kaiser Company, Inc., desiring to make a number of additions to and modifications of its iron and steel plant at Fontana, let a general contract to Kaiser Engineers, Inc. (a separate corporation from defendant) as "Engineer-Contractor", "to design and construct such additions and modifications". About a year later the defendant, as "owner", and Kaiser Engineers, Inc., as Engineer-Contractor, let a subcontract to Consolidated Steel Corporation, as "sub-contractor", to "furnish, fabricate, haul, and erect the structural steel" for an extension of the Alloy Finishing Building west of and adjoining the already existing Merchant Mill Building. About June 27, 1946, the "sub-contractor" reached the stage of its work where it was riveting together the structural steel and new overhead craneway. It was to be connected laterally with the building columns of the west wall of the Merchant Mill Building and the crane beam and supporting columns of a duplicate overhead crane-way already existing and in operation inside the Merchant Mill Building. On the morning of the accident the decedent Tice

was employed by the "sub-contractor" as one of a crew of five iron workers (four working aloft and one on the ground) engaged in riveting together the structural steel of the new craneway extension. The crew had been working at another point on the new craneway until about noon of that day. They then moved to a point at the foot of what is known as Column 29, adjoining the Merchant Mill Building. There is a conflict in the evidence as to what, if anything, was said to the riveting crew, including decedent Tice, as to the nature of the work pertaining to Column 29, and whether the crew was notified not to remove the metal siding on the west wall of the Merchant Mill Building and not to place themselves inside that particular building until a decision could be reached as to when the cranes and electricity operating the plant then located in the Merchant Mill Building could be conveniently shut down.

One O. J. Smith, foreman of the iron workers crew, employed by the Consolidated Steel Corporation, testified that he contacted the head of the Kaiser Engineers, Inc. about a week before the accident happened; that he told him that he wanted to have the overhead cranes operating on a crane rail across the west end of the Merchant Mill Building stopped, and he wanted the electricity in the building shut off for a period, because he wanted to connect the new Column 29 with a similar column on the inside of the Merchant Mill Building; that he, Smith, was told that the "mill could not be shut down" and that the crane could not be stopped; that the person he contacted in reference to this complaint had "nothing to do with the operation of the steel mill". He then testified that it was his duty to place the men and see that they were in proper positions to work and to take care of the construction work under the contract; that when he was informed that the electric cranes could not be stopped and would continue to operate, he stopped planning for the doing of any part of the work that was inside of the Merchant Mill Building until he could obtain a decision on what could be done; that the crew of which the deceased was a member commenced work on Column 29; that he "informed

them there was a crane operating inside and it would not be stopped and they were not to take chances; that they were to work on the outside and not work inside and not place rivets where they would be caught by the crane"; that they were "not to do anything that would put them in a hazardous position with that crane until we got further orders"; that the riveting on Column 29 was done outside the building.

One witness was asked if he knew of his own knowledge whether or not Mr. Tice knew that there were cranes operating along those overhead crane tracks in the Merchant Mill Building, and he testified: "Yes, I imagine he did. The rest of the boys seemed to have known it". One of Tice's fellow iron workers testified that he knew there were two overhead cranes working in the Merchant Mill Building; that he and Tice had a conversation about them when he went to work that day and that he told Tice to "watch it * * *. Don't let it get you * * *"; that "I told him that when I was out there before that the crane liked to have got me out on this building"; that on that afternoon, previous to the accident, a crane came past Column 29 "more than once", 3 to 6 times. Plaintiffs produced two other workmen as their witnesses, who testified that they did not remember hearing such conversations or instructions by the foreman. Plaintiffs' witnesses, who were members of the iron working crew along with Tice, testified in minute detail as to the conduct of Tice, as well as themselves, from the time they started up from the foot of Column 29 until the accident occurred. According to their testimony, upon reaching the foot of Column 29, they erected a wooden float suspended outside the Merchant Mill Building by rope falls and commenced working up the outside of Column 29, lifting themselves on the float by manipulating the ropes. After about two hours they reached the level of the crane beam and tied off the float outside of Column 29. At that level, about 40 feet above the floor, the sash and siding of the west wall of the Merchant Mill Building was stripped off for about five or six feet equally on both sides of building Column 29, making openings big enough for a man to

walk or crawl through on each side of the column. The crane was then stationary at the north end of the Merchant Mill Building with the operator visible inside the cab. These cranes in the Merchant Mill Building were used throughout the length of the large building in lifting heavy material from one place to another. They were equipped with sirens to notify the workmen below, so that when heavy material was about to pass over them they could remove themselves from beneath it.

It is defendant's argument that, in violation of the specific and positive orders given the deceased by his foreman Smith, the deceased went inside the west wall of the Merchant Mill Building. At that point he stood on a horizontal pipe north of building Column 29 with his waist about level with the inside crane rail which was about nine inches from the inside column, with his body between the rail and the wall of the Merchant Mill Building. From this position he leaned over, curling his body around the *inside* of the building column, and placing his chest and shoulders between the column and the inside rail to catch rivets being driven through the outside flange of the building column. His head and arms were south of the column and his back toward the crane at the north end. One of the workmen commenced to drive a drift pin through the holes in the south flange of the building column by means of a compressed air riveting gun. Tice was the only member of the riveting crew whose body was inside the building. While Tice was in this exposed position Machin operated the overhead electric crane south along the inside crane track and Tice was crushed between the moving crane and the building column. There is a conflict in the evidence as to whether the approaching crane moved silently or with considerable noise. The testimony of the crane operator indicates that it was his custom to sound the siren on certain occasions pertaining to the workmen on the floor; that his whole attention was given to these conditions, and that he had no reason to expect workmen to be on or near the overhead crane rail where the ordinary operation of the crane would endanger them, and that this was in accord-

ance with the ordinary manner of operating overhead cranes.

It is the argument of counsel for plaintiffs that the unusual admission of sunlight through the entrances in the west wall of the building through which the deceased entered should have been sufficient in and of itself to place the operator of the crane on notice that workmen were working in that portion of the building and that he should have seen Tice and should have sounded the siren to notify him of the approaching danger. Plaintiffs further argue that the defendant, under the facts, and under this construction contract, had knowledge at the time of the accident that all of the work called for by the contract, including that portion in which decedent was engaged was being done, and was being carried on under the express invitation of the defendant under the contract, and that the negligence of the defendant is clearly shown.

[4, 5] It is our conclusion that the question of the negligence of the defendant company was a factual question for the determination of the jury. This evidence, as well as the evidence as to the contributory negligence of the deceased, was, in some respects, conflicting and susceptible of two constructions. Under these circumstances and under the rule above enunciated, the trial court had the right to grant a new trial, if, in its studied opinion, the weight of the evidence showed contributory negligence on the part of the deceased which would bar a recovery, or failed to show negligence on the part of defendant. Since there appears to be no abuse of discretion in this respect the determination of the trier of facts is conclusive.

[6] The trial court, at plaintiffs' request, gave an instruction that "the evidence in this case has established that the deceased * * * was what the law terms a 'business invitee' upon the premises of the defendant Kaiser Company", and followed this with an instruction as to the duty the defendant owed to a "business invitee". The court rightfully concluded, on the motion for new trial, that the question of whether or not Tice was a "business invitee", at the time and place of the accident, was not a ques-

tion of law but a question of fact for the jury to determine.

The contract under which the Consolidated Steel Corporation was operating provided that that corporation was to erect the Alloy Finishing Building Extension, at owner's plant in Fontana, according to certain specifications. Badges were issued to employees of that corporation to enter the general admission gate. There is no showing that such a pass gave these employees permission to enter the enclosed Merchant Mill Building, which was at the time in full operation. There may be some question whether, under the contract of construction, the employees of the Steel Corporation were expected to enter that building, at the point indicated, for the purpose of anchoring new Column 29 to the existing one in fulfillment of the contract. If we disregard the testimony of the witnesses in regard to the claimed orders given the workmen about going into that building until arrangements could be made to shut down the operations being carried on there, it might be said that, under the contract, the deceased could be held to be a "business invitee" in that building at that time and place. However, if we believe the testimony of the witnesses, these workmen, including the deceased, were warned that they were not to enter that building until some future time to be agreed upon. This would present a factual question for the jury to determine as to whether deceased was a "business invitee" at the time and place under the construction contract and the evidence produced. *Martin v. Food Machinery Corp.*, 100 Cal.App.2d 244, 223 P.2d 293.

[7] The trial court's conclusion, on the motion for new trial, that the giving of the instruction as to the presumption of due care, under the evidence produced by plaintiff was error, is sustainable. The instruction reads in part: "The law presumes that Roy Alfred Tice now deceased in his conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary * * *."

It should be here noted that plaintiffs produced the workmen employed on the job with the deceased at the time as their own witnesses and they testified in detail as to all the surrounding facts pertaining to the actions and conduct of the deceased up to the very time of his fatal injury.

Heretofore some confusion existed in relation to this presumption and its application. (See discussion of cases in note "Battle of the Presumptions", B.A.J.I. No. 135, p. 159, 161, and 1950 Supplement, p. 113, No. 135.) The general rule is announced in *Mundy v. Marshall*, 8 Cal.2d 294, 296, 65 P.2d 65, that the manner in which the deceased was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care. It is said in *Paulsen v. McDuffie*, 4 Cal.2d 111, 119, 47 P.2d 709, 714, that: "What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject."

[8-10] In order to be entitled to such a presumption, the party relying upon it must first establish a sphere or field within which the presumption may operate. Whether the evidence introduced establishes such a field or sphere is, in the first instance, a question for the court. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Hoppe v. Bradshaw*, 42 Cal.App.2d 334, 108 P.2d 947. The disputable presumption that a decedent exercises due care is dispelled, has no probative value, and disappears from the case when the litigant relying upon the presumption introduces evidence contrary to the fact presumed. *Mundy v. Marshall*, supra; *Young v. Pacific Electric Ry. Co.*, 208 Cal. 568, 283 P. 61. See, also, *Ellison v. Lang Transportation Co.*, 12 Cal.2d 355, 84 P.2d 510.

[11] In *Speck v. Sarver*, 20 Cal.2d 585, 587, 128 P.2d 16, the clarified rule in respect to the application of such a presumption appears to be that an instruction as to the rebuttable presumption set forth in sec. 1963 subdivision 4 of the Code of Civil Pro-

cedure may properly be given to the jury in certain situations, but such an instruction should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. The court there adopts the same rule that was applied in *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884. See, also, *Cole v. Ridings*, 95 Cal.App.2d 136, 212 P.2d 597; *Chakmakjian v. Lowe*, 33 Cal.2d 308, 201 P.2d 801. No other errors appear.

[12] Since a cause of action was stated, since it cannot be held, as a matter of law, that there was no evidence of negligence on the part of the defendant, and since it cannot be held, as a matter of law, that the deceased was guilty of contributory negligence contributing proximately to his death, the order denying defendant judgment notwithstanding the verdict is affirmed. The order granting a new trial is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



OTTO v. UNION NAT. BANK OF PASADENA et al.

Civ. 17631.

District Court of Appeal, Second District,
Division 1, California.

Jan. 23, 1951.

Rehearing Denied Feb. 13, 1951.

Hearing Granted March 22, 1951.*

Helen E. Otto brought action against the Union National Bank of Pasadena, a national banking association, and others to terminate the trust executed by plaintiff, on ground that trust indenture was void as a suspension of power of alienation beyond continuance of lives in being or twenty five years. The Superior Court of Los Angeles County, Kenneth C. Newell, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that provision in in-

* Subsequent opinion 238 P.2d 961.

indenture requiring shares of minors to be retained in trust until they reached majority was void as suspension of power of alienation beyond continuance of lives in being or twenty five years, but that such void clause was not so inseparably blended with valid clauses that it could not be eliminated without destroying the remainder of the indenture.

Judgment affirmed.

1. Perpetuities Ⓒ6(10)

The "possibility" referred to in statute declaring every future interest void in its creation which, by any "possibility" may suspend power of alienation for longer period than prescribed by statute dealing with rule against perpetuities, is to be determined by conditions existing at time of creation of limitation or future interest, and if at that time there is possibility that power of alienation may be suspended beyond prescribed period, rule is violated, even though there is a probability that events may so transpire that no suspension results. Civ.Code, §§ 715, 716.

See publication Words and Phrases, for other judicial constructions and definitions of "Possibility".

2. Infants Ⓒ22

The right to acquire and enjoy property belongs to minors, as well as adults, but management and control of estates of minors is subject to guardianships.

3. Perpetuities Ⓒ6(2)

Trusts Ⓒ52

Where trustor, by trust indenture, reserved life estate in herself and reserved right to make testamentary disposition of trust property, and provided that on failure to so dispose corpus should be transferred in equal shares to trustor's issue per stirpes, and, in absence of such issue, to her heirs at law, but requiring that shares of minors be retained in trust until they reached majority, clause requiring shares of minors to be retained in trust was void as suspension of power of alienation beyond continuance of lives in being or 25 years, but void clause was not so inseparably blended with valid clauses that it could not be eliminated without destroying remainder of indenture. Civ.Code, §§ 715, 716.

George Penney, of Los Angeles, and Dunlap, Holmes, Ross & Woodson, of Pasadena, for appellant.

Hahn & Hahn; Stanley L. Hahn, of Pasadena, for respondent Bank.

Leon W. Delbridge and William Peter-silge, both of Pasadena, for respondents Gordon, Scott and Stephanie Wheeler.

DRAPEAU, Justice.

By this action plaintiff seeks to terminate a trust executed by her on April 11, 1941. At that time she was living apart and contemplating a divorce from her then husband, John E. Wheeler. She was in a distraught and emotionally upset condition, and was possessed of an estate in excess of \$500,000 which she acquired as her separate property prior to 1934. She was advised by counsel to put her property "beyond her control, lest she be persuaded * * * to dissipate her assets before she regained her normal judgment and composure."

The trust indenture contains a spendthrift clause in favor of trustor and a provision for the payment of the income to her for life.

Paragraph IV of the declaration of trust provides: "Upon the death of the Trustor, this Trust shall terminate and the entire Trust Estate, together with any income accrued * * * shall be * * * distributed * * * according to the Last Will and Testament of said Helen E. Wheeler, Trustor, and in the event that she should fail to exercise this power of appointment, then in equal shares to her issue per stirpes and if there be no issue to her heirs at law in accordance with the Statutes of Succession of the State of California then in effect. Should any child of Trustor be under the age of twenty-one (21) years upon the termination of this trust and, by reason of Trustor's exercise or failure to exercise her power of appointment herein provided be entitled to have distributed to him or her a portion of the then corpus of the Trust Estate and the undistributed income therefrom, said Trustees shall retain his or her share thereof until he or she becomes twenty-one (21) years of age, when the same shall be distributed to him or her,

but said Trustee shall distribute the income of said share accruing after the death of Trustor to or for the benefit of said minor child until he or she becomes twenty-one (21) years of age."

John E. Wheeler and a national banking institution were named cotrustees. In May, 1942, a final decree of divorce was entered in favor of trustor and against said John E. Wheeler. Thereafter both trustees were removed and defendant Union National Bank of Pasadena was named successor trustee.

When plaintiff filed the instant action on March 21, 1949, she was 43 years of age and the mother of two sons: defendants Evans Wheeler, aged 22 years, and Gordon Wheeler, 20 years of age. Gordon was then unmarried; and Evans was the father of the minor defendants Scott and Stephanie.

The default of defendant Evans Wheeler was entered October 14, 1949. The lower court sustained general demurrers interposed to the complaint by the trustee bank and the minor defendants. Plaintiff having failed to amend her complaint, judgment was entered decreeing that she take nothing by her complaint. This appeal followed.

The lower court in a memorandum opinion held that the last sentence of Paragraph IV of the Declaration of Trust, hereinabove quoted, was invalid as a suspension of the absolute power of alienation prohibited by section 715 of the Civil Code. But, said the court, "The invalid limitation is not so inseparably blended with the valid provisions that it may not be cut off and the balance permitted to stand."

Appellant urges that the doctrine of severability does not apply and that the entire trust was void *ab initio*. Secs. 715, 716, 771, Civil Code. In this connection, it is asserted that the declaration amounts to "An attempted gift in trust of a future interest to a class, which may include children born after the execution and delivery of the trust instrument with a clear command in the trust instrument that the share of any minor child is to be retained in trust until he or she attains the age of 21 years; or more concisely stated, *a trust by its terms designed to continue during the minorities*

of children born after the delivery of the trust instrument." (Emphasis included.)

In support of this theory, appellant cites *Sheean v. Michel*, 6 Cal.2d 324, 327, 57 P.2d 127, 128, where it is stated: "If the trust thus attempted to be created is by its terms designed to be continued during the minorities of children born after the delivery of the trust instrument, it is obvious that the instrument creates a suspension of the power of alienation in violation of the provisions of section 715 of the Civil Code * * * The possibility of the suspension of the power of alienation created by the contingency that all of the persons in being at the time of the creation of the trust may die before the youngest unborn child becomes 21 years of age, or the possibility of the suspension beyond the 25-year period, renders the trust void at its creation and title does not vest in the trustee. Sections 716, 749, 771, Civ.Code; In re Estate of Troy, 214 Cal. 53, 56, 3 P.2d 930."

Section 715 Civil Code, prohibits the suspension of the absolute power of alienation for a period longer than (1) during lives in being at the creation of the limitation or condition; or (2) for a period not to exceed twenty-five years from the time of the creation of the suspension.

Section 716, Civil Code, declares every future interest void in its creation which, by *any possibility*, may suspend such power of alienation for a longer period than prescribed.

[1] The possibility referred to in said section "is to be determined by the conditions existing at the time of the creation of the limitation or future interest, and if at that time there is a possibility that the power of alienation may be suspended beyond the prescribed period, the rule is violated even though there is a probability that events may so transpire that no suspension results." 20 Cal.Jur. 1042, section 9, citing *In re Estate of Maltman*, 195 Cal. 643, 234 P. 898; *In re Estate of Whitney*, 176 Cal. 12, 167 P. 399; *In re Estate of Steel*, 124 Cal. 533, 57 P. 564; *Estate of Walkerly*, 108 Cal. 627, 41 P. 772.

By the instant declaration, trustor (1) reserved a life estate in herself; (2) re-

served the right to make a testamentary disposition of the trust property; (3) provided that upon failure to so dispose, the corpus should be transferred "in equal shares to her issue *per stirpes*"; and in the absence of such issue, to her "heirs at law".

When trustor executed the trust instrument, she was about thirty-five years of age, and her only children were two minor sons. Nonetheless, she provided for continuation of the trust after her death and during the minority of *any child* of hers; provided for the distribution of the corpus to *him or her* at majority, and for the distribution of the income for the benefit of such minor child until *he or she* reached majority. And this regardless of the "exercise or failure to exercise her power of appointment."

From the language employed, it is clear that trustor intended to create a future interest in a class composed of all her children in being at her death, including any sons or daughters who might be born to her after the creation of the trust; and also the then living lineal descendants of any deceased child.

The stated desire of appellant that the trust should terminate upon her death and the corpus be distributed in accordance with her last will, and if no will, to her issue *per stirpes*; and if no issue, to her heirs at law, is clearly valid, even though some of the distributees be minors.

[2] The right to acquire and enjoy property belongs to minors, as well as adults, but the management and control of estates of minors is the subject of guardianships. (14 Cal.Jur. 115, § 5.)

[3] However, it is readily apparent that the clause requiring the shares of minors to be retained in trust until they reach majority is void as a suspension of the power of alienation beyond continuance of lives in being or 25 years. Sec. 715, *supra*; *Sheean v. Michel*, *supra*.

It is the contention of respondents that the application of the doctrine of severability would properly sever from the trust the secondary portion of the trust last above mentioned.

As a result of the application of such doctrine the trust would provide (a) income to trustor for life; (b) disposition as provided by trustor's last will; and (c) in the event of her failure to exercise such power of appointment, distribution to her issue *per stirpes*. Such interpretation would not change the persons to benefit under the trust, but would eliminate retention of any property in trust for such of trustor's children under twenty-one years of age at the time of her death.

In *Re Estate of Willey*, 128 Cal. 1, 11, 60 P. 471, 474, frequently referred to as the "leading case" on the subject of severability, it was said: "* * * courts have firmly established the principle that valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries." This principle has become a settled rule of decision in this court. *Estate of Michelletti*, 24 Cal.2d 904, 909, 910, 151 P.2d 833, 836, wherein it is also stated: "The statutory rules against restraints on alienation have a beneficial purpose, but they are not punitive. Testamentary dispositions that are otherwise valid are not necessarily invalidated by illegal limitations, and the testator's purpose must control so far as it reasonably can." See, also, *Estate of Troy*, 214 Cal. 53, 3 P.2d 930; and *In re Estate of Sahlender*, 89 Cal.App.2d 329, 201 P.2d 69.

In the instant cause, the invalid clause is not so inseparably blended with the valid clauses that it cannot be eliminated without destroying the main intent of trustor.

Appellant further urges that she is the sole beneficiary under the trust and therefore entitled to terminate it.

The most casual examination of the trust instrument discloses that appellant created the trust not only for her own benefit, but for that of her issue *per stirpes*.

For the reasons stated, the judgment appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.

**GASKILL et al. v. CALAVERAS CEMENT
CO. et al.**
Civ. 7829.

See publication Words and Phrases,
for other judicial constructions and defi-
nitions of "Independent Contractor".

District Court of Appeal
Third District, California.

Jan. 31, 1951.

Rehearing Denied March 2, 1951.

Hearing Denied March 29, 1951.

Frank Gaskill and others brought action against the Calaveras Cement Co., a corporation, Louis Ralph LeBrun, Harry D. Swain, and Pat L. Nolet, W. W. Miles and K. D. Anderson, copartners doing business as Motor Transport System, to recover for death of occupant of automobile which was struck by tractor, trailer and semi-trailer. The Superior Court of San Joaquin County, George F. Buck, J., rendered a judgment for the plaintiffs, and Pat L. Nolet, W. W. Miles and K. D. Anderson, copartners, doing business as Motor Transport System, appealed. The District Court of Appeal, Adams, P. J., held that evidence established that Harry D. Swain in operating tractor, trailer, and semi-trailer, was an independent contractor, and that therefore Pat L. Nolet, W. W. Miles and K. D. Anderson, copartners, doing business as Motor Transport-System, were not liable for damages resulting from the accident.

Judgment against appellants reversed.

Automobiles ⇨194(2)

Where owner of tractor entered into agreement with owner of trailer and semi-trailer that owner of trailer and semi-trailer would rent them to owner of tractor for 5.6 cents a mile, and providing that owner of tractor should receive 24 cents a hundred pounds from third party for cement delivered, less 10 per cent to be deducted by owner of trailer and semi-trailer, and that owner of trailer and semi-trailer should only designate the loads to be made and places of pick-up and delivery, and that all other matters should be under management, control, and supervision of owner of tractor, owner of tractor was an "independent contractor", and therefore owner of trailer and semi-trailer was not liable for damages resulting from accident involving tractor and trailer and semi-trailer.

Clark & Heafey, and Augustin Donovan,
Oakland, for appellants.

Mazzera, Snyder & DeMartini, Stock-
ton, for respondents.

ADAMS, Presiding Justice.

This is an appeal by Pat L. Nolet, W. W. Miles, and K. D. Anderson, copartners doing business as Motor Transport System (hereinafter referred to as M.T.S.), from a judgment entering against M.T.S. and others upon a verdict of a jury in favor of plaintiffs, which judgment awarded said plaintiffs damages in the sum of \$18,000 for the death of Effie Mae Gaskill, the wife of Frank Gaskill and mother of the other plaintiffs. Mrs. Gaskill's death resulted from an automobile accident for which defendants LeBrun and Swain admitted responsibility.

The evidence shows that a tractor owned by Swain and operated by defendant LeBrun, which tractor was hauling a trailer and semi-trailer rented by Swain but owned by M.T.S. collided with a parked automobile in which Mrs. Gaskill was seated. The sole question presented on this appeal is whether defendants Swain and LeBrun alone are liable, or whether, at the time of the accident, they were employees or agents of M.T.S., thus rendering the said M.T.S. also liable.

It is contended by M.T.S., and by Swain, also, that Swain was an independent contractor and that LeBrun was his employee. The evidence shows that on August 14, 1948, Swain and M.T.S. entered into a written agreement under the terms of which Swain, designated as contractor, represented that he was the owner of a tractor which he would use to pull such equipment as M.T.S., designated as carrier, should from time to time indicate, carrier to designate the equipments, loads and points of origin and destination of such equipment, the hauling to be on carrier's bills of lading. Contractor undertook to furnish his trac-

tor fully equipped, including two sets of air lines, and agreed to assume full responsibility for damages or loss of same due to use, fire or theft, or otherwise, and to hold carrier harmless from any claim by reason of the above. He was also to operate said equipment himself, or to furnish operators, without cost to carrier, to carry insurance including a Workmen's Compensation insurance policy covering his employees; and he agreed to hold carrier harmless from any claim arising out of any such employer-employee relationship or for injuries to himself. He also agreed to bear the entire cost of maintenance of his own equipment, and to be responsible to carrier for damage to carrier's equipment from any cause, up to \$500 in any one accident. Carrier agreed to bear such cost of maintenance and repair of its own equipment which resulted from reasonable usage, wear and tear.

The contract especially provided that contractor should be deemed to be an independent contractor, maintaining complete control over all equipment used, including driving personnel, hauling or other services; and that carrier should only designate the loads to be made and the places of pick-up and delivery, all other matters, unless otherwise provided, to be under the management, control, and supervision of contractor. All taxes or fees were to be paid by contractor, except that any Federal transportation tax should be paid by the carrier. Compensation to contractor was to be such as was agreed upon from time to time. Provision was made for cancellation of the agreement by either party on ten days' written notice.

Thereafter Swain secured from the Public Utilities Commission permission to operate as a Highway Contract Carrier. In the meantime M.T.S., also operating as a contract carrier, secured a contract with Calaveras Cement Co. to haul cement to the sites of various projects in the Feather River Canyon. At the time of the accident Swain's tractor, operated by LeBrun, was hauling a trailer and semi-trailer rented to Swain by M.T.S. which was on its way to load cement which Swain had undertaken to transport for M.T.S., to assist it in

carrying out its contract with the cement company.

Testimony given at the trial showed, without contradiction, that LeBrun was hired and paid by Swain, knew nothing of M.T.S., and received orders from Swain only; also it was shown that M.T.S. never gave Swain instructions as to the route to be followed by him, the manner of operation of the equipment, or as to whom Swain should hire; and after the accident Swain paid costs of repair to the tractor.

Appellant M.T.S. urges on this appeal that the evidence clearly establishes that Swain was an independent contractor, and, accordingly, that it is not liable for damages resulting from the accident.

Respondents contend that Swain and LeBrun were acting as agents of M.T.S. and that, though there was a conflict in the evidence, it is sufficient to establish that relationship. They rely upon testimony that the trailer and semi-trailer being hauled by Swain's tractor belonged to M.T.S.; that the tractor and the trailer and semi-trailer were of the same color, and all bore the insignia of M.T.S.; that the loads hauled by Swain were on M.T.S. bills of lading, which carried the identifying numbers of each piece of equipment; that on some occasions M.T.S. supplied fuel for operation of the tractor, though the evidence shows without contradiction that deductions were made by it for such fuel on settlement with Swain.

We are satisfied that the evidence clearly shows that Swain was not an employee or agent of M.T.S. but was an independent contractor. It shows that, while Swain did not own the trailer and semi-trailer which he was using, he paid rental to M.T.S. for their use, the rate of rental being 5.6 cents per mile. Compensation to Swain was made by giving him the amount paid by the cement company for delivery of cement, to wit, 24¢ per hundred, less 10% deducted by M.T.S.. Settlements were made every two weeks, and from the amount then due Swain for hauling M.T.S. deducted the rental charge, the 10%, and the cost of any fuel used by Swain for which M.T.S. might have paid. M.T.S.

would, after advice from the cement company, advise Swain as to when he should pick up a load of cement, and where to deliver it, all of the hauling being between San Andreas and two projects in the Feather River Canyon for which the cement company had contracted to furnish the cement. As for the fact that Swain's tractor and the trailers were of the same color it was shown without contradiction that this was a happening only; and testimony was that the initials of M.T.S. were pasted on the tractor as well as the trailers for advertising purposes only. Swain and defendant Anderson of M.T.S. were called by plaintiffs as adverse witnesses, and both testified that M.T.S. had never instructed Swain as to the route to be followed by him, or his manner of operation, or whom he should employ or discharge, nor given him any directions as to his employees; that M.T.S. had never paid Swain any wages, and that Swain had paid for all of his gas and oil; and the agreement between the parties definitely stated that Swain was to be an independent contractor and that no employer-employee relationship should exist.

In *Clarke v. Hernandez*, 79 Cal.App.2d 414, 179 P.2d 834, this court decided a comparable case. There copartners doing business as Sunrise Produce Company were appellants after a judgment in favor of plaintiffs against them and Hernandez who was the owner of the truck and trailer which collided with plaintiffs' vehicle causing the injuries for which damages were granted. Hernandez was hauling a load of onions from Coachella to San Francisco for the Produce Company. He, like Swain, was a licensed contract carrier. The only directions given Hernandez were as to where he was to pick up and where to deliver the onions, compensation to be 75¢ per sack carried. We held that the record did not contain substantial evidence that Hernandez was an employee of appellants, and that the judgment against appellants, based upon the doctrine of respondeat superior, lacked evidentiary support; that the right of an employer to exercise complete and authoritative control of the mode and manner of the work to be performed

was essential to such a relationship; that Hernandez rendered service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result was accomplished. That case, and numerous like cases there reviewed, are applicable herein, and further citation of authority is unnecessary.

In *Empire Star Mines Co. v. California Employment Commission*, 28 Cal.2d 33, 43-44, 168 P.2d 686, the court stated that significant factors in determining the relationship between the parties were the right to discharge at will, without cause, and whether the parties believed they were creating the employer-employee relationship. In the instant case the contract provided that the agreement should continue in full force and effect so long as the requirements thereof were complied with, but that it might be cancelled by either party on ten days' notice. This negatives any claim that M.T.S. might discharge at will. And that the parties themselves did not intend to or believe that they were creating an employer-employee relationship could hardly have been more strongly expressed than it was in the contract itself.

Respondents also contend that regardless of whether Swain was an independent contractor, M.T.S. should be held liable on the authority of *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044, and section 428 of Restatement of Torts. We do not find them applicable. In the *Taylor* case the Scavenger Company was operating under a franchise and its contract with the city of Oakland specifically provided that as a condition of exercising its franchise to collect garbage, it must assume master and servant liability for the acts of persons engaged by it to collect garbage. No such condition governed M.T.S. in the instant case. It operated under a permit as did Swain. The permit issued to M.T.S. is not in the record, and we find nothing in the record or in the law of this state that limited its right to contract as it did with Swain, as an independent contractor, without being liable for injuries to persons which might be occasioned by the negli-

gence of Swain or his employees. It is stated in the opinion in that case, 17 Cal.2d at page 604, 110 P.2d at page 1050: "An employer is generally liable for negligent acts of an employee performed within the scope of employment, but if an independent contractor rather than master and servant relationship exists, the independent contractor usually is alone liable for his negligent acts. If, however, an individual or corporation undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority, these liabilities may not be evaded by delegating performance to an independent contractor."

The court in the case before us instructed the jury that if Swain was an independent contractor M.T.S. was not liable. No objection to that instruction is made.

Section 428 of Restatement of Torts provides: "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an *unreasonable risk* of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity." (Italics added.)

But the comment thereon is that the rule there stated is principally applicable to public service corporations, which, as such, are permitted by their *franchises* to use instrumentalities which are *peculiarly dangerous unless carefully operated*, and that the rule stated does not apply to the carrying on of activities which involve no special danger and which can be lawfully carried on by private persons without liability for the misconduct of the contractors to whom they are entrusted. In California annotations to section 428 it is said that no California cases applying the rule were found. Furthermore, the activity which Swain was carrying on was not under franchise and was not one involving any unreasonable risk of harm to others.

The operation of any motor vehicle may be said to involve some risk to others but the use of Swain's equipment involved no more risk than that of any other.

Section 409 of Restatement of Torts provides that: "Except as stated in sections 410 to 429, the employer of an independent contractor is not subject to liability for bodily harm caused to another by a tortious act or omission of the contractor or his servants." Sections 410 and 429 have no application to the facts in this case.

We are satisfied that the evidence establishes that Swain was an independent contractor, and that LeBrun was the employee of Swain only. It follows that the judgment against M.T.S. must be, and it is reversed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER, J., dissenting.



102 Cal.App.2d 1

KANTLEHNER et al. v. BISCEGLIA et al.
Civ. 14492.

District Court of Appeal, First District,
Division 2, California.

Jan. 26, 1951.

Hearing Denied March 26, 1951.

Action by L. P. Kantlehner, and others, against Gabriel Bisceglia, and others, and James A. Clayton & Co., a corporation, and others, for damages for alleged fraudulent representations in the sale of orchard property. The Superior Court in and for the County of Santa Clara, Leonard R. Avilla, J., rendered judgment against James A. Clayton & Co., and others, and they appealed. The District Court of Appeal, Dooling, J., held that real estate agents sued by purchasers for fraudulent representations as to acreage of orchard purchased by plaintiffs could not assert on appeal that \$12,000 award of damages was not supported by evidence and was excessive, where agents did not object or move to strike purchasers' testimony on cross-examination that dam-

ages were \$12,000, and agents requested no instruction on applicable "out-of-pocket" rule of damages, and presumption was that the single instruction given on damages was given at agents' request.

Judgment affirmed.

1. Appeal and error ⇨930(1)

All conflicts are to be resolved and all reasonable inferences are to be indulged in support of the jury's verdict.

2. Fraud ⇨58(1)

In action for damages for fraudulent representations as to acreage of orchard sold to plaintiffs, evidence was insufficient to show that purchase of orchard was in gross without regard to acreage.

3. Appeal and error ⇨1008(1)

Whether failure to read deed is such negligence as to bar relief to purchaser for shortage in acreage is ordinarily a question for trier of fact, particularly where failure to read is induced by reliance on fraudulent representations of the other party.

4. Fraud ⇨64(5)

In action for damages for fraudulent representations as to acreage of orchard sold to plaintiffs, evidence whether plaintiffs' failure to read deed was reasonably excused by reliance on real estate agents' representations was for jury.

5. Appeal and error ⇨928(4)

Real estate agents sued by purchasers for fraudulent representations as to acreage of orchard purchased by plaintiffs could not assert on appeal that \$12,000 award of damages was not supported by evidence and was excessive, where agents did not object or move to strike purchasers' testimony on cross-examination that damages were \$12,000, and agents requested no instruction on applicable "out-of-pocket" rule of damages, and presumption was that the single instruction given on damages was given at agents' request. Civ. Code, § 3343.

6. Fraud ⇨59(3)

Under statute, the difference between price paid and market value of property received is correct measure of damages for fraudulent representations as to acre-

age of property sold to plaintiff. Civ. Code, § 3343.

7. Appeal and error ⇨928(4)

Where record did not show who requested instruction given, reviewing court would presume that such instruction was given at appellants' request.

8. Appeal and error ⇨882(3)

The rule that counsel may not so conduct themselves in trial of case or as to leave jury to proceed on one theory and then seek to abandon that theory on appeal and adopt another theory is frequently applied where one theory of damages is acquiesced in at trial and appellants seek to shift to another theory of damages on appeal.

9. Appeal and error ⇨216(2)

Appellants could not complain on appeal that jury was not more adequately instructed on measure of damages, where presumption was that single instruction on damages was given at appellants' request and appellants failed to request other instructions.

10. Fraud ⇨64(1)

In action for fraudulent representations as to acreage of orchard sold to plaintiffs, evidence concerning value of land at reduced acreage was for jury. Civ. Code, § 3343.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellants.

Campbell, Hayes & Custer, San Jose, Bronson, Bronson & McKinnon, San Francisco, for respondents.

DOOLING, Justice.

[1] Plaintiffs had judgment against appellants for \$12,000 awarded by a jury for fraudulent representations in the sale of an orchard property for the contract price of \$72,000 which was reduced to \$68,885 by the adjustment later referred to. The property was represented to contain 65.86 acres but when the title report was received by appellants it developed that it contained less than 61 acres and a survey showed the exact acreage to be 60.702.

Appellants, who are the real estate agents who handled the transaction, sought to prove that plaintiffs had knowledge of the shortage in acreage before the completion of the transaction, but plaintiffs denied this and the jury chose to believe plaintiffs. Appellants attempt to reargue the weight and effect of the evidence but no useful purpose would be served in our going further into the facts since all conflicts are to be resolved and all reasonable inferences to be indulged in support of the jury's verdict.

[2] One of the appellants testified that plaintiff Kantlehner stated to him "if there aren't sixty-five acres in it, we won't put up the money to close the deal", and the materiality of the representation of the acreage to them was testified to by both Kantlehner and Cali. There is therefore nothing in the point attempted to be made that the purchase was one in gross without regard to acreage. *Shearer v. Cooper*, 21 Cal.2d 695, 701, 134 P.2d 764; *Younis v. Hart*, 59 Cal.App.2d 99, 103, 138 P.2d 323; *Lombardi v. Sinanides*, 71 Cal.App. 272, 277, 235 P. 455; *Odson v. Swanson*, 70 Cal.App. 279, 282, 233 P. 354.

[3] Appellants argue that in accepting a deed without reading it, which deed showed on its face the acreage actually conveyed, the plaintiffs are barred by their own negligence from a recovery. In support of this argument appellants rely heavily on *Sisk v. Caswell*, 14 Cal.App. 377, 112 P. 185. If that case, which has apparently never since been cited on this point, stands for the principle that failure to read a document which would disclose the true facts is an absolute bar to recovery in a case of this nature it is out of line with a host of California cases. The correct rule is rather that whether the failure to read a document is such negligence as to bar relief is ordinarily a question for the trier of fact. *National Auto & Cas. Ins. Co. v. Industrial Acc. Comm.*, 34 Cal.2d 20, 26, 206 P.2d 841; *California Packing Corp. v. Larsen*, 187 Cal. 610, 613-614, 203 P. 102; *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, 27-28, 87 P. 1029; *Travelli*

v. Bowman, 150 Cal. 587, 590-591, 89 P. 347; *Mills v. Schulba*, 95 Cal.App.2d 559, 564-565, 213 P.2d 408; *Tieso v. Tieso*, 67 Cal.App.2d 872, 877, 155 P.2d 659; *Hanlon v. Western Loan & Bldg. Co.*, 46 Cal.App. 2d 580, 597-598, 116 P.2d 465; Particularly is this true where the failure to read is induced by reliance upon the fraudulent representations of the other party. *Security-First Nat. Bank v. Earp*, 19 Cal.2d 774, 777, 122 P.2d 900; *Glickman v. New York Life Ins. Co.*, 16 Cal.2d 626, 631, 107 P.2d 252, 131 A.L.R. 1292, et seq.; *Fleury v. Ramacciotti*, 8 Cal.2d 660, 662, 67 P.2d 339; *California Trust Co. v. Cohn*, 214 Cal. 619, 627, 7 P.2d 297.

On cross-examination the plaintiff Cali was asked:

"Q. In other words, you bought a piece of property for the sum of seventy-two thousand dollars and you weren't sufficiently interested to read any of the documents pertaining to the transaction?" He replied: "A. I felt that I was dealing with people that had integrity on whatever they told me. I relied on what they told me and I have always done that."

[4] It was within the province of the jury to determine whether plaintiffs' failure to read the deed was reasonably excused by their reliance upon appellants' representations.

[5] Appellants argue strenuously that no proper evidence appears in the record to support the award of damages to plaintiffs in the sum of \$12,000 and that the award in that amount is grossly excessive. An examination of the record satisfies us that this argument is not open to appellants on this appeal by reason of their conduct of the case in the trial court.

[6] It is true that under section 3343, Civil Code the "out-of-pocket" rule is the correct measure of damages in cases of this character, *Oliver v. Benton*, 92 Cal. App.2d 853, 854, 208 P.2d 375, i. e., the difference between the price paid and the market value of the property received. The only evidence on the subject of damages was given by the plaintiff Cali (neither the appellants nor the other defend-

ants introduced any evidence on the subject of damages):

"Q. * * * Mr. Cali, forgetting all about this adjustment that was made, for other matters, storm damage and equipment and so forth, what is your opinion of the value of that ranch consisting of somewhere between sixty and sixty-one acres, as of the time you bought it; that is, what is your opinion of the value of the ranch that you got? A. Well, I wouldn't have paid over sixty thousand dollars for it."

Appellants now assert that at most this is a statement not of market value but of value to the purchaser Cali and to make it the measure of damages is to adopt the "benefit-of-the-bargain" rule instead of the "out-of-pocket" rule established by Civ. Code, sec. 3343. The answer was given in response to the question "what is your opinion of the *value* of the ranch that you got?" The answer by a layman "I wouldn't have paid over sixty thousand dollars for it" might well be intended by him as equivalent to saying: "Its value is not over sixty thousand dollars" and be so understood by the jury.

No motion to strike the answer on the ground that it was not proper evidence of value, or on any other ground, was made and later on cross-examination the cross-examiner assumed that the answer was testimony of value. We quote from the record: "Q. You have testified as to market values. You are a qualified witness: you own the land. How much is five acres of that land worth?"

It is true that this question was asked by counsel for the defendant Title Company, but counsel for appellants not only left the cross-examination of Cali to this attorney, but just two pages before the page on which the last quoted statement and question appears in the transcript counsel for appellants successfully argued to the court in support of a question asked by the same cross-examiner of the same witness.

Particularly significant is the following, all of which was brought out on cross-

examination, with no objection or motion to strike from counsel for appellants:

"Q. Well, how much were those damages? * * * A. Well, I said at that time, if I—if the ranch was just like I found out it was afterwards, I wouldn't have paid over sixty thousand dollars for it. That is my answer.

* * * * *

"Q. Well, how much are those damages? A. Well, at that time—at that time, as I stipulated, my counsel asked me and I said, 'If I know what I know now, I wouldn't have paid over sixty thousand dollars.'

"Q. I see. And you did pay on a basis of seventy-two thousand dollars, is that right? A. Yes.

"Q. So you figure damages twelve thousand dollars? A. Yes.

"Q. Is that correct? A. Yes."

Thus on cross-examination the answer "I wouldn't have paid over sixty thousand dollars" was twice repeated by the witness and then the figure \$12,000 was planted in the minds of the jury by a leading question, all without objection or motion to strike from appellants' counsel.

The only instruction on damages given by the court was in the following language: "If you find that plaintiffs have established the allegations of their complaint * * * and * * * have sustained damages * * * I instruct you that you should award plaintiffs a verdict for an amount equal to the damages which you find plaintiffs have sustained as a result thereof, provided, however, that your verdict must not exceed the sum of \$25,000, which is the amount of the prayer of plaintiffs' complaint."

[7] Not only was no instruction on the "out-of-pocket" rule requested by appellants or any other party, but it does not appear from the transcript at whose request the quoted instruction on damages was given. Where the record is silent on the subject, in support of the judgment "we must presume that such instructions were given at defendants' request." *Deevy v. Tassi*, 21 Cal.2d 109, 124, 130 P.2d 389, 398 and cases cited; *Downey v. Bay Cities Transit Co.*,

94 Cal.App.2d 373, 210 P.2d 713; Blythe v. City and County of S. F., 83 Cal.App.2d 125, 132, 188 P.2d 40.

[8] Counsel may not so conduct themselves in the trial of a case as to lead the jury to proceed upon one theory and then seek to abandon that theory upon appeal and adopt another one. *Graddon v. Knight*, 99 Cal.App.2d 700, 222 P.2d 329; *Ernst v. Searle*, 218 Cal. 233, 240-241, 22 P.2d 715; *Mathews v. Pacific Mut. Life Ins. Co.*, 47 Cal.App.2d 424, 428, 118 P.2d 10; 2 Cal.Jur. 237. This rule has frequently been applied where one theory of damages was acquiesced in at the trial and appellants sought to shift to another theory of damages on appeal. *Wolfsen v. Hathaway*, 32 Cal.2d 632, 646, 198 P.2d 1; *Grupe v. Glick*, 26 Cal.2d 680, 691, 160 P.2d 832; *Gibson Properties Co. v. City of Oakland*, 12 Cal.2d 291, 298-300, 83 P.2d 942; *Kaufman v. Tomich*, 208 Cal. 19, 26-27, 280 P. 130; *Wharam v. Investment Underwriters*, 58 Cal.App.2d 346, 350, 136 P.2d 363.

[9] Not only is it to be presumed that the single instruction on damages, sketchy as it was, was given at appellants' request but after failing to request an instruction on the "out-of-pocket" rule appellants have no standing to complain before us that the jury was not more adequately instructed on the measure of damages. *Perry v. City of San Diego*, 80 Cal.App.2d 166, 171-172, 181 P.2d 98. On the whole record appellants are in no position to attack the damages allowed by the jury.

Appellants point out that by reason of an adjustment for damage by flood and shortage in equipment the amount actually paid by plaintiffs was reduced to \$68,855 and argue that even under Cali's testimony an award of \$8,855 is the maximum that could be supported. But the question

asked Cali on direct was "*forgetting all about this adjustment* that was made, for other matters, storm damage and equipment and so forth, what is your opinion of the value of that ranch * * *?" The fair construction of the answer to this question as so qualified is that if there had been no storm damage and no shortage of equipment the witness would not have paid over \$60,000.

On cross-examination Cali testified that sold by the acre the land would be worth \$1200 per acre. He qualified this answer "Without those other reservations that I put in there though." This referred to his testimony that 5 acres as part of a 65 acre tract is more valuable because "our equipment and our overhead is always the same and practically our cost is, and if we are farming we can pay our expenses on five acres. * * *

"Q. Well, if I understand you correctly then, you feel your margin of profit on additional five acres would be higher than on the other acres? A. Oh, yes, sure. No question about that."

[10] The total effect of this evidence was for the jury to determine.

Whether, as appellants claim, there was no evidence that the county had an easement on the land conveyed need not be decided, because Cali testified that he could not estimate the effect of the easement on the value of the property and it is clear from the record that in his testimony as to damages above quoted Cali was restricting himself to the shortage in acreage alone.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice Pro Tem., concur.

Hearing denied; SCHAUER, J., dissenting.

102 Cal.App.2d 88

ARNOLD et al. v. HADGIS.**Civ. 18161.**District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1951.

Action by Oliver P. Arnold, and another against Michael W. Hadgis to remove the cloud of an alleged invalid attachment. Defendant filed a cross-complaint. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered a judgment quieting plaintiffs' title and defendant appealed. The District Court of Appeal, Wilson, J., held that defendant failed to make out a prima facie case of fraud, and did not sustain the burden resting upon him to show that plaintiffs' title was acquired by a fraudulent conveyance.

Affirmed.

1. Fraudulent conveyances Ⓒ115(1)

A debtor may prefer any one of his creditors over others provided he does not do so to defraud his creditors. Civil Code, §§ 3431, 3432.

2. Fraudulent conveyances Ⓒ115(1)

Where debtor was in a position in which he was obliged to allow one creditor or the other to obtain a preference, fact that one creditor succeeded in obtaining payment of his loan and the other creditor was left without security, was not an act of fraud.

3. Quieting title Ⓒ44(3)

In action to remove the cloud of alleged invalid attachment levied on property, evidence was insufficient to establish that there was a departure from usual business methods in transaction whereby plaintiffs acquired title to property.

4. Fraudulent conveyances Ⓒ118(1)

Where debtor was in a position in which he was obliged to allow one creditor or the other to obtain a preference on property, fact that one creditor was a brother of debtor, and that debtor preferred his brother was not an indication of conspiracy to hinder, delay and defraud the other creditor.

5. Fraudulent conveyances Ⓒ273, 308(1)

Whether a transfer is in fraud of creditors is a question of fact and not of law, and when there is consideration for the transfer, burden is on the party attacking it to establish an actual fraudulent intent.

6. Fraudulent conveyances Ⓒ295(1)

Though the burden may shift when a prima facie case is made for a fraudulent conveyance, fraud must ultimately be proved by a preponderance of the evidence.

7. Fraudulent conveyances Ⓒ299(1)

In action to remove the cloud of an alleged invalid attachment, wherein defendant alleged that plaintiffs' title was acquired by a fraudulent conveyance, evidence established that defendant did not make out a prima facie case of fraud and did not sustain the burden resting upon him.

8. Appeal and error Ⓒ931(1)

Where trial court drew contrary inferences and made its findings thereon, the evidence and the inferences to be drawn therefrom must be regarded in light most favorable to support the judgment, and the conclusions of the trial court were binding on the District Court of Appeal.

Butts & Grosenbaugh, Hollywood, for appellant.

Bernard Lawler, El Segundo, for respondents.

WILSON, Justice.

Alleging ownership of a parcel of real property, plaintiffs brought this action against defendants Hadgis and James Arnold to remove the cloud of an alleged invalid attachment levied on the property in an action in which Hadgis was plaintiff and James Arnold was defendant. Judgment was entered quieting plaintiffs' title, declaring the claims of defendant to be without right, and decreeing the purported levy of attachment to be null and void. Defendant Hadgis has appealed from the judgment.

On July 15, 1947, plaintiff Oliver Arnold loaned his brother James \$15,000 and took

the latter's note for that amount. Title to the property in question was taken in the names of Broz and wife on August 22, 1947, subject to a trust deed in favor of one Barnes for \$18,000. Broz and wife never claimed to be owners of the property or to have any interest therein other than as trustees for James Arnold.

Hadgis and James Arnold had been in a business venture together wherein James became indebted to Hadgis on July 2, 1947, in the sum of \$24,500. At some time prior to May 9, 1949, Hadgis brought an action on his claim and caused an attachment to be levied on the property.

Hadgis and his brother purchased the Barnes trust deed. By reason of its delinquency they ordered a trustee's sale, which was set for June 22, 1949. The amount necessary to satisfy the trust deed was \$20,118.59. On the date of sale at James Arnold's request Hadgis consented to postpone the sale for one day in order to enable Arnold to obtain funds.

On June 21, the day prior to the original date set for the trustee's sale, James offered to turn the property over to Oliver in settlement of his \$15,000 debt. Oliver obtained a loan from another brother of \$14,000 to be applied on the payment of the trust deed. Previously Oliver had offered plaintiff Steel a 25 percent interest in the property if the latter would advance \$5,000, which offer Steel accepted.

On the morning of June 23, the date to which the sale had been postponed, Oliver, James and Broz met at the trustee bank. While they were in conference with the agent of the bank Hadgis entered and was told that Oliver and Steel were paying off the trust deed. He informed them he had an attachment on the property and threatened litigation if the deal was consummated. Broz assured all of them the attachment was invalid and stated the reasons therefor. Steel and Oliver, having decided to pay off the trust deed, endorsed their re-

spective checks to Broz who delivered them to the agent of the bank. Hadgis and his brother were then paid the amount required to satisfy the trust deed. At the direction of James Arnold, Broz and wife delivered a conveyance of the property to Oliver Arnold and Steel. They entered into a written agreement on the same day for the division of the rentals, 75 percent to Oliver and 25 percent to Steel. Thereafter Steel collected the rentals and kept the books. The upstairs portion of the house was leased and Mrs. James Arnold resided in the downstairs portion until Oliver Arnold asked her to vacate the premises, which she did.

Defendant asserts the conveyance made to plaintiffs by Broz and wife as title holders and trustees for James Arnold is void for the reason that it was made for the purpose of hindering, delaying and defrauding defendant as a creditor of James.

It is not contended that the conveyance was made without consideration or that the consideration was inadequate. The property had been purchased for \$39,000 and the only evidence as to its value at the time of the transfer was that it was worth \$35,000—just the total of James' debt to Oliver and the amount paid on the trust deed.

[1] Defendant concedes it is well settled that a debtor may prefer any one of his creditors over others provided he does not do so to defraud his creditors. This is statute law. Civil Code, secs. 3431, 3432;¹ U. S. Fid. & Guar. Co. v. Postel, 64 Cal. App.2d 567, 571-572, 149 P.2d 183.

Having made the concessions of (1) consideration for the conveyance to plaintiffs, and (2) a debtor's right to create a preference, defendant enumerates what he designated as "indicia" or "badges" of fraud in connection with the transfer of title which he maintains require a reversal of the judgment.

1. Section 3431 reads: "In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."

Section 3432 reads: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

[2] 1. Defendant contends that the execution of the deed from Broz to plaintiffs, made at the direction of James while defendant's action against the latter was pending, is evidence of fraudulent intent. The pendency of defendant's action to enforce payment of James' indebtedness is not a circumstance to be considered as indicating fraudulent intent of any of the parties. James was in a position in which he was obliged to allow one creditor or the other to obtain a preference. He could have preferred his brother by conveying the property to him in payment of his loan, which he did, or he could have permitted defendant Hadgis to obtain title by a sale under his trust deed and by allowing him to take judgment and to enforce his attachment lien in the action pending. The fact that Oliver succeeded in obtaining payment of his loan and defendant was left without security is not an act of fraud on the part of plaintiffs or of James.

2. The alleged secrecy and haste of the transfer is instanced as a badge of fraud. Hadgis had consented to postpone for only one day the sale under the trust deed. Oliver had telephoned his brother in San Francisco who transmitted by wire part of the funds to pay off the trust deed and had procured part from Steel. The meeting at the bank was only a few hours before the sale would have taken place. There was no secrecy about the transaction and the haste was necessary by reason of defendant's refusal of a further delay.

[3] 3. We find no support for the contention of defendant that there was a departure from usual business methods in the transaction whereby plaintiffs acquired title. Steel had resided for 48 years near the property involved and had knowledge of its value. His failure to demand a title insurance policy before advancing his part of the money is explained by his desire to assist his friend and former business associate in the transaction.

4. Defendant says the inclusion of all the debtor's property indicates fraud, but there is no evidence that James did not own other property than that covered by the deed to plaintiffs.

5. The fact that plaintiffs allowed James' wife to reside in the property for some time after they acquired title was due, as shown by the evidence, to Oliver's natural reluctance to force his sister-in-law out of her apartment and is no indication of retention of possession by James. The contrary is shown by the fact that Steel collected the rents on behalf of himself and Oliver from the other tenant in the property.

[4] 6. Finally defendant contends that the fact that Oliver and James are brothers is an indication of conspiracy between them to hinder, delay and defraud defendant as a creditor. Since James' indebtedness to Oliver in the sum of \$15,000 is uncontroverted, their blood relationship does not detract from James' legal right to pay one creditor and not another.

[5-7] Whether a transfer is in fraud of creditors is a question of fact and not of law, and where there is a consideration for the transfer the burden is on the party attacking it to establish an actual fraudulent intent. Though the burden may shift when a prima facie case is made out, fraud must ultimately be proved by a preponderance of the evidence. *Asadoorian v. Kludjian*, 210 Cal. 564, 565, 292 P. 644. Defendant did not make out a prima facie case of fraud and did not sustain the burden resting upon him.

[8] Defendant's assertion of fraud is based on inferences which he alone has drawn from the evidence. The trial court drew contrary inferences and made its findings thereon. The evidence and the inferences to be drawn therefrom must be regarded in the light most favorable to the support of the judgment, *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 779, 163 P.2d 756; *Wheeler v. Barker*, 92 Cal.App.2d 776, 780, 208 P.2d 68; *Chichester v. Mason*, 43 Cal.App.2d 577, 585, 111 P.2d 362, and the conclusions of the trial court are binding on us. *Cook v. Huntley*, 44 Cal.App.2d 635, 639, 112 P.2d 889.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

102 Cal.App.2d 81

**BAY AREA PAINTERS & DECORATORS
JOINT COMMITTEE, Inc., v. ORACK.**

Civ. 14408.

District Court of Appeal, First District,
Division 2, California.

Jan. 30, 1951.

Action for declaratory relief by the Bay Area Painters and Decorators Joint Committee, Inc. against I. Orack involving a collective agreement between associations of employers and unions wherein defendant became a party to such contract as a non-member signatory. The Superior Court in and for the City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J. Pro Tem, held that contract was valid and enforceable.

Judgment affirmed.

1. Monopolies ☞12(1)

A collective agreement between associations of employers and unions providing that non-member employers must, as a condition to becoming a party to such an agreement, deposit an annual sum equal to that paid by association members and that such sums were to be used in securing compliance with provisions of agreements, provision assessing non-member employers was not discriminatory nor an invalid restraint of trade.

2. Monopolies ☞12(1)

It is proper for associations of employers to agree on methods of procedure whereby their activities might be policed and supervised so as to insure observance of labor agreement entered into between them, and it is further proper that a non-member who adheres to agreement may well join in such an agreement for the purpose of producing stability in the industry.

3. Monopolies ☞12(1)

Agreements entered into between employers and unions for bettering of conditions in the industry, even where employer is called on to bear a charge involved therein, do not constitute illegal monopolies or restraints of trade.

4. Monopolies ☞12(1)

Under a collective agreement between associations of employers and unions, providing that non-member employers must, as a condition to becoming party to such an agreement, deposit an annual sum equal to that paid by association members and that such sums were to be used in securing compliance with provisions of the agreement, fact that non-member employer paid his required sum to committee rather than to association, would not constitute a discrimination against him, inasmuch as amounts paid by both non-member employers and members of association were exactly equal.

M. S. Huberman, San Francisco, for appellant.

Tobriner & Lazarus, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment declaring and decreeing that a questioned provision in a contract was valid and enforceable and that appellant was legally obligated to deposit the sums specified in the contract.

The instant case arose from an action for declaratory relief which respondent, a non-profit corporation, brought against appellant, who, although not a member of a signatory association, became a party to the contract as a non-member signatory. The complaint sets forth the contention of appellant that the provisions for financing the administration of the agreement is "discriminatory against appellant; imposes an unfair and unreasonable imposition and restraint upon trade and commerce," that it is a "discrimination against defendant," and "the exaction of such charge is unlawful"; that this section is "invalid and contrary to law." The complaint also sets forth respondent's contention that the questioned provision is valid and seeks a judgment that "plaintiff is entitled to defendant's share of the expenses of administering the contract."

Respondent is a non-profit corporation, the members of which are representatives

of associations of painting and decorating contractors in the San Francisco Bay Area, and representatives of unions of painting and decorating workers in that area. Respondent was organized in order to function as a permanent joint committee under a contract executed by these associations and unions in behalf of their respective members.

Appellant is a painting contractor in the Bay Area but is not a member of any of the associations. He did, however, become a party to the agreement as a so-called non-member signatory.

The contract sets forth the organization and functions of respondent and provides for the establishment of local joint committees and other committees and boards. An equal number of representatives from the employer organization and the employee organization in a given locality make up the membership of a local joint committee. A local joint committee is authorized to adjust disputes and grievances and is empowered to have access to records pertaining to violations of the agreement with authority to request testimony under oath before a notary public. Funds advanced by the signatories of the agreement are to be used exclusively for such enforcement purposes. An employer who is not a member of one of the associations may become a party to the agreement either by joining the association or by signing the agreement individually; in the latter case such a party is designated a non-member signatory.

The Joint Committee issues shop cards to members of the Association and to non-member signatories upon the payment of a Twelve Dollar (\$12.00) flat fee. Since the member of the Association pays dues to it for the purpose of financing the contract, the agreement correspondingly obligates the non-member signatories "to deposit on account of his share of the expense of administering the contract an amount equal to the yearly dues paid by the Association." The agreement specified the reason for this provision for financing in the following language:

"Such shop cards are issued for the following reasons: It is agreed that it is un-

fair for any person to be bound by the terms of this agreement unless other parties thereto observe it likewise. It is recognized that it would constitute unfair competition for one employer to observe reasonable working conditions agreed upon while his competitors ignored such conditions. To assure all parties that every party to the agreement complies therewith, it is necessary to use investigators and to maintain a central supervising agency operating as and through the Local Joint Committee. Such supervising involves expense which should as a matter of equity, be prorated on a reasonable basis among all parties who benefit by this agreement and its observance. It is therefore agreed that the expense of supervising be borne by the Association and/or Chapters and that Shop Cards should be issued as above described to attest that the proportionate share of such expense has been met. As non-member signatories do not share in the contribution made by the Association, such non-member signatories shall bear a reasonable prorate on the cost of supervising and shall make a deposit on account of their share of the cost. Such deposit shall be made at the time of the issuance of the cards herein provided and in the amounts herein specified and upon the specified amounts being deposited a yearly renewal card will be issued."

The actual amount of the yearly dues to the Association is sixty dollars. Hence, the financial obligation of the non-member signatories, in order to obtain a shop card, amounts to seventy-two dollars.

While the agreement specifies that all funds advanced by signatories are to be used exclusively for enforcement purposes, it likewise provides that if there are any deficits they shall be borne by the employer association and union groups rather than by the non-member signatories.

Appellant states that the question to be determined upon this appeal is whether or not in a collective agreement between associations of employers and unions it may validly be provided that non-member employers must as a condition to becoming party to such an agreement deposit an annual sum equal to that paid by association

members to be used in securing compliance with the provisions of the agreements. Appellant states frankly that he is not contending that a collective agreement between associations of employers and labor unions is invalid even though its necessary effect in a highly unionized area is to require non-member employers to become parties to the agreement in order to secure labor. He states further that his quarrel is not with the objective of the agreement to establish uniform wages and working conditions throughout the area but rather with the particular sanction or method employed for enforcing it. It is appellant's position that in the absence of legislative sanction the provision for assessments against non-member employers is discriminatory and is invalid restraint of trade. However, appellant cites no authorities in support of his contentions.

The same contentions were made by appellant in the trial court and the trial judge (the Honorable Milton D. Sapiro) in a well reasoned opinion ruled against these contentions. We believe that said opinion correctly determined the issues involved and we adopt the following portions thereof as part of the opinion of this court:

"The express purpose of the agreement under which plaintiff was created was to stabilize the painting industry by creating harmonious relations and maintaining stability of conditions of employment, the subject matter of this proceeding, first provides for the organization of the plaintiff committee, then proceeds to set out certain provisions covering apprentices, employers and unions. It then provides for the wages and working conditions of employees, and other terms and considerations as to painting work.

"Provision is made in the agreement for the supervision of the activities of the employers for the purpose of assuring their conformance to the working conditions that had been established.

[1] "The cost involved in supervising the conduct of the employers is borne by a fund to which members of the association are required to contribute \$12.00, for which an official shop card is issued, and non-mem-

bers of the association are required to pay \$12.00 plus certain dues, and for which they receive an identification card. The dues that the non-members are required to pay are equal to the dues paid by the members of the associations to their associations. Defendant has contended that the agreement is unenforceable as to him because it is invalid on its face. He bases his contention on a claim that the agreement violates the anti-trust laws, and also that there is discrimination. Neither of these grounds of objection is tenable. The agreement appears clearly to be valid and enforceable.

[2] "It has been long recognized, and it is clearly a desirable situation to achieve, that employers and unions work together for stability in the industry. As this agreement recites, if an employer enters into an agreement with the union and fails to conform to the working conditions, it would result in unfair competition among other employers, and would also create unrest, labor disturbances, and many other situations that would work to the disadvantage of public welfare. It is therefore proper for associations of employers to agree on methods of procedure whereby their activities might be policed and supervised so as to insure observance of the labor agreement entered into between them.

[3] "Inasmuch as this is true as to the members of the association, it certainly follows that this activity could be extended one step further and a non-member who adheres to the agreement may well join in such an agreement for the purpose of producing stability in the industry. It follows as a matter of course that there is a certain cost involved in supervising and policing the industry. It is proper for this cost to be borne by a charge placed on the employers. The cases cited by plaintiff in the memorandum filed: *Electrical Contractors' Association v. [A. S.] Schulman Electric Co.*, 1945, 391 Ill. 333, 63 N.E.2d 392 [161 A.L.R. 787], and also *Griffiths & Sprague Stevedoring Co., v. Waterfront Employers Association of Pacific Coast*, 1947 [9 Cir.], 162 F.2d 1017, clearly set forth why such agreements are not in restraint of trade.

Likewise in *Minkoff v. Jaunty Junior, Inc.* [Sup. 1942], 36 N.Y.S.2d 507, it is recognized that agreements entered into between employers and unions for the bettering of conditions in the industry, even where the employer is called upon to bear a charge involved therein, do not constitute illegal monopolies or restraints of trade. So here the agreement itself cannot be said to constitute a monopoly or restraint of trade. To the contrary, its provisions that would produce harmony and peace in an industrial activity are of the type that ought to be encouraged, and the court should make every effort to see that they are lived up to for the purpose of producing industrial peace that would so benefit the community.

"The particular agreement involved in this case does not in any manner control prices, nor limit the activities of the employer parties so as to stifle or suppress competition, nor injure the public. It purports only to regulate relations between employer and employee groups. There is nothing in the contract that would point to the contrary.

[4] "The claim of discrimination is not well founded. It is true that the non-member employer pays the joint Committee a sum greater than that paid directly to the joint committee by the employer who is a member of an association. However, that employer pays dues to the association in a sum equal to the amount required to be paid by the non-member employer to the committee. The employers are placed in exactly the same position when it comes to a determination of the amount expended by them in this activity. The fact that the non-member employer pays to the committee rather than to an association does not constitute a discrimination, inasmuch as the amounts paid are exactly the same. There is no contention, and there could be no contention, that the amounts paid are unreasonable because it appears from the agreement that the charge made is but a small charge that would not work a hardship on any employer.

"There seems to be no reason whatsoever for declaring this agreement invalid. On

the other hand, there seems to be ample reason to sustain the agreement and to grant the declaratory relief called for by the complaint."

In view of the foregoing we believe the judgment should be and the same is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.



101 Cal.App.2d 740

PEOPLE v. BROWN.

Cr. 741.

District Court of Appeal
Fourth District, California.

Jan. 15, 1951.

Hearing Denied Feb. 8, 1951.

James E. Brown, Jr., was convicted in the Superior Court of San Diego County, John A. Hewicker, J., of subscribing the names of fictitious persons to an initiative petition and he appealed from the judgment and from the order denying his motion for a new trial. The District Court of Appeal, Mussell, J., held that defendant could be convicted of such crime, as against contention that the signing of the petition by defendant was not done under oath and that petition could not therefore be considered as a proposed initiative petition.

Judgment and order affirmed.

I. Statutes $\Rightarrow$ 327

Where defendant, after subscribing fictitious names to an initiative petition, returned petition to deputy county clerk with intent that petition be processed for filing with county clerk, and that signatures attached thereto be used to qualify measure for ballot, and petitioner signed affidavit attached thereto, defendant could be convicted of subscribing names of fictitious persons to initiative petition, as against contention that signing of petition by defendant was not done under oath and that petition could not therefore be considered

as a proposed initiative petition. Elections Code, § 11649.

2. Forgery *§*12(2, 4)

A forged writing need not create a valid and legally enforceable obligation in order to constitute the making of it a forgery, and it is sufficient that it may possibly deceive another and was prepared with intent to deceive and defraud another.

3. Forgery *§*29(2)

Where writing alleged to have been forged shows on its face that it might be means of fraud, no averments of extrinsic facts to show how it could be are necessary.

4. Forgery *§*1, 12(2, 4)

The crime of "forgery" consists either in the false making or alteration of a document without authority or the uttering of such a document with intent to defraud, and whether forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial, and test is whether upon its face it will have effect of defrauding one who acts upon it as genuine.

See publication Words and Phrases, for other judicial constructions and definitions of "Forgery".

5. Forgery *§*12(2)

A deed which conveys no title may be subject of forgery.

6. Perjury *§*10

In a prosecution for perjury it is no defense that oath was administered or taken in an irregular manner, or that person accused of perjury did not go before or was not in presence of officer purporting to administer oath, if accused caused or procured such officer to certify that oath had been taken or administered. Pen. Code, § 121.

7. Statutes *§*308

Where type used in printing of quoted title of initiative petition was substantially same as specified in constitution and was a substantial compliance with constitutional provisions, petition would be held to meet qualifications of constitution. Const. art. 4, § 1.

Ray Miller, San Diego, for appellant.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was tried before the court without a jury and found guilty of six counts in an information charging violations of section 11649 of the Elections Code. This section provides that: "Every person who subscribes to any initiative, referendum or recall petition or to any nominating petition a fictitious name, or who subscribed thereto the name of another, is guilty of a felony and is punishable by imprisonment in the State prison for not less than one nor more than fourteen years."

The separate offenses charged related to the subscription by the defendant of six different names of fictitious persons to an initiative petition to legalize gambling in the State of California. Defendant was sentenced to imprisonment in the State's prison and he appeals from the judgment and order denying his motion for a new trial.

The principal contention of appellant is that since the instrument upon which the prosecution was based was not sworn to by him, it was not an initiative petition as defined by Article IV, section 1, of the California Constitution and that the judgment of conviction should, therefore, be reversed.

From the record before us it appears that the defendant was employed to circulate the petition involved, and, after having subscribed fictitious names thereto, he returned it to the distributor's office, where he signed the affidavit attached thereto, stating therein that he was a registered elector; that he had solicited the signatures attached to the petition; that all the signatures were made in his presence and upon the dates shown and were solicited by him within the county; that to the best of his knowledge and belief, each signature was the genuine signature of the person whose "name it purports to be." The affidavit purports to be subscribed and

sworn to before a deputy county clerk, who signed and delivered it to the county clerk's office, where the clerk's seal was affixed and the document filed.

It appears that six of the signatures listed on the petition were of fictitious names subscribed to the petition by the defendant and no claim was made by the defendant at the trial that the signatures were genuine.

The Attorney General of the State prepared a title and summary of the initiative measure and a certificate of the Secretary of State was issued showing that the measure was received and filed in his office and was in due form as required by the provisions of Article IV, section 1, of the California Constitution. The Attorney General executed a certificate to the effect that the copies of the initiative measure attached to the certificate were identical with that of the draft of the measure submitted to him by the proponents and the measure was placed on the ballot as Proposition Six at the general election of November 7, 1950. The initiative measure in question qualified for the ballot and was substantially in the form prescribed by Article IV, section 1, of the California Constitution.

[1] The contention that the signing of the petition by the defendant was not done under oath and that, therefore, the document cannot be considered as a proposed initiative petition is without merit. Unquestionably, the defendant, when he returned the petition to the deputy county clerk, intended that the document was to be processed for filing with the county clerk and that the signatures attached thereto were to be used to qualify the measure for the ballot. The question of whether or not an oath was administered to the defendant is not material here. The defendant was not prosecuted for making a false oath to the document in question but for the signing of fictitious names thereto.

[2-5] Section 11649 of the Elections Code was based on former Penal Code section 472a, which was in Chapter 4, Part 1, Title 13 of the Penal Code, among the sections relating to forgery and counter-

feiting. In the case of a forgery of an instrument it is not necessary that the forged writing create a valid and legally enforceable obligation in order to constitute the making of it a forgery. It is sufficient that it may possibly deceive another and was prepared with intent to deceive and defraud another. Where the writing alleged to have been forged shows on its face that it might be the means of fraud, no averments of extrinsic facts to show how this could be are necessary. In *re Parker*, 57 Cal.App.2d 388, 391-392 134 P.2d 302.

As was said in *People v. McKenna*, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068: "The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. Sec. 470, Pen.Code. Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine. *People v. Gayle*, 202 Cal. 159, 259 P. 750; *People v. Thorn*, 138 Cal.App. 714, 33 P.2d 5; *People v. Munroe*, 100 Cal. 664, 35 P. 326, 24 L.R.A. 33, 38 Am.St.Rep. 323. A deed which conveys no title may be the subject of forgery. *People v. Baender*, 68 Cal.App. 49, 228 P. 536."

[6] In a prosecution for perjury it is no defense that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered. Penal Code section 121.

We are of the opinion that the instant petition with the signatures thereon and the statements in the affidavit signed by defendant attached thereto was a sufficient showing that the document as submitted by defendant to the deputy county clerk would have the effect of defrauding those who acted upon it as genuine. The record

shows beyond doubt that defendant signed the fictitious names to the petition with intent to defraud. Under such circumstances, it is immaterial whether an oath was actually administered to him.

[7] Defendant argues that the petition did not meet the qualifications of Article IV, section 1, of the Constitution or the statutes in that no proof was adduced that the words "Initiative measure to be submitted directly to the electors" were printed across the top of the petition in 12-point black face type. The petition was introduced in evidence, and the certificate of the Secretary of State relating to the same measure in identical form shows that it met the qualifications of Article IV, section 1, of the Constitution. The type used in the printing of the quoted title was substantially the same as specified in the Constitution and a substantial compliance with its provisions. *California Teachers Ass'n v. Collins*, 1 Cal.2d 202, 204, 34 P.2d 134.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



101 Cal.App.2d 862

LARSEN v. LARSEN.

Civ. 14487.

District Court of Appeal, First District,
Division 2, California.

Jan. 25, 1951.

Action for separate maintenance by Hazel Curran Larsen against Harald Larsen. The Superior Court in and for the City and County of San Francisco, Twain Michelson, J., entered an order awarding plaintiff \$1,000 additional attorney's fees and \$4,689.18 for necessities supplied to plaintiff and infant child of parties and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that the court had power to grant additional attorney's fees and that award for

the necessities supplied to plaintiff and infant daughter of parties was not an abuse of discretion.

Order affirmed.

1. Husband and wife ⇨295

Where supplemental award made to plaintiff's wife in separate maintenance action was not specifically made for completed past services rendered by plaintiff's attorney and in order prepared by plaintiff's counsel amount allowed was described as for services rendered but in order as signed, words for services rendered, were struck out by trial judge, trial judge expressly demonstrated that amount was not awarded for past services and a finding as to indebtedness for attorney's services already incurred by plaintiff was then superfluous and that court did not strike out hidden finding in making award for necessities and services rendered by attorney was an oversight. Civ.Code, § 137.

2. Appeal and error ⇨948

Unless there is clear evidence to effect that granting of additional amount of attorney's fees to plaintiff wife in separate maintenance action constitute an abuse of discretion, order will not be set aside on appeal. Civ.Code, § 137.

3. Husband and wife ⇨295

As a part of temporary alimony, a payment of a lump sum for past expenses may be allowed when such is necessary to enable wife to further prosecute her case and to support herself on amount to be paid to her periodically in the future. Civ.Code, § 137.

4. Husband and wife ⇨298(1), 301

Term "necessary" in statute providing for allowance of alimony and costs, must be given its broadest connotation and what is necessary rests in sound discretion of trial judge. Civ.Code, § 137.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessary".

5. Husband and wife ⇨298(1), 301

In the allowance of alimony and costs, law recognizes fact that wife is entitled

to live in her customary manner according to her station in life. Civ.Code, § 137.

6. Husband and wife $\hookrightarrow$ 298(1), 301

In allowance of alimony and costs, wife is not compelled to exhaust corpus of her separate estate if her income is not sufficient to provide her with adequate means for counsel fees and living expenses. Civ.Code, § 137.

7. Husband and wife $\hookrightarrow$ 298(1)

Ordering defendant husband to repay amount of indebtedness incurred by plaintiff wife for necessities between separation of parties and beginning of monthly alimony payments was not an abuse of discretion. Civ.Code, § 137.

8. Husband and wife $\hookrightarrow$ 299(3)

Trial court's order in action for separate maintenance that defendant husband pay wife amount after beginning of monthly alimony payment, for storage and moving of furniture partly prior and partly after that date constituted a modification of alimony by court and necessity of incurring indebtedness caused by defendant's behavior in removing from the state for a period leaving wife and children in expensive hotel, constituted new circumstances which in court's discretion might have justified increase in award. Civ. Code, § 137.

9. Husband and wife $\hookrightarrow$ 299(3)

Increase in alimony may be granted and/or partly in lump sum when such is necessary to prevent old indebtedness from hampering the ability of wife to live on future monthly alimony payments. Civ. Code, § 137.

10. Appeal and error $\hookrightarrow$ 934(1)

Where minute order entered in separate maintenance action from which defendant husband timely appealed and written order from which defendant husband also appealed contained different amounts of indebtedness which husband was directed to pay, appellate court would assume the different amount in minute order was caused by clerical error or inadvertance of Court and the written order was intended to correct that, although such was not expressly stated. Civ.Code, § 137.

Young, Hudson & Chouteau, San Francisco, for appellant.

Lucille F. Athearn, San Francisco, for respondent.

NOURSE, Presiding Justice.

In an action for separate maintenance defendant, husband, appeals from an order of November 10, 1949 awarding the plaintiff \$1000 additional attorney's fees and \$4,689.18 for necessities supplied to plaintiff and the infant child of the parties, partly paid by her from her separate estate, partly paid by friends and partly unpaid. A prior order of February 7, 1949 had granted plaintiff custody of the minor child of the parties, \$350 per month temporary alimony for herself and the child beginning December 23, 1949, and her attorney \$250 for and on account of costs and \$500 for and on account of legal services rendered plaintiff. The matter of the repayment of the necessities had for a large part been before the court at the hearing on the order to show cause but had expressly been left undecided. The notice of "motion to compel defendant, Harald N. Larsen, to pay indebtedness for necessities supplied to wife and infant child and for other and further relief" was filed February 17, 1949, a notice of motion for payment of further counsel fees on June 22, 1949 after having been orally introduced on June 16, 1949. The capacity of defendant to make also the additional payments ordered on November 10, 1949, pursuant to these motions is not disputed.

Appellant contends that the \$1000 additional attorney's fees were awarded for past services and that section 137, Civil Code, the only section governing the subject, does not give the court authority to do so because with respect to past services the required necessity of the allowance is lacking. Warner v. Warner, 34 Cal.2d 838, 840, 215 P.2d 20; Loveren v. Loveren, 100 Cal. 493, 495, 35 P. 87. Appellant relies especially on Smith v. Superior Court, 89 Cal.App. 177, 186, 264 P. 573, in which case an order to pay \$200 additional attorney's fees for services as to the motion leading to that award was held void on the above ground.

[1] However in the present case the supplemental award was not made specifically for such completed past services. The notice of motion filed June 22, 1949 mentioned only "further reasonable counsel fees in the action." It is true that the order prepared by plaintiff's counsel described the amount of \$1000 as "For and on account of attorney's fees for services rendered plaintiff to and including July 1, 1949" but in the order as signed on November 10, 1949 the words "for services rendered plaintiff to and including July 1, 1949" were struck out by the trial judge. Appellant contends that nevertheless the award must be considered as made for past services because the order contains a finding "that plaintiff had incurred indebtedness for necessities in the amount of \$5,689.18 supplied to plaintiff and the minor child of plaintiff and said defendant during marriage" and that this unspecified amount of \$5,689.18 does not only include the obligations actually incurred for necessities which total \$4,689.18 but also the \$1000 additional attorney's fees. We are of the contrary opinion. By striking the reference to past services the trial judge expressly demonstrated that the amount was not awarded for said past services as such, but that he had decided that the services in the whole action, according to his estimation at the time of the order, would necessitate fees in the amount of \$1500 instead of the \$500 originally estimated. A finding as to an indebtedness for attorney's services already incurred by plaintiff was then superfluous; that the court did not strike out this hidden finding when he rejected the theory of plaintiff's attorney was clearly an oversight. It must be disregarded as surplusage.

[2] The court had power under section 137, Civil Code, to grant additional attorney's fees. In *Rose v. Rose*, 109 Cal. 544, 545-546, 42 P. 452, it is said: "The court cannot know at the commencement of the action the amount of labor that will be required, or the value of the services to be performed, in the prosecution or defense of the action on behalf of the wife, and there is no rule of procedure which re-

quires it to fix the entire amount of counsel fees at the beginning of the action, or to prevent it from making allowances from time to time as the exigencies of the case shall seem to demand." In deciding these requirements from time to time the court will also consider the services already rendered, when further services are needed and the prior services have not in fact been rendered on the wife's own credit. See 1 *Nelson on Divorce*, 2d ed. 405-6; *Theisen v. Keough*, 115 Cal.App. 353, 361, 1 P.2d 1015; *Howton v. Howton*, 51 Cal. App.2d 323, 327, 124 P.2d 837; *Thomas v. Thomas*, 66 Cal.App.2d 818, 826, 153 P.2d 389. The protracted and tenacious opposition to the motions leading to the order appealed from which necessitated several hearings contained in a reporter's transcript of 270 pages and the submission of briefs could be considered as indication of the large volume of attorney's services which would be required in the matter as a whole. Appellant does not contend that the granting of the additional amount of \$1000 constituted an abuse of discretion under the circumstances before the superior court. Unless there is clear evidence to that effect the order will not be set aside on appeal, *Warner v. Warner*, supra, 34 Cal.2d at pages 839-840, 215 P.2d 20, and cases there cited.

[3] With respect to the awards for necessities supplied to plaintiff and the infant daughter of the parties appellant does not contend that the court lacked power to make the awards but that it abused its discretion in doing so, because repayment pendente lite of the amounts laid out or the indebtedness incurred was not necessary to enable respondent to support herself or prosecute the action as she had a sizeable estate of her own. *Tremper v. Tremper*, 39 Cal.App. 62, 67, 177 P. 868; *Busch v. Busch*, 99 Cal.App. 198-203, 278 P. 456. In *Gay v. Gay*, 146 Cal. 237, 242-243, 79 P. 885, it is expressly recognized that, as part of temporary alimony, a payment of a lump sum for past expenses may be allowed when such is necessary to enable the wife to further prosecute her case and to support herself upon the amount to be paid to her periodically in the future. See also *Reed*

v. Reed, 40 Cal.App. 102, 106-107, 180 P. 43. The Tremper and Busch cases cited by appellant recognize that principle but hold that it was not applicable under the special circumstances of those cases, in the Tremper case because no showing whatever as to need was made, in the Busch case because there was no indebtedness as the earlier support had been provided as gift by the father of the wife.

[4, 5] Necessity in the above respect has the same meaning as in relation to all other awards based on section 137, Civil Code. "The term 'necessary' in section 137 must be given its broadest connotation. What is 'necessary' rests in the sound discretion of the trial court." *Howton v. Howton*, 51 Cal.App.2d 323, 325, 124 P.2d 837, 838; *Westphal v. Westphal*, 122 Cal.App. 379, 382, 383, 10 P.2d 119. "In the allowance of alimony and costs under section 137 of the Civil Code, the law recognizes the fact that a wife is entitled to live in her customary manner according to her station in life." *Falk v. Falk*, 48 Cal.App.2d 780, 790, 120 P.2d 724, 729. The wife is not compelled to exhaust the corpus of her separate estate if her income is not sufficient to provide her with adequate means for counsel fees and living expenses. *Westphal v. Westphal*, 122 Cal.App. 388, 10 P.2d 122; *Heck v. Heck*, 63 Cal.App.2d 477, 480, 147 P.2d 114; *Falk v. Falk*, 48 Cal.App.2d 780, 788-790, 120 P.2d 724. In the *Westphal* case the wife owned stock of a value of \$15,000 from which she derived an income of \$500 a year; in the *Heck* case a separate estate of \$10,000 which produced a small income; in the *Falk* case her income from her separate estate was approximately \$1600 in one year; in each of these cases the size of the separate means of the wife was held not to prevent an award under section 137, Civil Code.

[6] In the present case the evidence showed that before her marriage to defendant, which took place in the year 1946, plaintiff was the widow of a member of the Bar who had left her an estate of approximately \$50,000 but from which first marriage she also had two children, a boy eleven and a girl six years old at the time of the hearing in this case. The income

from the separate estate amounted to approximately \$1250 a year. It was plaintiff's position that the inheritance from the first husband should be earmarked for the support and education of his two minor children (for whose support the defendant was not legally responsible) and that defendant should have to repay the amounts of indebtedness with which she had had to burden that separate estate when defendant left her in the middle of October, 1948 without providing for support, except three payments of \$75 each for the infant daughter of the parties. On or about October 8, 1948 defendant had installed plaintiff and the three children in the Benjamin Franklin Hotel in San Mateo, California, after having sold his home in San Francisco where they had been living. He left them at the hotel without providing another home when he learned that before leaving San Francisco plaintiff had filed the complaint in the present separate maintenance action. (No attempt had been made to serve defendant with process.) Defendant then left the state, according to his testimony on an extended business trip, and informed the hotel that he would not any longer be responsible for the bill of the family. Plaintiff temporarily could not find out his whereabouts. Only on November 23, 1948, was he served with process in Reno, Nevada, and on December 23, 1948 he appeared in court at the hearing of the order to show cause which led to the original order for temporary alimony stated earlier in the opinion. The major part of the amount ordered to be reimbursed relates to indebtedness for necessities incurred between the separation of the parties and the beginning of the monthly alimony payments on December 23, 1948. We cannot say that the superior court abused its discretion when in accordance with *Gay v. Gay*, supra, it ordered defendant to repay the amount of such indebtedness. By not appealing from the original temporary alimony order defendant conceded that plaintiff needed his support. It was within the discretion of the court to decide that the high living expenses during the first two and a half months when plaintiff was left with her

family in a relatively expensive hotel without having a home available should also be borne by defendant and not deplete the estate left by the first husband, which constitutes the only means of support of the children of the first marriage. The amount laid out evidently could not be put aside out of the income of plaintiff which amounted at most to \$450 a month including the monthly alimony. We are not aware of any good reason why appellant should be entitled to evade or postpone his duty of support with respect to that first period because he forced the wife to advance the amounts needed from her separate estate.

Appellant presents a separate argument with respect to a group of items which he was ordered to pay totalling \$1,105.29 which relate to home equipment and furniture acquired by plaintiff after December 23, 1948 and paid for her by her attorney and a brother-in-law and to storage and moving of furniture partly prior and partly after that date paid by the same persons. Plaintiff's affidavit shows in that respect that to obtain suitable quarters at not too high cost and to terminate the costly stay at the Benjamin Franklin Hotel, plaintiff found it necessary to acquire and furnish an apartment. The equipment and furniture of the former San Francisco home of the parties, mostly the separate property of defendant, were moved away by him on October 8, 1948 and he refused to allow plaintiff the use of them. Plaintiff had certain furniture of her own which had been stored in the warehouse of defendant, from which defendant after the separation removed it to a vacant lot. Plaintiff was therefore compelled to have that furniture moved and stored. To furnish the apartment she had her stored furniture moved there and moreover it was necessary to purchase certain equipment and furniture of the same character as that which defendant had removed from the former home, to wit, a stove, a refrigerator and bedroom and kitchen furniture and furnishings. She testified that these were essential when she moved into the flat.

[7] Appellant argues that he cannot be taxed for such expenditures made subsequent to the order for alimony pendente lite and that his liability was limited to the monthly payments ordered until that award was properly modified by the court. It is our opinion that the order to pay said amounts constitutes such modification of the alimony by the court and was properly within the court's discretion. The necessity of incurring the indebtedness caused by defendant's behavior constituted new circumstances which in the court's discretion might justify an increase in award. *Miller v. Miller*, 57 Cal.App.2d 354, 360, 134 P.2d 292. If plaintiff had arranged for installment payment of these one time necessities, the court could have granted her an increase in monthly allowance to cover the instalments. We find nothing objectionable or unjust to defendant in the solution here chosen. The principle of the *Gay* and *Reed* cases, *supra*, that alimony may be granted retroactively and/or partly in lump sum when such is necessary to prevent old indebtedness from hampering the ability of the wife to live on future monthly alimony payments, we consider also applicable to increase in alimony. With respect to the necessity in this case the same applies to the payments for necessities provided after December 23, 1948 as to those prior to that date.

[8-10] Prior to the written order of November 10, 1949, in this opinion so far treated as the only order appealed from, the Court had made on July 15, 1949, a minute order covering the same subject matter, but ordering the defendant to pay indebtedness in the sum of \$4,727.85, whereas the written order directs him to pay six items of indebtedness totalling \$4,689.18. Also from said minute order of July 15, 1949, defendant has timely appealed. As the parties limit their arguments to the separate items and the total as contained in the written order, we assume that the different amount in the minute order was caused by clerical error or inadvertence of the Court, and that the written order was intended to correct this, although such is not expressly stated. For

the reasons stated for an affirmance of the second order we must affirm the minute order on the separate appeal taken from it, however it is proper to make the correction explicitly.

The sum of \$4,727.85 contained in the minute order of July 15, 1949, as the indebtedness ordered to be paid by defendant is corrected to read \$4,689.18.

The order of July 15, 1949 is affirmed as corrected. The order of November 10, 1949 is affirmed.

GOODELL and DOOLING, JJ., concur.



102 Cal.App.2d 94

HILL v. JOHNSON.

Civ. 18183.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1951.

Hearing Denied March 29, 1951.

Action by Leroy A. Hill, Jr., a minor, by Ruth V. Hill, his guardian ad litem, against Edgar S. Johnson for support wherein defendant answered denying paternity. An order was entered in the Superior Court of Los Angeles County, Joseph M. Maltby, J., directing defendant to pay for the support of plaintiff and the defendant appealed. The District Court of Appeal, Wilson, J., held that where mother of plaintiff was living with her husband during the period when plaintiff was allegedly conceived there was a conclusive presumption of his legitimacy and receiving evidence of the mother and her husband that they did not have sexual intercourse during such time was error.

Order reversed.

I. Bastards ⇐6

Evidence ⇐89

Evidence is inadmissible to rebut a conclusive presumption and an illegitimacy cannot be established by evidence that a husband and wife while living together did not have sexual relations. Code Civ.Proc. § 1962, subd. 5.

2. Bastards ⇐3

Where there is opportunity of access to the wife by the husband during the period conception would normally occur the presumption of legitimacy is conclusive. Code Civ.Proc. § 1962, subd. 5.

3. Witnesses ⇐57

In action to compel defendant who was not the husband of plaintiff's mother to contribute to the plaintiff's support, where mother of plaintiff was living with her husband during period when plaintiff was conceived and there was no contention that he was impotent, admitting evidence of the plaintiff's mother and her husband that they did not have sexual intercourse during the time when plaintiff could have been conceived was error. Code Civ.Proc. § 1962, subd. 5.

4. Bastards ⇐65

Evidence of result of a blood test is to be considered with all other evidence in the case in determining paternity and is not conclusive.

5. Bastards ⇐55

In action to compel defendant to contribute to the support of plaintiff, where defendant was not the husband of plaintiff's mother, who cohabitated with her husband during the period when plaintiff was conceived, evidence of result of a blood test allegedly showing that the husband of plaintiff's mother could not have been his father should not have been admitted, since it was contrary to the conclusive presumption of legitimacy. Code Civ.Proc. § 1962, subd. 5.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Porter & Ragland, Los Angeles, for respondent.

WILSON, Justice.

Plaintiff, a minor, alleging defendant to be his father, brought this action through his mother as guardian ad litem for support. Defendant answered denying paternity. Upon the hearing of an order to show cause why defendant should not pay for plaintiff's support and for his attor-

ney's fees in the action a court commissioner made findings of fact as follows: That Ruth V. Hill gave birth to plaintiff on December 5, 1949; "plaintiff" became pregnant some time between February 13, 1949, and the end of the same month as the result of relations with defendant who is not her husband; "Plaintiff" is married and occupied the same premises with her husband "at all times" but from January 1, 1949, until some time in March following they were not cohabiting as husband and wife; "Mrs. Hill's husband, Leroy Hill, is not and could not possibly be the father of the minor child."

The findings were approved by the court and an order was made directing defendant to pay \$7.50 a week for plaintiff's support and \$150 on account of attorney's fees. Defendant has appealed from the order.

Since plaintiff was only six months of age at the time of the hearing of the order to show cause and is a male we assume the court was in error in finding that "plaintiff" became pregnant or was married and that such findings were intended to refer to plaintiff's mother and guardian ad litem. Even with benefit of such assumption the findings do not support the order.

[1-3] The finding that the mother of plaintiff was living with her husband during the period when the child was conceived is supported by the evidence of both parties. There is no contention that he was impotent, in fact the evidence is to the contrary. He testified he had sexual relations with his wife in March of 1949. The finding that defendant is the father of the child is repelled by the conclusive presumption that "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;" Code Civ.Proc., sec. 1962(5). Evidence is inadmissible to rebut a conclusive presumption and illegitimacy cannot be established by evidence that a husband and wife, while living together, did not have sexual relations. In re Estate of Mills, 137 Cal. 298, 303-304, 70 P. 91; In re Estate of Walker, 180 Cal. 478, 491, 181 P. 792. When there is opportunity of access to the wife by the husband during the period conception would normally

occur, the presumption of legitimacy (with exceptions not applicable here) is conclusive. *People v. Kelly*, 77 Cal.App.2d 23, 26, 174 P.2d 342; *Dazey v. Dazey*, 50 Cal. App.2d 15, 17, 122 P.2d 308; *People v. Hamilton*, 88 Cal.App.2d 398, 400, 198 P.2d 907; *Williams v. Moon*, 98 Cal.App.2d 214, 219 P.2d 902. The court erred in receiving the evidence of Mr. and Mrs. Hill to the effect that they did not have sexual intercourse between the first of January, 1949, and the latter part of the following March.

[4,5] Blood tests of all parties disclosed that the blood of the minor plaintiff and of defendant is type "B" and that of Mr. and Mrs. Hill is type "O". From this plaintiff argues that Mr. Hill could not have been the father of the child and that defendant could have been. Evidence of the result of a blood test is to be considered with all other evidence in the case and is not conclusive. *Berry v. Chaplin*, 74 Cal.App.2d 652, 664-665, 169 P.2d 442. It was error to admit the evidence since it is contrary to the conclusive presumption of legitimacy.

This is as it should be, since in the absence of a presumption that is conclusive, uncontestable and uncontradictable, an innocent man, whose only defense might be his uncorroborated denial of improper relations with the mother of a child, could easily be made the victim of blackmail by the collusive, false testimony of a husband and wife who are living together and having normal sexual relations.

From the foregoing it indubitably follows that the findings that (1) "plaintiff," meaning Mrs. Hill, became pregnant as the result of relations with defendant, (2) from January 1, 1949, until some time in March of 1949, Mrs. Hill and her husband were not cohabiting as husband and wife, and (3) Mrs. Hill's husband "is not and could not possibly be the father" of plaintiff minor, are not supported by the record.

Order reversed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

101 Cal.App.2d 846

BRAMARIC et al. v. CHURICH.

Civ. 14511.

District Court of Appeal, First District,
Division 1, California.

Jan. 24, 1951.

Adrien Bramaric and another brought action against Kosta M. Churich on a common count for money had and received, based on an attempted rescission of a contract of sale because of alleged misrepresentations. A judgment for defendant was entered in the Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., and the plaintiffs appealed. The District Court of Appeal, Bray, J., held that evidence supported finding that plaintiffs were not entitled to rescind contract for purchase of apartment building because of alleged misrepresentations of defendant as to size of the real property sold, or as to rentals approved by the OPA.

Judgment affirmed.

1. Vendor and purchaser ⇨34

Purchasers of apartment building were not required to check size of lot but were entitled to rely upon vendor's representation.

2. Vendor and purchaser ⇨44

Evidence supported finding that purchasers were not entitled to rescind contract for purchase of apartment building on ground of vendor's misrepresentation as to rentals approved by OPA, even if misrepresentations were shown, because of purchasers' failure to show that they had relied on such representation in entering into the contract or that they had in any way been damaged by it.

3. Vendor and purchaser ⇨44

Evidence supported finding that size of lot on which apartment building was located was not inducing factor in purchasers' agreement to purchase the property and that purchasers would have purchased property even though they had known that depth of lot was only 110½ feet and not 120 feet as represented, so that area shortage did not authorize rescission of the contract to purchase.

4. Contracts ⇨94(1, 2)

Where party seeks rescission of contract on ground of a false suggestion, it must appear that misrepresentation complained of was to a material fact, by which party was induced to make the contract, and that he was actually misled thereby to his injury.

5. Action ⇨1

Neither courts of law nor equity enforce obligations or redress wrongs which are such only in foro conscientiae, and are followed by no loss or damage.

Appel, Dains & Liebermann and Albert Picard, all of San Francisco, for appellants.

Holloway Jones, Hugh K. McKevitt, Thomas C. Vassar, all of San Francisco, for respondent.

BRAY, Justice.

Judgment went for defendant, in an action for \$37,500 on a common count for money had and received, based on an attempted rescission of a contract of sale because of alleged misrepresentations. Plaintiffs appeal.

Contention of Plaintiffs.

The principal question is whether the evidence is sufficient to support the findings. There are no specific findings of fact. The court merely found that the allegations of the common count in the complaint were untrue and that defendant was not indebted to plaintiffs in any sum. Plaintiffs contend that they are entitled to rescind the contract hereafter mentioned on two grounds: (1) misrepresentation as to the size of the real property sold; and (2) misrepresentation as to the rentals approved by the OPA.

Undisputed Facts.

The undisputed facts show that defendant was the owner of an apartment and rooming house property located on the south side of California Street, between Hyde and Larkin, in San Francisco. The building apparently is divided into five apartments and ten rented rooms. All of the apartments and rooms were rented except

the apartment occupied by the owner, apartment 2. In buying the property plaintiffs dealt with a real estate agent named Millspaugh with whom defendant had listed the property for sale. Millspaugh gave plaintiffs at the beginning of the negotiations a writing referred to as a "listing." This listing gave the "lot size" as 25 by 120 feet. Actually the lot is 25 by 110½ feet. It gave the income or rental (including \$82 for apartment 2) as \$483 per month. These were the rents actually being received by defendant, excepting, of course, that the owner was occupying apartment 2 from which he received no rent. However, there is no controversy concerning the value placed on that apartment, as plaintiffs understood the situation, and agreed that defendant should continue to occupy it, paying \$82 per month. The OPA approved rentals were only \$313, which, with the agreed estimate of \$82 for apartment 2, made the approved income only \$395. However, in spite of the fact that, after purchase of the property, plaintiffs discovered the discrepancy between the OPA allowances and the actual rentals, plaintiffs continued, even including the time of trial, to collect the same rentals as charged by defendant, namely, \$483, including the \$82 for apartment 2. The evidence is not clear as to whether this was with or without OPA approval. Since serving notice of rescission plaintiffs have refused to accept rent from defendant. Actually, plaintiffs collected a few dollars more than this amount in certain months, due to a double occupancy of certain rooms. Apparently OPA regulations permit such additional charge.

[1] Plaintiffs did not receive a copy of the title company's preliminary report, nor did they receive the recorded deed or title insurance policy, until about three months after the transaction was closed. In all these documents the property was properly described, showing that its depth was only 110½ feet. Defendant testified that on one occasion before the deal was closed he gave the "papers, deeds and policies" to plaintiff Adrien and Millspaugh and "both look at papers, deeds and policies." The only deed specifically identified as being in this group was the deed by which defendant had ac-

quired the property, which apparently contained the proper description. Plaintiffs visited the property on two or three occasions before the sale was consummated. The rear portion of the premises is not covered by the apartment building, but is used as a garden. There is no evidence that plaintiffs checked the size of the lot. They were not required to do so and were entitled to rely upon the representation. *Harder v. Allred*, 61 Cal.App. 394, 214 P. 1017. They testified that they relied upon the representation in the listing. Nor is there any evidence of the difference between the value of the lot as it actually is, and as represented. Apparently defendant originally had secured OPA approval of the rents charged when the building was used exclusively for apartments. Thereafter he converted certain apartments to rooms and rented the rooms separately. He had obtained no OPA approval of the rentals charged for these rooms.

OPA Regulations.

[2] It is not clear from plaintiff Adrien's testimony (he did all the negotiating on behalf of plaintiffs) just what the oral representations made were. The listing showed the income without mention of OPA. Plaintiff Adrien testified that he asked defendant if he had ever obtained an increase in rents from the OPA and defendant had said that he had not. (There is no evidence that he had.) However, taking the listing and some of the rather indefinite testimony of plaintiff Adrien together, it can be assumed that defendant did represent that the listed rentals were OPA approved. (Impliedly the court found that there was no such representation.) But even with such assumption, plaintiffs cannot recover for two reasons: first, there is sufficient evidence to support the implied finding that plaintiffs did not rely on such representation; and secondly, plaintiffs have in no way been damaged by it.

1. Plaintiffs did not rely on the representation.

Attorney Divine testified that he had been employed by Millspaugh, defendant's agent, to draw the deed and bill of sale

from defendant to plaintiffs, and make certain prorations; that on January 19 (plaintiffs made the final payment January 31) the parties met at the title company; that in trying to prorate rents he could not reconcile the OPA "slips" with the rents being collected (there were OPA slips only for the apartments and none for the rooms); that he told plaintiff Adrien to go over to the OPA and check; that Adrien said he would have his attorney attend to it and would not close the deal until this was done. Both plaintiffs denied Divine's testimony. Adrien testified that on this occasion, when they gave him the OPA papers, "I saw right away it looks sick like something was wrong because there was only five papers from the OPA when there was suppose to be fifteen"; "I only see five sheets listing of five apartments instead of five apartments and ten rooms"; "I thought this was something suspicious about it" and that he told Millspaugh he was not going to sign that day. He then went to see an attorney. That attorney was sick so he saw the partner. He left the five OPA slips with him. A few days later, the attorney called Adrien and said, "As far as the OPA is concerned * * * everything is O. K." Thereupon, the plaintiffs closed the transaction. It is obvious that this is sufficient to support an implied finding that plaintiffs did not rely upon defendant's representation, but on the investigation and advice of his own attorney.

2. No damage.

From the time that plaintiffs took possession of the property until now, they have never collected less than the rentals shown on the listing.

"The Court: * * * you're charging the same rents now as you did when you took the place over?"

"The Witness: Your Honor, yes.

"The Court: So that you haven't lost anything as a result?"

"The Witness: Well, I don't lose anything * * *."

Plaintiff Adrien testified that in April he discussed with the OPA representative the matter of a \$2 extra charge to one of the tenants for cooking in the room, and was

then informed that there was no OPA approval for rental of the rooms. The record is not clear as to whether or not plaintiffs then obtained the necessary approval. However, inasmuch as the OPA was thereby put on notice as to the rentals charged for the rooms, and as plaintiffs continued for months thereafter to charge these rentals, it is reasonable to infer that such OPA approval has been obtained. Thus, the court's implied finding that the misrepresentation, if any, was not a material one and that no damage resulted is well supported.

Area Shortage.

[3] Plaintiff Adrien testified that there were no oral statements made to him by either defendant or Millspaugh concerning the size of the lot except that he asked Millspaugh what the real size of the lot was, and Millspaugh told him the Lang Realty Company had the information, and later when he asked Millspaugh if he was sure that the size as listed was correct, Millspaugh said "absolutely." Millspaugh denied these conversations, although admitting that he gave plaintiffs the incorrect listing. The listing is on the stationery of the Lang company, and it shows the lot to be 120 feet deep. Millspaugh testified that this information was originally furnished by defendant. Plaintiff Adrien was asked if on January 31 when he deposited the purchase price with the title company, he saw the preliminary report and the deed from defendant to plaintiffs. He replied, "I don't remember." There was no testimony that he did see them. Thus, the only representation as to depth is that appearing in the listing. It is doubtful whether that representation, standing alone and limited as it was by the statement that it was not guaranteed, is, under the circumstances of this case, a sufficiently positive representation upon which to base a rescission. The fact that plaintiffs made no inquiry as to whether or not it was correct (we must assume the court did not believe Adrien's testimony on this subject), coupled with the fact that they introduced no evidence that it was an inducing factor in the purchase of the property, is quite significant. Plaintiffs, in their negotiations over the pur-

chase of the property, had considerable discussion concerning the rents, but at no time discussed the size of the property. This was apartment house property and it is a reasonable inference from the evidence that plaintiffs were concerned, not about the exact size of the property, but about the income it would bring. Plaintiffs at no time testified that the exact depth of the property was a material matter, nor is there any evidence that this apartment house property, of which a portion is used as a garden, is of materially less value than it would have been had the lot been $9\frac{1}{2}$ feet deeper. It is true that plaintiff Adrien said he would not have purchased had he known that the depth was only $110\frac{1}{2}$ feet. Yet when the court tried to find out if the depth really was an inducing factor plaintiff either intentionally or unintentionally evaded the question.

"The Court: Were you concerned about the size of this property? Was that any concern of yours?"

"The Witness: I beg your pardon, your Honor?"

"The Court: Were you concerned about the size of the property? You looked at it, did you not?"

"The Witness: I did look at it, yes."

"The Court: Were you concerned as to the depth of the property and the width?"

"The Witness: Well, as I say, your Honor, I don't—I'm very—I don't know much about it."

Throughout his testimony plaintiff Adrien was evasive and contradictory. Repeatedly throughout the trial plaintiff Adrien had denied making any investigation of the OPA situation. On cross-examination he rather reluctantly admitted obtaining the advice of an attorney. His testimony as to the rentals actually being received by him was contradictory. In his deposition he was asked if he had his attorney check the OPA figures. He denied that he had, saying he intended to see someone else. When asked who the someone else was, he said, "I don't know for to tell you," and his attorney instructed him not to answer. At no time during his deposition did he testify to having seen an

attorney about the matter. In view of his own lack of credibility and the circumstances, the court had the right (which it apparently exercised) of refusing to believe that plaintiffs would not have purchased had they known the true depth of the lot. Defendant produced a general insurance broker named Draghicevich who testified that a few days after plaintiffs purchased the property plaintiff Adrien, in a conversation over a glass of wine at plaintiff's home, stated that if plaintiffs had known that the operation of the property required someone to be there all the time, they never would have purchased it. While it has been held that where a person has a right to rescind a contract of sale, the court cannot consider his motives in so doing, *Crim v. Umsen*, 155 Cal. 697, 103 P. 178, this statement to Draghicevich is significant on the question of whether the representation as to the depth was an inducement, and whether the discrepancy is important. The evidence, then, supports the court's implied finding that the size of the property was not an inducing factor, that plaintiffs would have purchased it even though they had known its true size, or that the difference in area did not constitute a material difference in value.

Plaintiffs point out that the difference in area between the property as listed and as conveyed amounts to $8\frac{1}{2}$ per cent and contends that this court must take judicial notice of the fact that in the "congested downtown apartment section of San Francisco" such an area is extremely valuable. They have cited no cases showing that we may take such knowledge. It may well be that in the section where this property is located the garden portion of apartment premises is, within limits, of relatively little value. On the other hand, it may well be that, because of the probability that sometime in the future it will be advisable to cover the entire property with a building, such portion is highly valuable. There is no evidence in the case to enlighten us on the subject. As pointed out before, the plaintiffs' lack of inquiry, plus their failure to produce proof, would indicate that the value of the property lies in its income production rather than in its area. In most

of the cases cited by plaintiffs where there was misrepresentation as to area, there was evidence either that the area represented was an inducing factor, or that the property conveyed was less valuable than it would have been if it was as represented. *Younis v. Hart*, 59 Cal.App.2d 99, 138 P.2d 323; *Hargrove v. Henderson*, 108 Cal.App. 667, 292 P. 148; *Montgomery v. McLaury*, 143 Cal. 83, 76 P. 964; *Quarg v. Scher*, 136 Cal. 406, 69 P. 96; *Mills v. Hellinger*, 100 Cal.App.2d 482, 224 P.2d 34, are a few in this category. However, in *Dohrman v. J. B. Roof, Incorporated*, 108 Cal.App. 456, page 465, 291 P. 879, at page 883, it was held: "Appellant complains that he was not permitted to prove the value per front foot of the lot purchased. The value of the property per front foot in dollars and cents was immaterial. If the purchaser desired and thought she was getting a lot having a front footage of 100 feet, she was entitled to same and was not compelled to accept a lot having a front footage of only 90 feet, irrespective of values." See also *Von Bargen v. Ginsberg*, 218 App.Div. 545, 218 N.Y.S. 601, affirmed 245 N.Y. 647, 157 N. E. 894. The *Dohrman* case based its decision on language in *De Bairos v. Barlin*, 46 Cal.App. 665, 190 P. 188, to the effect that a purchaser has the privilege of using his purchase in any manner that might be most profitable to him, including sale; that "There might be many uses to which an 80-foot lot could be put which would not be equally well met by a 77½-foot lot", 46 Cal.App. at page 670, 190 P. at page 190, and that the sale value of the latter might be materially different from that of the former. But the court said 46 Cal.App. at page 669, 190 P. at page 190: "Of course, the question of what is a material difference between the actual and represented description of land is a *question of fact*, and varies with the circumstances and the uses of the land and the size of the parcel being sold." (Emphasis added.) In *Eichelberger v. Mills Land & Water Co.*, 9 Cal.App. 628, 100 P. 117, the land sold was represented as being 270 feet in width, whereas the court found it to be of less width, but did not specify how much. In sending the case back to the trial court to

determine the difference, the Supreme Court said, 9 Cal.App. at pages 638-639, 100 P. at page 122: "Fraud, in order to warrant the rescission of a contract, must be accompanied by some appreciable loss or damage, for 'courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral and involving no pecuniary or tangible injury' (*Wain-scott v. Occidental Bldg. & Loan Ass'n*, 98 Cal. 253, 33 P. 88); and, where the right to rescind is based upon a failure of consideration, such failure must be in a material respect. (Civ.Code, subd. 4, § 1689) * * * [I]t cannot be determined from the findings whether the deficiency in width so found to exist is such as to entitle plaintiffs to rescind the contract on account of appreciable loss or damage, nor whether the width is sufficiently less to constitute a material failure of consideration."

[4,5] The only evidence in our case that the difference in depth of land might be material was plaintiff Adrien's testimony that had he known of that difference, he would not have purchased. In view of the peculiar circumstances of this case and the unreliability of the testimony of plaintiff Adrien, the court could reasonably have concluded that the plaintiffs would have purchased the property even had they known of the difference, and that, in the words of the *De Bairos* case, *supra*, 46 Cal.App. at page 669, 190 P. at page 190, there was no "material difference between the actual and represented description of land". It is of some significance that although plaintiff Angele Bramaric appeared as a witness, she at no time testified that she would not have purchased had she known of the difference in depth. "Where a party seeks a rescission of a contract on the ground of a false suggestion, it must appear that the misrepresentation complained of was as to a material fact, by which the party was induced to make the contract, and that he was actually misled thereby to his injury; for a naked misrepresentation, however wrong it may be in point of morals, unaccompanied by any actual damage or injury, does not afford ground for relief against an executed contract. Neither Courts of law nor equity

enforce obligations or redress wrongs which are such only *in foro conscientiae*, and are followed by no loss or damage." Board of Commissioners v. Younger, 29 Cal. 172, 176. " * * * [T]his court has said that a mistake as to the number of acres 'affords no ground of action by either party against the other, unless it be made to appear beyond controversy by clear and positive testimony that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase.' Board of Commissioners v. Younger, 29 Cal. 172." Harding v. Robinson, 175 Cal. 534, 538, 166 P. 808, 810.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



101 Cal.App.2d 831

EXLEY v. EXLEY.

Clv. 7830.

Sac. 6100.

District Court of Appeal,
Third District, California.

Jan. 23, 1951.

Richard M. Exley sued Ethel M. Exley for divorce, and a decree was entered dissolving the marriage and awarding custody of the child of the marriage jointly to the parties. Subsequently the defendant moved to modify the decree relative to the custody of the child, and the plaintiff filed a cross-motion seeking similar relief. The Superior Court, Mendocino County, Benjamin C. Jones and Lilburn Gibson, JJ., entered an order awarding full and complete custody of the child to the defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the trial court's finding that the defendant was a fit person to have custody of the minor.

Affirmed.

1. Divorce ☞303(1)

Court which awards custody of minor child when its parents are divorced has continuing jurisdiction on good cause shown to change from time to time its custodial orders.

2. Divorce ☞303(1)

It is not necessary that order modifying custodial decree should contain finding as to unfitness of a parent from whom the custody is taken.

3. Infants ☞19

There is of necessity confided to trial courts, when determining proper disposition of minor children, very extensive discretion with view of conserving highest and best interest of such minors, and conclusions arrived at by such courts in such cases will not be set aside unless the record discloses a clear abuse of that discretion. Civ.Code, § 138.

4. Divorce ☞303(3)

On motion by mother to modify divorce decree relative to custody of child, there was sufficient showing of change of circumstance to bring matter within broad discretion of trial court.

5. Divorce ☞312.6(1)

On review of trial court order modifying divorce decree relative to custody of child, appellate court would be compelled to refer to that part of evidence which supported the order made, notwithstanding that there was, in some respects, conflicting testimony.

6. Divorce ☞312.2

Where it was stipulated at hearing on motions to modify decree relative to custody of child that probation officer should make investigation and report to court and that report could be considered as evidence, and at close of hearing court stated that matter would be submitted without any further proceedings when officer had reported, and no opportunity to challenge officer's report was requested by father, and no motion was made after trial court had entered its order that judgment should be set aside because of mistake, inadvertence, surprise or excusable neglect, father was in no position on appeal from trial court's

order to contend that mode of procedure in respect to probation officer's report did not comply with the niceties of practice. Code Civ.Proc. § 473.

7. Stipulations ☞12

If under terms of mutual stipulation, which was only verbal, one party has received advantage for which he entered into it, or the other party has at first party's instance given up some right or lost some advantage, so that it would be inequitable for first party to insist that stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon ground that it had not been entered in the minutes of the court. Code Civ.Proc. § 283, subd. 1.

8. Stipulations ☞7, 9

At hearing on motion to modify divorce decree relative to custody of child, where parties stipulated that probation officer's report might be considered as testimony in case, trial court did not err in treating such report as testimony, notwithstanding that stipulation was neither in writing nor entered in minutes of court. Code Civ.Proc. § 283, subd. 1.

9. Divorce ☞303(3)

At hearing on motion to modify divorce decree relative to custody of child, evidence sustained finding that mother was fit person to have custody of child and trial court's order awarding her full and complete custody.

10. Divorce ☞299

In absence of express prohibition, rights of reasonable visitation, including right to have the child on proper occasions, ensues from parenthood.

11. Divorce ☞303(3)

Trial court's order modifying decree so as to award full and complete custody of child to its mother without expressly reserving right of visitation to father did not constitute such an abuse of discretion as to justify reversal of decree, notwithstanding that there was no conflict of evidence as to fitness of father as parent, since decree would not deprive father of his natural right of reasonable visitation.

Preston & Falk, Ukiah, for appellant.

Burke & Rawles, Ukiah, for respondent.

VAN DYKE, Justice.

The parties hereto were formerly husband and wife. A final decree of divorce dissolving their marriage was made and entered August 11, 1947. There was an only child of the marriage, a daughter now aged nine. Her custody was by the final decree in the divorce action awarded jointly to the parties, but the court ordered that the physical custody of the child be in the father except that during the months of July and September of each year such custody should be in the mother. The mother was also given the right to have the child visit with her on alternate week-ends while in the custody of the father. After the final decree the mother married again and now resides at Santa Rosa with her husband, Harold E. Goslin.

On July 9, 1949, the mother, respondent in this appeal, noticed a motion to modify the decree relative to the custody of the child and on July 22nd following the father, appellant here, likewise noticed a similar motion. Each party asked that the custody of the child be awarded to the moving party absolutely. Thus each sought modification of the existing order. The motions were heard together and evidence in support of each was taken. During the course of the hearings and after the court had inquired whether or not any mutual concessions were possible, the following occurred:

"The Court: If you can't agree upon anything then you will have to proceed with your proof and I will have to decide it.

"Mr. Burke [Counsel for respondent]: We are willing to make this offer, your Honor, with respect to living conditions of the plaintiff's [really the respondent's] home. We are willing to have the probation officer of Sonoma County * * * make an investigation of the home conditions in Sonoma County and to report to the Court and the Court to consider that evidence as testimony in the case. * * *

"Mr. Falk [Counsel for appellant]: We have some testimony on that. * * *. We have no objection, if your Honor please, to have a report from the probation officer of Sonoma County. We will stipulate to that, if your Honor deems it necessary.

"The Court: Very well. * * *. That will be ordered."

Thereafter witnesses were sworn by each party and testified. At the conclusion of the hearing, both sides announced to the court that they rested and the court said: "The matter will stand submitted on the report of the Probation Officer coming in", to which statement of the court counsel for the appellant replied, "Yes your Honor." It appears from the record that, on August 22nd following the hearing, the probation officer of Sonoma County addressed a letter to the trial judge, stating he had investigated the home of respondent as to its suitability for residence of the minor. In brief, he said he found the home to be a new one south of Santa Rosa and that the Goslins had lived there since April 1st of that year. A grammar school was two blocks from the home. There was a new cottage on either side; there were two bedrooms, kitchen, living room, bathroom with tub and shower and enclosed service porch, cemented back yard with outdoor patio. Other minor details were given, which we need not repeat. It was reported that Mr. Goslin had worked for the Greyhound bus company for twenty-three years and was still so employed, earning \$400 per month; that the child would have her own bedroom; that the house was furnished with new furniture, and house and yard were neat and clean. He stated his belief that the child would have "a wonderful home if they lived in the Goslin home and one they would be proud of." On October 5th the probation officer addressed a second letter to the trial judge. The officer reported he had again called at the Goslin home which he found to be satisfactory in every way; that respondent was well looked upon by her neighbors; that he felt the morale of the home was of the best; that respondent and her husband were adding two more rooms and that he had no

reason to believe that the home would not be a good home for the child. In addition to the foregoing details the letter was generally commendatory as to the suitability of the home and to the effect that the respondent would give proper supervision to the child.

Shortly thereafter the trial court entered an order awarding full and complete custody of the child to respondent until further order of the court. No right of visitation was expressed or reserved to appellant. From that order this appeal was perfected.

In support of his appeal the appellant contends: 1. That there was no evidence of any change of circumstances from the date of the entry of the final decree and it was therefore error to change the custody of the child; 2. That the order was based in part upon inadmissible and incompetent evidence; 3. That the respondent is not a fit and proper person to have the custody of the minor; and, 4. That the order appealed from is not for the best interests of the child.

With respect to the first contention the record discloses that when the first order of custody was made in the final decree of divorce the respondent had been working from the time of the making of the interlocutory decree and continued to be so employed through the interlocutory year and for some time thereafter. A stipulation had been entered by the parties to the divorce action that the custody of the minor be awarded to them jointly "with the understanding that the mother is now working and when and if she should thereafter be able and desirous of taking said child she may have the custody of said child, subject, of course, to the right in the plaintiff to see and visit said child at all reasonable times." It was further stipulated that both parents were fit and proper persons to have the care, custody and control of the minor. The court in the divorce action made no finding as to the unfitness of either party and in the main gave expression to the stipulation in both interlocutory and final decrees. It appears from the record here that when the divorce proceedings were pending respondent

ent had no fixed home into which she could receive the child, but that subsequent to her remarriage and several months before she moved to obtain custody she established a home with her husband in Santa Rosa, which was the subject of the probation officer's report. She testified that her husband was steadily employed; that she had had the child with her during July and that she had got along well in respondent's home; that her home was a good one and suitable for caring for her daughter. She described it much as did the probation officer. She related that she had always called for the child on the weekends when entitled to have her; that up until the time she moved to Santa Rosa she had lived in Ukiah and that on moving to Santa Rosa the distance necessary to be traveled to get the child at Willits, the home of appellant, and return her had greatly increased; that while in Ukiah she had lived in an auto court, since she could not find a house, and her quarters were cramped, but that she had room in the present home.

[1-3] There are some well settled rules that control the matter of awarding custody of a minor child after its parents have been divorced. First, the court has continuing jurisdiction on good cause shown to change from time to time its custodial orders. Again, it is not necessary that an order modifying a custodial decree should contain a finding as to unfitness of a parent from whom the custody is taken. *Simmons v. Simmons*, 22 Cal.App. 448, 456, 134 P. 791; *Stever v. Stever*, 6 Cal.2d 166, 167, 56 P.2d 1229; *Guardianship of White*, 84 Cal.App.2d 624, 628, 191 P.2d 466. Also by force of Civil Code Section 138, as interpreted by our courts, there is of necessity confided to trial courts, when determining proper disposition of minor children, a very extensive discretion with a view of conserving the highest and best interest of such minors; and the conclusion arrived at by such courts in such cases will not be set aside unless the record discloses a clear abuse of that discretion. *Simmons v. Simmons*, supra, 22 Cal. App. at page 451, 134 P. at page 793.

[4, 5] As we have stated above, there was evidence of a change of circumstances of the mother of this minor and we hold the showing to have been sufficient to bring the matter within the broad discretion of the trial court above noted, and for that reason its ruling in this respect must be affirmed. Of course, in the above recital of facts we have, as we are compelled to do, referred to that part of the evidence which supports the order made, notwithstanding in some respects there was conflicting testimony.

[6] Appellant contends further that the order is based upon inadmissible and incompetent evidence and reference is had to the two letters received by the trial judge from the probation officer of Sonoma County. Appellant concedes that it was stipulated that these reports could be made, but he says it was presumed that they would comply with the law by being verified, that he would get a copy thereof and could object before a decision was made if he felt the reports were false. We have already referred to the stipulation concerning these reports and we think it can only be fairly inferred from what took place that the parties and the court understood that the report might be sent in and acted upon without any further proceeding; in fact at the close of the hearing the court aptly stated that such would be the situation, saying that the matter before it would be submitted when the officer had reported. No opportunity to challenge the report was then requested. We think appellant is in no position now to contend here that the mode of procedure in respect to the probation officer's report does not comply with the niceties of practice. In this connection it is to be noted that if there was in fact a misunderstanding which resulted, as asserted by counsel, to the detriment of himself or his client, a plain and speedy remedy was furnished by Section 473 of the Code of Civil Procedure and a motion could have promptly been made for relief from the order if taken against appellant through mistake, inadvertence, surprise or excusable neglect. In support of such an order a showing could

have been made that there was matter in the report of the probation officer which, as counsel here suggests, was false. Apparently no such steps were taken and we think that appellant's contentions which we are now discussing cannot be here sustained.

[7] But appellant further attacks the action of the court in considering and acting upon the report, saying that notwithstanding what the record contained concerning the stipulation, none the less under Code of Civil Procedure, Section 283, subdivision 1, that stipulation was not binding because it was neither in writing nor entered in the minutes of the court; that it therefore formed no basis for the court's consideration of the matters reported to it and that prejudicial error was committed by such consideration. We think that the code section cited cannot be given such narrow interpretation, particularly if the court has acted in reliance upon a stipulation made in open court. In *Witaschek v. Witaschek*, 56 Cal.App.2d 277, 283, 132 P. 2d 600, 604, in discussing Section 283, subdivision 1, of the Code of Civil Procedure the court said: "It is true that the code provision relied upon by appellant does impose exacting limitations upon the authority of an attorney to bind his client by stipulation, and early cases such as *Preston v. Hill*, 50 Cal. 43, 19 Am.Rep. 647, called for very strict compliance with the codal rule, but later pronouncements have indicated instances where the rule is relaxed, e. g., to vest the attorney with complete charge and supervision of the procedure to be adopted, the conduct of the trial and all cognate subjects, provided only the attorney does not impair, compromise or destroy his client's cause of action or subject matter of the litigation without his client's consent (*Zurich General Accident & Liability Ins., Co. v. Kinsler*, 12 Cal.2d 98, 81 P.2d 913), in which latter case the court quotes with approval the pronouncement that the recital of powers of an attorney as contained in the code does not exclude all other powers. * * * 'If under the terms of a mutual stipulation, which was only verbal,' says the court, 'one party has received the advantage for

which he entered in to it, or the other party has at his instance given up some right, or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court.'"

[8] In accord with the foregoing authorities we hold that under the circumstances shown by the record here the trial court did not err, following the stipulation, in treating the probation officer's report as testimony in the case since that was expressly within the terms of the stipulation. Appellant relies upon the case of *Fewel v. Fewel*, 23 Cal.2d 431, 144 P.2d 592, 594, but we think it is inapplicable. The basis of the ruling there was that the trial court, without permitting either side to present evidence in a child custody proceeding, referred the entire matter to the court investigator and directed the parties to be in court at a future date without witnesses, stating that the court would adopt the recommendation of the investigator. This actually was done and neither party was even informed as to the contents of the investigator's report. The court aptly said concerning Code of Civil Procedure, Section 261a, authorizing appointment of such investigators in domestic relations cases: "The Legislature would have no power to substitute an investigator for a judge. Neither does such legislation authorize a trial court to deny to the parties any of the usual attributes of a fair trial in open court upon due notice." We think it apparent that the situation here is so far different from that referred to in the cited case that appellant can draw no support from that decision.

[9] Appellant next contends that the record shows respondent to be an unfit person to have the custody of the minor and that the order appealed from is not for the child's best interests. These contentions cannot be sustained. The showing made of the capacity of the mother to properly house and care for her nine-year old daughter, along with evidence of her continued care and concern for the child, all

taken together with the fact that the child is a female child of tender years, is sufficient to give the necessary factual support to the court's decision. We say this notwithstanding there was a good deal of testimony coming from the appellant and his relatives to the effect that the mother had been guilty of various infractions of the moral code prior to the final decree of divorce. But these matters do no more than raise a conflict and afford no ground for reversal.

Lastly, complaint is made that the order appealed from contains no provisions expressly giving to appellant any right of visitation or right to have the child of the parties with him at any time. We cannot tell from the record what was the reason why the order contained no provisions as to such matters. It does not expressly give such rights to the father; neither does it in terms deny the same. This may have been the result of inadvertence. There is nothing to indicate the court felt the appellant was undeserving of such usual provisions. There is no conflict in the record touching his fitness and even counsel for the respondent in open Court stated during the hearing that, while their motion asked complete custody, yet they were agreeable to visitation rights in favor of the father, including his right to have the child with him for extended periods during school vacations. When a home breaks up a minor child must lose to a great degree the benefit of dual parental control and care and must spend its time separately with each parent. Yet it is generally considered to be the right of the parent who must lose the privilege of having the child for most of the time to have such contact with the child as can be afforded, the general interest of the child considered. In a similar situation the Supreme Court in the case of *Clarke v. Clarke*, 35 Cal.2d 259, 262, 217 P.2d 401, 403, disposed of the matter in the following way: "The plaintiff also contends that the court abused its discretion in failing to reserve to the plaintiff a right of reasonable visitation. The question of the plaintiff's right to visit the child was not raised at the hearing. Furthermore his

right of visitation was not included in the interlocutory decree. In the absence of express prohibition, rights in that regard ensue from parenthood, *Wand v. Wand*, 14 Cal. 512, 513, 518, * * *. It was probably not deemed necessary to include the specific requirement in the decree or the modification order."

In the early case of *Wand v. Wand*, 14 Cal. 512, 518, referred to in *Clarke v. Clarke*, supra, and touching the same matter, the Supreme Court there observed: "* * * We do not see why the mother should not, in the first instance, be intrusted with this office, for which she seems, upon every ground of humanity and natural right, to have the claim. For it does not at all follow that, in the present unhappy state of relations of these parties, the care or protection of the father is to be relinquished, or his parental duties or obligations destroyed. On the contrary, he has a right to be admitted to see the child at all convenient times when he may desire it. For the purpose of insuring him in the enjoyment of this right, he may have leave at any time to apply to the District Court for the necessary orders—for which the cause may be considered as open, so as to provide the necessary relief, if application be unhappily necessary. But it is to be hoped that this matter can be, as it should be, amicably settled by the parties so as to give the full benefit of parental protection and care to this child, and at the same time give to both parents the comfort of her society."

[10, 11] As held in the *Clarke* case, supra, in the absence of express prohibition, and none such appears in the order appealed from, rights of reasonable visitation, including the right to have the child with him on proper occasions, ensue from parenthood and it cannot be said that the court has denied these rights to appellant. While it might have been better for the trial court, on ordering the change of custody, to have included in its decree express provisions governing the exercise of this natural right, nevertheless we cannot say that the failure to do this, not amounting to a prohibition of such rights, constituted such an abuse of discretion in the

premises as to justify reversal of the decree as made, either in whole or in part. If appellant in the exercise of this right is met with such opposition or lack of cooperation as in practical effect would amount to a denial of such right by the mother, then the way is open to him to apply to the court to make by specific order such practical arrangements as will preserve the right to him.

The order appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.



101 Cal.App.2d 869

WAHL v. MARTINELLI.

Civ. 14507.

District Court of Appeal, First District,
Division 2, California.

Jan. 25, 1951.

H. Wahl brought action against Rena Giovannini Martinelli and husband on a claim for medical services, and a judgment was rendered against the defendants. The Superior Court in and for the City & County of San Francisco, Lile T. Jacks, J., rendered an order refusing to vacate writ of execution on interest of the named defendant in certain realty, and she appealed. The District Court of Appeal, Nourse, P. J., held that realty, which had been acquired by the named defendant by gift or devise, was not liable for family debts contracted for necessities.

Order reversed.

Husband and wife ☞ 151(7)

Separate property of wife acquired by wife by gift or devise was not liable for medical services rendered to the family of the wife during marriage. Civ.Code, § 171.

Stephen L. Mana, San Francisco, for appellant.

Alden Ames, Bert W. Hirschberg, San Francisco, for respondent.

NOURSE, Presiding Justice.

In May, 1925, an assignee of Dr. Ryan obtained a judgment against Mr. and Mrs. Martinelli on a claim for medical services. Succeeding judgments on the prior judgment were obtained in 1930, 1939, 1941 and 1947. On the last judgment execution was issued and levy made on the interest of Mrs. Martinelli in certain real property. On a hearing on an order to show cause why the execution should not be vacated it was shown that the property was conveyed by the father of Mrs. Martinelli to W. Finlay Geary in 1938 and on the same day transferred by Geary to the father for a life estate, the remainder to his two sons and two daughters, one of whom is Mrs. Martinelli. The father died in 1938. Thereafter the two sons conveyed their interest to Mrs. Martinelli and her sister. The record has been augmented to show that on the hearing of the order to show cause all parties assumed that the realty came to Mrs. Martinelli either by gift or devise and the matter was heard on that theory. This appeal is taken from the order refusing to vacate the writ of execution.

The order must be reversed. Section 171 of the Civil Code reads: "The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage."

The parties agree that medical services rendered to the family during coverture are "necessaries of life" within the terms of the first proviso of the section. Hence,

under the terms of the second proviso "the separate property of the wife * * * acquired by her by devise, succession, or gift" is not liable for family debts contracted for such necessities.

Respondent cites cases holding that a wife may be jointly and severally liable for certain debts contracted during marriage. But liability for debt and the levability of certain separate property are two wholly unrelated matters.

Respondent also relies on the overworked postulate that the findings of the trial court on conflicting evidence should not be disturbed. Here there are no findings and no conflicting evidence. The motion was heard on the uncontradicted affidavit of appellant.

The order is reversed.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.



102 Cal.App.2d 97

PEOPLE v. BENTLEY.

Cr. 4575.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1951.

Paul Perciful Bentley was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of violation of section 288a of the Penal Code, and from order denying motion for new trial, he appealed. The District Court of Appeal, Wilson, J., held that evidence sustained conviction.

Affirmed.

1. Criminal law  566

Evidence sustained conviction of violation of section 288a of Penal Code, as against defendant's contention that he was not sufficiently identified. Pen.Code,   288a.

2. Sodomy  6

In prosecution for violation of section 288a of Penal Code, corroboration of arresting police officer's testimony was not required. Pen.Code,   288a.

3. Criminal law  260(11)

In prosecution for violation of section 288a of Penal Code, where arresting police officer's testimony was not unsubstantial or inherently improbable, District Court of Appeal would not set aside judgment of trial judge who accepted and believed the evidence. Pen.Code,   288a.

4. Criminal law  254

In prosecution for violation of section 288a of Penal Code, where trial judge at defendant's request viewed premises and stood in positions occupied by arresting officer when officer made observations as to which he testified, trial judge's statement that he had "concluded beyond a reasonable doubt that that which the officer said he did see, was, in fact, possible to be seen" could not be construed as meaning that trial judge had at that time reached conclusion concerning defendant's guilt or innocence. Pen.Code,   288a.

5. Criminal law  260(7)

An appellate court will not give any consideration to remarks made by trial judge in course of deciding a case as impeaching trial judge's judgment or finding.

6. Criminal law  260(4)

In prosecution for violation of section 288a of Penal Code, where trial judge's visit to scene of alleged crime was made at defendant's request and defendant did not make any objection either during view of premises or at any other time during trial that lighting conditions were not the same as when offense allegedly occurred, and did not make any objection to what transpired while there, assignment of error that lighting conditions were probably much better when trial judge visited premises than at time of alleged offense was without avail. Pen.Code,   288a.

William W. Larsen, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant and one Garcy were charged with the violation of section 288a of the Penal Code. Defendant pleaded not guilty, waived trial by jury, and was found guilty by the court as charged. His motion for a new trial was denied and he has appealed from the order denying the motion.

[1] Defendant's contention that the evidence is insufficient to sustain the judgment of guilty for the reason that he was not sufficiently identified is without merit. The act with which he was charged took place in a public restroom having two stalls. There was a hole in the partition separating them. A police officer testified that he looked through the east window of the restroom and observed defendant; he then looked through the west window and observed Garcy in the act of committing the offense. He entered the restroom and arrested both parties. No other persons were in the restroom during the period of time covered by the evidence. Defendant does not deny his presence in the restroom but merely denies having engaged in the criminal offense.

[2,3] Corroboration of the police officer's testimony was not required. *People v. Shafer*, 101 Cal.App.2d 54, 224 P.2d 778, 781. It is not unsubstantial or inherently improbable and this court will not set aside the judgment of the trial judge who accepted and believed the evidence. *People v. Kasunic*, 95 Cal.App.2d 676, 679, 213 P.2d 778.

[4,5] At the request of defendant the trial judge viewed the premises and stood in the positions occupied by the officer when the latter made his observations. At the hearing of the motion for a new trial the judge stated that at the time he visited the premises "defendant was still clothed with the presumption of innocence," and that after the officer had indicated the

manner in which he looked through the windows and the judge had stood in the positions indicated by the officer he had "concluded beyond a reasonable doubt that that which the officer said he did see was, in fact, possible to be seen." Defendant contends that these remarks of the court must be construed to mean that he was not clothed with the presumption of innocence throughout the trial. The quoted statement merely indicates that when the court looked through the windows, as indicated by the officer, it was clear beyond a reasonable doubt that the officer could have seen the parties in the positions he had described. The statement does not indicate that the court had at that time reached a conclusion concerning defendant's guilt or innocence. Furthermore, an appellate court will not give any consideration to remarks made by the trial judge in the course of deciding a case. *People v. Lindsey*, 90 Cal.App.2d 558, 564, 203 P.2d 572; *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 781, 163 P.2d 756; *Stone v. Los Angeles County Flood Control Dist.*, 81 Cal.App.2d 902, 907, 185 P.2d 396; *People v. Shafer*, supra, 101 Cal.App.2d at page 54, 224 P.2d 778.

[6] The act with which defendant was charged was committed shortly before 4:00 o'clock in the afternoon. The court viewed the premises during the morning. Defendant assigns error in that the lighting conditions were probably much better when the court visited the premises than at the time of the offense. The visit to the scene of the crime was made at the request of defendant and he did not make any objection either during the view of the premises or at any other time during the trial that the lighting conditions were not the same as when the offense occurred, nor did he make any objection to what transpired while there. In the absence of objection at the trial this assignment of error is without avail and without merit.

The order denying defendant's motion for a new trial is affirmed.

MOORE, P. J., and McCOMB, J., concur.

WHITMORE et ux. v. FRENCH et ux.

Civ. 18066.

District Court of Appeal, Second District,
Division 2, California.

Jan. 26, 1951.

Hearing Granted March 26, 1951.*

Action by Arthur M. Whitmore and wife, against Howard W. French and wife, to recover damages for personal injuries resulting from an automobile collision. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered a judgment for the plaintiffs, and defendants appealed. The District Court of Appeal, McComb, J., held that instructing the jury that defendants were liable for simple negligence was proper.

Judgment affirmed.

1. Venue ☞8

An action in tort is a transitory action and may be maintained in any jurisdiction where defendant may be found.

2. Courts ☞489(1)

Where a head-on automobile collision occurred in Yosemite National Park, the federal courts did not have exclusive jurisdiction of an action for damages by occupants against driver.

3. Pleading ☞36(3)

In action by automobile occupants against driver for injuries sustained in collision, defendant's allegations that they were engaged in a joint venture and that plaintiffs had authority to exercise control over the automobile were binding on defendant as admissions of fact.

4. Appeal and error ☞1064(1)

In action by automobile occupants against driver for injuries sustained in collision, the trial court did not commit prejudicial error in instructing the jury that defendant was liable to plaintiff for simple negligence and refusing to instruct on automobile guest statute. Vehicle Code, § 403.

Thomas P. Menzies and Harold L. Watt,
Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and
Richard E. Reese, all of Los Angeles, for
respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for personal injuries resulting from an automobile collision on the Big Oak Flat Road in the County of Mariposa, State of California, located within Yosemite National Park, defendants appeal.

Facts: At the time of the accident plaintiffs were occupants of an automobile owned and operated by the defendant French. Plaintiffs and defendants had started to make a trip to the Pacific coast from Lebanon, Missouri, on the mutual understanding that the expenses should be divided equally between them; that defendant Howard French would do the driving and plaintiff Arthur M. Whitmore would take care of the road maps. A head-on collision with another car ensued, as a result of which plaintiffs were injured.

[1,2] *Questions:* First: *In view of the fact that the accident occurred in Yosemite National Park did the Federal Courts have exclusive jurisdiction over the cause of action alleged in the complaint?*

This question must be answered in the negative. An action in tort is a transitory action and may be maintained in any jurisdiction where the defendant may be found. (*Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63, 84 A.L.R. 1264.)

Second: *Did the trial court commit prejudicial error in instructing the jury that defendants were liable to plaintiffs Whitmore for simple negligence under the undisputed facts?*

[3] This question must also be answered in the negative. Defendants alleged in their answer to the amended complaint that plaintiffs and defendants were engaged in a joint venture in making a trip from Missouri to California, and alleged among other things that plaintiffs had a "voice and a right to be heard in the management and control of the enterprise;" and also that plaintiffs had authority to exercise control over the operation of the automobile and a power to supervise the manner in which it should be operated.

These allegations are entirely repugnant to defendants' present contention that plain-

* Subsequent opinion 235 P.2d 3.

tiffs were merely guests in defendants' automobile, and that therefore the provisions of section 403 of the California Vehicle Code relative to personal injury to guests was applicable.

The allegations were binding upon defendants as admissions of fact and it would have been the duty of the trial judge to instruct the jury to disregard any evidence to the contrary. (*Hubbard v. Jurian*, 35 Cal.App. 757, 764, 170 P. 1093.) The trial judge correctly refused to instruct the jury relative to the provisions of section 403 of the California Vehicle Code.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.



102 Cal.App.2d 104

PEOPLE v. KULWIN et al.
Cr. 4543.

District Court of Appeal, Second District,
Division 1, California.
Jan. 31, 1951.

Rehearing Denied Feb. 13, 1951.

Meyer Myron Kulwin, and others, were convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., for the crime of conspiracy, and defendants appealed, and defendants also appealed from an order denying motion for a new trial. The District Court of Appeal, White, P. J., held that the evidence was sufficient to make out a prima facie case of conspiracy against the defendants, and therefore it was not error for trial court to admit against all of them the evidence of the acts and declarations of alleged conspirators.

Judgment and order as to one defendant affirmed, and appeals as to other defendants dismissed, and orders affirmed.

1. Criminal law ⇨1023(10)

Where trial court did not pronounce judgment against the defendants other than one of them, purported appeals from judgment would be dismissed, and District

Court of Appeal would give consideration only to the points raised by defendants as ground for reversal of orders denying a new trial.

2. Criminal law ⇨427(2, 5)

Before evidence of acts and declarations of an alleged co-conspirator is admissible against the others, fact of conspiracy must be proved, however, existence of a conspiracy need be proved only to the extent of establishing prima facie evidence of fact.

3. Criminal law ⇨400(1)

Where one testified to what he had seen or heard, such testimony is primary evidence, regardless of whether such fact or facts are reduced to writing or incorporated in a record or document.

4. Criminal law ⇨400(1)

In prosecution for conspiracy, where police officer actually overheard a conversation between defendants, to which he testified, trial court did not err in refusing to require the production of recordings of conversations as to what took place at the times and upon the cases testified to by the officer.

5. Criminal law ⇨316

In prosecution for conspiracy, where none of the defendants either took the stand in their own defense nor produced any witnesses, trial court was free to consider the failure of defendants to explain or deny evidence against them.

6. Conspiracy ⇨47

Generally a conspiracy can only be established by circumstantial evidence, for it is not often that the direct fact of an unlawful design can be proved otherwise than by establishment of independent facts, bearing more or less closely or remotely upon common design.

7. Conspiracy ⇨47

Since the existence of a conspiracy is a question of fact, it is sufficient if the circumstances proved satisfy the trier of fact beyond a reasonable doubt.

8. Criminal law ⇨427(5)

In conspiracy prosecution, evidence was sufficient to make out a prima facie

case against defendants, and therefore it was not error for trial court to admit against all defendants the evidence of acts and declarations of alleged conspirators in furtherance of conspiracy. Pen.Code, § 337a, subds. 1-4, 6.

9. Conspiracy 47

Evidence was sufficient to sustain convictions for conspiracy. Pen.Code, § 337a, subds. 1-4, 6.

John J. Bradley, Max Solomon, Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were charged with the crime of conspiracy to violate subdivisions 1, 2, 3, 4 and 6 of Section 337a of the Penal Code, in that between the dates of March 6, 1950 and March 29, 1950 they conspired to commit acts forbidden under said section and the foregoing subdivisions thereof. Defendant Philip Klein was also charged with a prior felony conviction in the state of Kentucky allegedly on or about March 9, 1932, and another prior felony conviction in the District Court of the United States, in and for the northern district of the state of California on or about August 3, 1934, upon which convictions said defendant served a term of imprisonment in a state and federal prison.

Each defendant pleaded not guilty to the offenses charged in the information, and appellant Philip Klein denied the prior convictions charged against him. Trial by jury was waived by all defendants and the cause was submitted by stipulation upon the transcript of the preliminary examination together with additional evidence presented by the prosecution. None of the defendants took the stand in his own behalf nor was any evidence presented in their defense.

The court found each defendant guilty as charged in the information and granted leave to file an application for probation.

No finding was made as to the alleged prior convictions of defendant Philip Klein. A motion for a new trial was made on behalf of all defendants and denied.

The application for probation was denied as to defendant Philip Klein and he was sentenced to the County Jail for a term of one year. As to the remaining defendants, proceedings were ordered suspended and probation was granted, conditioned, among other things, that such defendants serve terms of imprisonment in the County Jail. Each defendant has appealed from the "judgment" and from the "order denying a motion for a new trial".

[1] Since the court did not pronounce judgment against the defendants other than Philip Klein, their purported appeals from the judgment must be dismissed, and consideration will be given only to the points raised by them as ground for reversal of the orders denying a new trial. *People v. Steccone*, 36 Cal.2d 234, 223 P.2d 17.

The factual situation which gives rise to this prosecution may be summarized by saying that Benno Wolfer, a watchmaker, rented premises at 5063 West Pico Boulevard in the City of and County of Los Angeles. The premises were divided by partitions into three parts, and he sublet the rear two portions of the premises to defendant Joe Kline. This rear portion of the premises was called the Swiss Musical Shop and had an entrance from the rear. Defendant Kline had been a sublessee thereof since December 1, 1949.

A microphone had been placed in one of the partitions and the wire from the instrument led to a fire station some 1,600 feet away where there was installed a recording instrument. D. B. F. Williams, a police officer of the City of Los Angeles, went to the recording station at 3 o'clock on the afternoon of March 10, 1950. Commencing with March 11, 1950, he was at the receiver daily, with the exception of Sundays, from 8 o'clock in the morning to approximately 6 o'clock in the evening, and on some evenings remained there until 8 or 9 o'clock up to March 29, 1950.

Following the arrest of defendants, he talked to each of them and testified he

recognized their voices as the ones he heard over the receiver in the fire station.

We deem it unnecessary to here set forth in detail the many conversations to which Officer Williams testified as having been heard by him over the foregoing receiver in the fire station. Suffice it to say that if such testimony was admissible it was sufficient to substantiate the conviction with numerous corroborative facts, to which we shall hereinafter refer, evidencing defendants' collaboration in bookmaking activities.

[2] We are consonant of the rule that before the evidence of the acts and declarations of an alleged co-conspirator is admissible against the others, the fact of the conspiracy must be proved. However, the existence of a conspiracy need be proved only to the extent of establishing prima facie evidence of the fact. In a civil action proof by a preponderance of the evidence is not required, nor is proof beyond a reasonable doubt required in a criminal action. This latter doctrine applies only to the issue of guilt.

On this appeal appellants urge a reversal of the judgment on the ground that (1) the decision of the trial judge finding them guilty is contrary to law in that the trial court denied the appellants' request for "the best evidence"; and (2) the verdict is contrary to the evidence.

After testifying that he could identify the names of the men and the voices he overheard over the foregoing receiver in the fire station, and upon being asked to relate the things that he heard over the receiver in the fire station and to identify the voices which he recognized, objection was made on the ground that the recordings were "the best evidence", and that the officer's testimony was not the "best evidence". The district attorney advised the court that he had the recordings and invited defendants and their counsel to listen to the recordings consisting of 47 reels of 30 minutes each, and that the recordings were available to defendants if they desired to go to the police department and hear them. It might here be noted that this objection was first made at the pre-

liminary examination, was overruled by the committing magistrate, and the ruling was sustained by the trial judge.

Although the case was submitted upon the transcript of the preliminary examination, Officer Williams was nevertheless called to testify in person at the trial. To assist him in his testimony he used notes that he transcribed from the various recordings, these notes being made after the arrest and being taken from the reels. The officer used these notes to assist him in his testimony, as well as notes made at the time of his conversations with the respective defendants. No objection was made to the method by which the officer testified. Appellants' contention on this appeal is that the decision of the court is contrary to the law in that the trial court committed error in not requiring production of the allegedly "best evidence" (the recordings) as to what took place at the times and upon the occasions testified to by the officer.

[3] We are impressed that the so-called "best evidence" rule has no application to the circumstances here involved. We are not here confronted with a situation wherein the witness was testifying to the contents of a document but are confronted with a situation in which the officer who testified at the time of trial actually overheard the conversations to which he testified. Where one testifies to what he has seen or heard such testimony is primary evidence, regardless of whether such fact or facts are reduced to writing or incorporated in a record or document. In other words, the witness is not testifying as to what the writing contains, but as to what he observed and knew because he heard it. While the recordings might be more reliable and satisfactory evidence under ordinary circumstances than testimony from memory, the latter is not rendered incompetent by the fact of the existence of the former. *Meyer v. Foster*, 147 Cal. 166, 169, 81 P. 402; *People v. Curtis*, 50 Cal. 95; *Maguire v. Cunningham*, 64 Cal.App. 536, 549, 222 P. 838. In the instant case the police officer was an actor in the occurrences concerning which he was testifying and having heard the words and the voices

of other actors in the occurrence, his testimony, upon the basic principles of evidence, may well be characterized as primary. The fact that the recordings were available furnishes no objection to the introduction of portions or all evidence of what the officer actually heard.

[4] In the light of the foregoing it cannot be said that the trial judge abused his discretion in refusing to order the recordings brought in, particularly where appellants had ample opportunity to examine them and yet made no attempt to refute the testimony of the officer either by taking the stand themselves or making any offer of proof.

Appellants' contention that the testimony of Officer Williams was only as to fragmentary parts of alleged conversations on the taped recordings is not borne out by the record which shows that there was no continuous conversation during the 19 days under which the establishment in question was under surveillance, but there was a series of conversations, and that as to each conversation to which the officer testified he stated that he was giving substantially all of what he overheard.

No attempt was made by cross-examination to establish that there was any further conversation; appellants presented no evidence that any material portions of the conversations were omitted; nor was any offer of proof made that such omissions existed. And this, although the recordings were available to defendants and their counsel between the time of the preliminary examination and the time of the court action.

The objection that sufficient foundation was not laid to entitle the officer to identify the voices he heard went to the weight rather than the admissibility of his evidence. He testified that subsequent to the arrest of appellants he talked with each of them and recognized their respective voices as those he had heard over the receiver in the fire station. Manifestly, no prejudice occurred to appellants by reason of the trial court's ruling in this regard. It is noteworthy that during the trial when appellants demanded the right to test Of-

ficer William's ability to recognize voices with an experiment in court by "asking Officer Williams to turn around and have some of the defendants read and see if he can identify them", and permission for such experiment was granted by the court, appellants declined to proceed therewith.

[5] Finally, appellants contend that whether or not the testimony of Officer Williams is considered, the conviction is without legal support in the evidence. An examination of the evidence in the instant case must be made in the light of the fact that appellants neither took the stand in their own defense nor produced any witnesses. The trier of fact was therefore, free to consider the failure of appellants to explain or deny evidence against them. *People v. Adamson*, 27 Cal.2d 478, 486, 487, 165 P.2d 3.

[6] It is generally recognized that a conspiracy can only be established by circumstantial evidence "for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal. Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts * * *, nor that they had previously arranged a detailed plan among them for the execution of the conspiracy. (Citing authority.)" *People v. Sampsell*, 104 Cal.App. 431, 438, 439, 286 P. 434, 437.

[7] The existence of a conspiracy being a question of fact, it is sufficient if the circumstances proved satisfy the trier of fact beyond a reasonable doubt, to whom is also left the weight and sufficiency of the evidence.

In the case now engaging our attention, remembering that appellants offered no witnesses, and did not take the stand, there is practically no conflict in the record concerning the facts involved.

The Pico Boulevard premises were rented by appellant Joseph Kline although the telephone bill was not only paid by him but also by appellant Kulwin. In the absence

of an explanation this fact could be taken into consideration by the trial judge in concluding that there was an agreement between these two appellants, inasmuch as there would be no reason for one of them to participate in the payment of the telephone bill of another, particularly in the absence of any explanation. The rear portion of the premises was called "The Swiss Musical Shop" and had an entrance from the rear, although no business in the sale or repair of clocks was carried on there. In the absence of some explanation the trial judge would be warranted in concluding that this was merely a subterfuge for illegal activities.

The testimony of Officer Williams established that during the period from March 10 to March 29, the date of arrest, the foregoing premises were frequented by all of the appellants, and that each of them freely used the telephone for incoming and outgoing calls, all of which authorized an inference that their presence therein was not of a social nature. It was also established that each of the appellants, with the exception of Miller, took bets over the telephone. At the time of the arrest a scratch sheet and note pad were found with appellant Kulwin's handwriting on them, reasonably indicating that he had recorded bets, and a piece of paper was picked up from the floor in front of appellant Joseph Kline with his handwriting on it indicating that he had recorded bets for March 29 on it.

Another noteworthy factor in connection with the character of the premises is that after the arrest, police officers continued to answer the telephone and to take bets from persons calling in.

Concerning the premises occupied by appellant Miller there would seem to be little question about the character of this location, for at the time of the arrest Miller was seated at a table on which was a telephone and in front of him were the markers and California Digest used in the recording of bets while the testimony of expert witnesses established that the use and purpose of such papers was for recording bets. Again, the arresting officers,

while on the premises, continued to answer the telephone and to take bets from persons on the other end of the line.

Concerning the connection between appellant Miller and the Long Beach Boulevard premises occupied by him, with the Pico Boulevard premises occupied by the other appellants, the testimony of Officer Williams established that Miller also frequented the Pico Boulevard premises. It was also established that incoming calls were received by a party named "Nick" and the fact that appellant Miller's name was Nicholas, as well as other circumstances, fairly justified an inference that the calls were coming to the latter. There is further evidence that when appellant Kulwin called the Long Beach Boulevard address he hung up when he failed to get appellant Miller and he was in fact talking to the arresting officer instead. Furthermore, when appellant Miller was released by the arresting officer he immediately proceeded to the vicinity of the Pico Boulevard premises to meet one of the other appellants and drove away only after failing to make such contact. According to his own admission, after his release, he took the betting papers not seized by the officers, to appellant Kulwin's home, where the wife of the latter destroyed them. The evidence also established that both the Pico and Long Beach Boulevard premises used the same "lay-off" number when bets were received that were too high for them to handle. Appellant Miller's statement clearly connected him with the operations of the conspiracy at the Pico Boulevard premises.

Other circumstances which were before the trial judge were the address book found on appellant Kulwin which contained the names and telephone numbers of appellants Joseph Kline and Louis Lendzen. Also, on the day following the arrest of appellants Kulwin and Joseph Kline, betting markers containing the handwriting of appellants Kulwin and Miller were found in appellant Philip Klein's apartment. When these were called to the attention of the last-named appellant, he at first maintained they were "old markers" although they were within a ten-day period. He then

stated that he did not know how they got into his apartment but that even if he did he wouldn't tell the officers.

Appellants contend that the mere fact that bookmakers use the same premises or frequent the same location does not indicate a conspiracy, and can be easily explained on the theory that they might be competitors, simply using each other's names or place of business for the purpose of gaining patronage or obtaining credit. In the absence of some evidence explaining that such was the purpose and object of the appellants in the instant case, the trial court was not required to indulge in such an inference. The law does not require that co-conspirators in a conspiracy to commit acts forbidden by section 337a of the Penal Code must be partners in legal contemplation. If by a common agreement they determine to use the same premises and facilities, cooperate with each other, they would be conspirators even though they did not share in each other's profits and losses. The gist of the conspiracy is the agreement to commit the crime, and the fact that the conspirators might be business competitors is immaterial.

The discussions heard by the police concerning bookmaking payoffs on various races, association of the appellants as well as other circumstances hereinbefore adverted to, all warranted the trial court in finding the existence of a conspiracy.

Although standing alone as bits of isolated evidence, some of the foregoing testimony with reference to the activities of appellants might be entitled to but little weight, nevertheless their evidentiary value as a connecting link along with other incriminating factors, must be recognized. And while it is true that conspiracies cannot be established by mere suspicion, nor can a defendant's failure to testify as to facts within his knowledge be used to supply failure of proof by the prosecution, such is not the case here. The record discloses numerous corroborative facts tending to show appellants' collaboration in bookmaking activities at their respective establishments.

[8] Holding as we do that the evidence herein set forth, aside from any admissions of appellants, was sufficient to make out a prima facie case of conspiracy against them, it was not error for the trial court to admit against all appellants the evidence of the acts and declarations of the alleged conspirators in furtherance of the conspiracy.

[9] When all of the legally admitted testimony is considered in connection with the prima facie case we are satisfied that the evidence was ample to sustain the finding by the trial judge that all appellants were guilty of the crime charged against them.

For the foregoing reasons, the judgment and the order denying appellant Philip Klein's motion for a new trial are, and each is affirmed. The appeals of the remaining defendants from the alleged judgment are dismissed, and the orders denying their motions for a new trial are affirmed.

DORAN and DRAPEAU, JJ., concur.



DORSEY et al. v. BARBA et al.

Civ. 14381.

District Court of Appeal, First District,
Division 1, California.

Jan. 12, 1951.

Hearing Granted March 12, 1951.*

Personal injury action by Josephine Dorsey and Beatrice Anderson against Vincent Barba and Catherine Barba. The Superior Court of the State of California in and for the County of Alameda, Donald K. Quayle, J., rendered judgment in favor of Catherine Barba and after motion for new trial modified judgment against Vincent Barba by increasing the amount thereof without the plaintiffs' consent, and the plaintiffs appealed. The District Court of Appeal held that wife in whose name automobile was

* Subsequent opinion 240 P.2d 604.

registered was not liable for husband's negligence in operation of automobile awarded to husband by property settlement agreement incorporated in divorce decree even though automobile was not re-registered in husband's name, and that the trial court did not have the power of additur over the objections of the plaintiffs.

Judgment in favor of Catherine Barba affirmed, and judgment against Vincent Barba reversed, and cause remanded as to Vincent Barba.

Bray, J., dissented in part.

1. Husband and wife ⇨262(1)

Placing wife's name as owner on certificate of registration of automobile purchased during marriage did not constitute acquisition of property by "instrument in writing" which statute requires to raise presumption of separate property. Civ. Code, § 164.

2. Husband and wife ⇨264

Evidence that automobile purchased after marriage was paid for out of joint earnings of husband and wife was sufficient to rebut any presumption of separate property arising from the placing of wife's name as owner on certificate of registration of automobile and was sufficient to support finding that automobile was community property. Civ. Code, § 164.

3. Automobiles ⇨56

A conditional seller of automobile is liable as "owner" for accident occurring before compliance with registration provisions of vehicle code. Vehicle Code, § 178.

4. Automobiles ⇨190

A wife surrendering possession and control and all interest in community automobile to husband pursuant to property settlement agreement incorporated in subsequent divorce decree was not owner and could not consent to husband's operation of automobile, and hence was not liable for injuries sustained by occupants of automobile with which husband collided, notwithstanding that wife's name appeared as owner on registration certificate and that automobile had not been re-registered in husband's name after the property settlement agreement. Vehicle Code §§ 66, 178, 186, 402, Civ. Code, § 172.

5. Jury ⇨10

The provision in constitution concerning right of trial by jury guarantees right to jury trial as it existed at common law when Constitution was first adopted in 1849. Const. art. 1, § 7.

6. Jury ⇨31(3)

The legislature or the courts may, without violation of constitutional guarantee of right of trial by jury, change the rules of practice and procedure as they existed at common law and may introduce new devices better suited for the efficient administration of justice, but legislature and courts cannot impair substantial features of jury trial. Const. art. 1, § 7.

7. Trial ⇨340(5)

Where the verdict is the result of a measurable mistake, the trial court has the power to raise the verdict in order to correct the mistake.

8. Constitutional law ⇨47

The argument of expediency cannot justify the invasion of a fundamental and constitutional right.

9. Courts ⇨90(1)

That courts may have power of remittitur is not a sound reason for holding that courts have power of additur, in view of doubtful soundness of remittitur doctrine. Const. art. 1, § 7; U.S.C.A. Const. Amend. 7.

10. Courts ⇨90(1)

A precedent that at best is doubtful should not be blindly extended by analogy if the result will be to weaken constitutional guarantees.

11. Damages ⇨208(1)

Jury ⇨12(1)

The fixing of damages in a controverted unliquidated damage case is fundamentally a jury power and not a power of the trial court, and this right to have a jury fix damages is substantive and not procedural. Const. art. 1, § 7; U.S.C.A. Const. Amend. 7.

12. Damages ⇨208(1)

It is a jury and not a court function to pinpoint the damages within a wide range of figures, any one of which in law would be adequate and neither inadequate

nor excessive. Const. art. 1, § 7; U.S.C.A.Const. Amend. 7.

13. Jury ☞31(7½)

New trial ☞161(1)

Trial judge determining that jury verdicts were inadequate as a matter of law and fact must set verdicts aside and grant plaintiffs a new trial, and order granting new trial unless defendant should consent to modification increasing damages in specified amounts was denial of constitutional guarantee of jury trial, where trial judge did not determine the uppermost boundary between which the damages would be excessive. Const. art. 1, § 7; U.S.C.A.Const. Amend. 7.

14. Jury ☞31(7½)

Courts should not impair constitutional rights, such as constitutional guarantee of jury trial, under the guise of improving procedures. Const. art. 1, § 7; U.S.C.A. Const. Amend. 7.

15. New trial ☞9

A new trial awarded for inadequacy of damages would be limited to issue of damages where defendant's liability was not questioned.

Theodore Golden, J. Bruce Fratis, Oakland, Julius M. Keller, San Francisco (of counsel), for appellants.

James F. Galliano, C. Paul Paduck, Oakland (Henry Teichert, Berkeley, of counsel), for respondent, Vincent Barba.

Clark & Heafey, Edwin A. Heafey, Augustin Donovan and Louis B. DeAvila, all of Oakland, for respondent, Catherine Barba.

In an action for personal injuries, tried by a jury, plaintiffs appeal from a judgment in favor of defendant Catherine Barba, and also from the judgment as modified after motion for new trial, increasing without the consent of plaintiffs, the judgment against defendant Vincent Barba.

The portion of this opinion dealing with the appeal from the judgment in favor of Catherine Barba was prepared by Justice BRAY, and all of the members of the Court agree with that portion of the opin-

ion. The second portion of this opinion dealing with the subject of additur was prepared by Presiding Justice PETERS and Justice WOOD concurs, with Justice BRAY dissenting.

Questions Presented.

Two questions are presented: (1) Where a community automobile registered in the wife's name is awarded to the husband in a property settlement agreement and in a divorce decree, and the automobile is not re-registered under the Vehicle Act, is the wife thereafter an "owner" within the meaning of sections 402 and 178 of the Vehicle Code? (2) Has the trial court, over the objection of plaintiff, in personal injury actions, the power of additur?

Facts.

It is conceded that the implied finding of the jury that the negligence of defendant Vincent Barba was a proximate cause of the accident, and that plaintiffs were not contributively negligent, is supported by substantial evidence. The two plaintiff sisters were riding in a car driven by one Schuppert (a plaintiff in this action against whom the jury returned a verdict, and who is not a party to this appeal). At a certain intersection in Oakland, the Schuppert car collided with one driven by defendant Vincent. Plaintiffs were thrown from the car and sustained injuries. They brought suit against Vincent, as driver of the Barba car, and against Catherine, alleging that she was its owner and that Vincent was driving with her permission. The jury verdicts will be discussed later.

Ownership—Appeal from Judgment in Favor of Catherine Barba.

BRAY, Justice.

Plaintiffs appeal from the judgment in favor of Catherine on the ground that under the evidence and section 402 of the Vehicle Code, she was an "owner" of the car, and hence Vincent's negligence must be imputed to her as a matter of law. The accident occurred May 1, 1948, at which time the car was still registered in Catherine's name. Catherine and Vincent had been husband and wife, and approximately

six months before their separation, the automobile in question was purchased. It was paid for out of the joint earnings of the parties, and the ownership certificate (pink slip) was taken in the name of Catherine alone. Catherine testified that this was done so she would feel that half of it belonged to her. It was considered as community property by the parties. Both the pink slip and the car were always in Vincent's possession and control. He drove the car to and from work and used it whenever he desired. Catherine had never driven the car. In fact, she could not drive and had no driver's license. The parties separated, and on January 24, 1948, entered into a property settlement agreement, which settled all of their property rights. One of the provisions of the agreement was a transfer from Catherine to Vincent of all her interest in the car. Thereafter, and on February 9, 1948, Catherine obtained an interlocutory decree of divorce, which decree, by reference, incorporated the property settlement agreement, approved it and ordered each of the parties "to do those things required of them to be done * *." Catherine did not endorse the pink slip (Vincent testified that he mislaid it), nor did she comply with section 178 of the Vehicle Code until approximately two months after the accident, when Vincent sold the car. Vincent testified that after the divorce, Catherine saw him using the car and did not object; that the court had given him the car and she could not object. Catherine testified that after the divorce she had not seen him drive the car but presumed he was driving it; that she never gave her consent or permission to his using the car. On cross-examination of Vincent it was brought out that, at a justice's court trial arising out of the same accident, he had testified that the car at the time of the accident belonged to Catherine.

The trial court considered the matter as a question of fact to be determined by the jury. It first gave full instructions on ownership and the requirements of consent, express or implied, and then instructed that the jury must determine whether Catherine was an owner, and if the jury

found she was, then whether she consented to the use of the car by Vincent. Plaintiffs do not question these instructions. As the jury found for Catherine, it evidently found against plaintiffs on both questions.

[1,2] In *Pacific Tel. & Tel. Co. v. Wellman*, 98 Cal.App.2d 151, 219 P.2d 506, it was held that where an automobile is purchased with community funds something more than the fact that the wife's name appears as owner on the registration certificate (pink slip) is required to overcome the presumption that the automobile is community property. Placing her name on the pink slip does not constitute acquisition of property by an "instrument in writing" which section 164 of the Civil Code requires to raise the presumption of separate property. But even if there were a presumption, raised by the pink slip, that the car belonged to Catherine, the evidence is sufficient to rebut the presumption, and to support the implied finding that the car actually was community property at the time of the property settlement agreement. Thus, the real question to be determined here is, was the transfer of the community property interest from wife to husband one which required a strict compliance with section 178 in order to relieve the former wife of liability under section 402? Section 402 provides: "Every owner of a motor vehicle is liable" for the death or injury to persons or property resulting from the negligent operation of the vehicle by any person using or operating it with the "permission, express or implied" of such owner. Section 66 provides: "'Owner' is a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents or pledges such vehicle; the person entitled to the possession of a vehicle as the purchaser under a conditional sale contract; * * *."

Section 178 provides that "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser" shall not be deemed the owner for purposes of civil liability for its operation by another when the owner, in addition to sale or transfer and de-

livery of possession has either (1) made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in the code, or (2) has notified the department of motor vehicles of such sale or transfer in the manner set forth in the code. Section 186 of the Vehicle Code provides that no transfer of any interest in a motor vehicle shall pass nor any attempted transfer be effective until the requirements of that section, which are somewhat similar to those of section 178, have been complied with.

[3] It is well settled in California that a conditional vendor of a motor vehicle is still liable as "owner" for an accident which occurs before he has complied with the registration provisions of the code. *Weinberg v. Whitebone*, 87 Cal.App.2d 319, 196 P.2d 963. Plaintiffs contend that the transfer of the wife's interest in the automobile to the husband is the same, so far as Vehicle Code compliance is concerned, as the transfer by a conditional vendor to the vendee. They rely on *Wilcox v. Berry*, 32 Cal.2d 189, 195 P.2d 414, in which the car was registered in the name of the husband and/or wife. The husband was driving and it was sought to impute negligence to the wife. The court held the wife liable, saying that the evidence supported the implied finding that the automobile was owned jointly and it was a question of fact whether the car's operation was with her consent. That case is distinguishable from ours, in that first, the car was *jointly* owned, where here, it was community property; secondly, in that case there was no transfer between husband and wife, where here, there was such a transfer as well as a court confirmation of that transfer; and thirdly, there, the evidence justified a finding of consent, while here the evidence supports a finding of no consent, unless, as contended by plaintiffs, the law implies a consent; and fourthly, there, the court expressly stated that if the car had been community property there could be no consent of the wife, since the husband is the manager of the community property. This statement was based on the authority of *Cox v. Kaufman*, 77 Cal.App.2d 449, 175

P.2d 260. In that case the auto was community property. At the time of the accident the husband was driving and the wife was riding in the car. He was taking her to her place of employment. After pointing out that section 172 of the Civil Code gives the husband the entire management and control of the community property, the court said that "no consent of the wife, express or implied, to her husband's use or operation of the community automobile could add anything as a matter of law or of fact to his rights in that respect, which are already plenary and complete. Under secs. 161a and 172, Civ.Code, her objection to his use of the automobile would be as futile as her consent to his use of it would be superfluous. His operation of the car in contemplation of law is referable to his absolute right to manage and control the community property and not to any consent, express or implied, of his wife; and sec. 402, Vehicle Code, for that reason has no application to the facts of this case." 77 Cal.App.2d at page 452, 175 P.2d at page 261. It then held that the wife could not be held liable under section 402. "[S]he had no consent to give * * *." *Pacific Tel. & Tel. Co. v. Wellman*, 98 Cal.App.2d 151, 219 P.2d 506, 509.

[4] If a wife cannot be held liable where she still has a community interest in the car, because she has no power to consent to the husband's use of the car, it would be an anomalous situation if she were to be held liable after she has surrendered all interest in it. The husband still does not need her consent and as said in the *Cox* case, 77 Cal.App.2d 449, 175 P.2d 260, concerning use of the community car, "her objection to his use of the automobile would be as futile as her consent to his use of it would be superfluous." Therefore, in the case at bar, the finding of the jury that there was no consent by Catherine to the use of the car by Vincent was correct.

Moreover, for another reason, Catherine was not an "owner" within the contemplation of section 402. Section 66 says an "owner" is a person having all the incidents of ownership including the legal title. At no time did Catherine have all

the incidents of ownership. Under section 172, Civil Code, she was entitled to neither the possession nor control of the car. This fact alone distinguishes the situation from that in conditional sales.

This conclusion makes it unnecessary to discuss the question as to whether or not sub. (b) of section 186 of the Vehicle Code, excluding certain involuntary transfers from the operation of the section, excludes the type of "involuntary" transfer here involved.

The judgment in favor of Catherine should be affirmed.

ADDITUR—The Appeal by Plaintiffs from the Judgment Against Vincent Barba.

PETERS, Presiding Justice.

The jury brought in verdicts against Vincent Barba and in favor of Josephine Dorsey and Beatrice Anderson. The verdict in favor of Josephine was for \$620.39, while that in favor of Beatrice was for \$1,293.60. The uncontradicted evidence shows that Josephine spent for medical expenses the sum of \$512.39; that further surgery was required that would cost \$100 to \$200. Thus her special damages were either \$612.39 or \$712.39, depending upon whether the \$100 or \$200 estimate was accepted by the jury. Beatrice's medical expenses were \$721.60. The estimate for plastic surgery in her case was \$300 to \$500. She also claimed \$280 for loss of wages for eight weeks at \$35 a week, and she testified, in addition, that tips (she was a waitress) amounted to more than \$60 per week. Thus her medical expenses, including the plastic surgery, were from \$1,021.60 to \$1,221.60, depending upon whether the \$300 or \$500 estimate was accepted by the jury. When loss of wages and tips are added, her special damages exceeded the jury award of \$1,293.60.

The plaintiffs moved for a new trial on most of the statutory grounds including "inadequacy of the damages, appearing to have been given under the influence of passion or prejudice and not in conformity with the evidence produced at the trial." After argument, the trial court determined

that the damages were inadequate and ordered a new trial granted on the issue of damages alone unless defendant "files his written consent to a modification of the judgment entered herein in favor of Josephine Dorsey so that said judgment may be entered therein in the sum of \$1500.00 in place and stead of the sum of \$620.39 originally awarded, and to the modification of the judgment herein in favor of Beatrice Anderson, so that said judgment may be entered therein in the sum of \$3000.00 in place and stead of \$1293.60 originally awarded," and further providing that if defendant filed such a consent plaintiff's motion for a new trial was denied. Within the period specified the defendant filed the required consent, whereupon judgment for plaintiffs was entered in the amounts specified in the conditional order. The judgment recites all of the pertinent facts and specifically states that prior to making the conditional order the court had "found that the evidence was insufficient to support each of the verdicts hereinabove set forth in that the damages awarded each of said respective plaintiffs were inadequate."

Plaintiffs appeal from this judgment in their favor, contending that the trial court had no power to thus deny conditionally the motion for a new trial, and that the procedure adopted denied to them a jury trial on the issue of damages.

It is apparent that the jury found that the negligence of defendant proximately caused the accident and that the defendant was liable for all damages proximately caused thereby. It is also apparent that then the jury fixed the amount of special damages and gave each plaintiff an award of her special damages, but either overlooked or disregarded the element of general damages entirely, or impliedly found that plaintiffs were entitled to no general damages at all. It is also apparent that the trial court in upping each award by its conditional order awarded each plaintiff something for general damages, about \$800 for Josephine, and about \$1,500 for Beatrice.

In this case, once it was determined that defendant Vincent Barba was legally responsible for the damages, it is clear that

plaintiffs were entitled to both their special and general damages as shown by the evidence. So far as general damages are concerned, the testimony showed that Josephine suffered severe lacerations on her forehead, on the right side of her head, and to her left eyelid, all of which were sutured; that she had a cerebral concussion and was unconscious until the day after the accident; that she had a severe tenderness in her abdomen, pelvic region and in her left knee; that there were abrasions to her left knee, and this knee had a chip fracture; that she suffered a tear in the back of the right knee; that the accident happened on May 1, 1948, and she remained in the hospital until May 6th, and remained in bed at home until May 16th when she returned to the hospital where she remained until May 22nd; that it was necessary to give her penicillin as a preventive for lockjaw; that at the time of trial (a little over a year after the accident) she still had headaches and her eye swelled up at intervals. She also testified that for two or three weeks after her last release from the hospital she was unable to do housework. Beatrice had multiple abrasions of the head and face and also had a cerebral concussion. She had a triangular laceration over the right eye about 2½ inches in length which had to be sutured, and extensive abrasions of both knees and right heel. There was an inflammatory area in the right shoulder. She suffered from severe shock. She, too, was unconscious until May 2nd and remained in the hospital until May 6th. She returned to the hospital May 23rd for lockjaw treatment, and again on June 6th to reopen the wound in her forehead to clean out particles of gravel. She, also, still suffered from headaches at the time of trial. She was out of work eight weeks because of the accident.

A plastic surgeon testified that the facial scars of plaintiffs were permanent and that, while they could be reduced in width by plastic surgery, they could not be eliminated.

[5,6] The problem presented is whether the trial court has the power to increase a jury verdict by a conditional order of the type here involved with the consent of the defendant but against the will and without the consent of the plaintiffs. This revolves around the question as to whether or not such procedure violates the guarantee of a jury trial contained in Article 1, § 7, of our state Constitution, which reads: "The right of trial by jury shall be secured to all, and remain inviolate".¹

This provision guarantees the right to a jury trial as it existed at common law when our Constitution was first adopted in 1849. *People v. Kelly*, 203 Cal. 128, 133, 263 P. 226; *People v. Powell*, 87 Cal. 348, 354, 25 P. 481, 11 L.R.A. 75, et seq.; *Clyne v. Brock*, 82 Cal.App.2d 958, 961, 188 P.2d 263. The legislature or the courts may, without violation of the constitutional guarantee, change the rules of practice and procedure as they existed at common law and may introduce new devices better suited for the efficient administration of justice, but neither the legislature nor the courts have the lawful power to impair the substantial features of a jury trial.²

Thus the basic question involved is whether this process of additur is a mere rule of practice or procedure, and so may be adopted without violation of the Constitution, or whether such procedure is substantive in nature and violates the fundamental concepts of a jury trial as such concepts were known at common law.

There are few decided cases upon this subject, and what cases have been decided are in hopeless conflict. Most of the writ-

1. The Constitution of 1849 contained the identical language, Art. 1, § 3, and, in addition, contained the word "forever" at the end of the clause.

2. See *Walker v. New Mexico & Southern Pacific Railroad Co.*, 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837; *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.

Ed. 919; *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188; *People v. Powell*, 87 Cal. 348, 25 P. 481, 11 L.R.A. 75; *People v. Richardson*, 138 Cal.App. 404, 32 P.2d 433; *Clyne v. Brock*, 82 Cal. App.2d 958, 188 P.2d 263; *Moore v. Purse Seine Net*, 18 Cal.2d 835, 118 P. 2d 1.

ers on this subject seem to favor the conclusion that additur does not violate the constitutional guarantee.³ The exercise of this power, against the will of a non-consenting plaintiff, has been denied to the federal courts by a five-to-four decision of the United States Supreme Court. *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, decided in 1935. The upper courts of the various states have decisions every which way on this subject, with the majority denying the existence of the right. *American Ry. Express Co. v. Bender*, 20 Ohio App. 436, 152 N.E. 197; *Shanahan v. Boston & Northern St. R. Co.*, 193 Mass. 412, 79 N.E. 751; *Lemon v. Campbell*, 136 Pa.Super. 370, 7 A.2d 643; *Bradwell v. Pittsburg & W. E. R. Co.*, 139 Pa. 404, 20 A. 1046; *Gaffney v. Illingsworth*, 90 N.J.L. 490, 101 A. 243; *Clausing v. Kershaw*, 129 Wash. 67, 224 P. 573; *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182, 99 N.W. 630; *Rudnick v. Jacobs*, 7 W.W. Harr., Del., 348, 183 A. 508. Wisconsin has adopted a somewhat unique practice which seems to be peculiar to that state. There the trial court may grant the plaintiff the option to accept the smallest amount warranted by the proof, and if he refuses to consent, then it grants the defendant the option to pay the greatest amount warranted by the proof. The choice, in either case, is binding on the other party, and a new trial ordered if neither option is exercised. *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771; *Risch v. Lawhead*, 211 Wis. 270, 248 N.W. 127.

[7] California has never directly passed upon the problem involved, but there are dicta both ways on the subject. The case relied upon by defendant in support of the existence of such power is *Secreto v. Carlander*, 35 Cal.App.2d 361, 95 P.2d 476. That case undoubtedly contains some dicta that supports the defendant, but the sole authority relied upon in the opinion in support of the rule stated is not in point. In the *Secreto* case the plaintiff, in a personal injury action, received a jury verdict of

\$150. As in the instant case, the plaintiff moved for a new trial on the ground of inadequacy, and, as in the instant case, a conditional order was made granting the new trial unless defendant consented to raising the sum awarded plaintiff to \$1,200. The defendant *did not* consent and then the *defendant* appealed from the order granting the new trial. Thus the case is simply one where a trial court has granted a new trial because of the inadequacy of the damages—a power that always has existed in this state. (See 20 Cal.Jur., § 67, p. 104.) By way of dicta, and in response to defendant's contention that the trial court in ruling on a motion for a new trial is without power without the consent of both parties to make a conditional order of the type here involved, the court stated, 35 Cal.App. 2d at page 364, 95 P.2d at page 477: "The second proposition is untenable. The law is established in this state that as a condition for denying a motion for a new trial the trial court has the power to require the opposing party to consent to an increase of the amount of the jury's verdict to bring the amount of the verdict in conformity with the evidence." The sole authority relied upon to support this dictum is *Adamson v. County of Los Angeles*, 52 Cal.App. 125, 198 P. 52. That case did not involve the conditional increase of a jury verdict in an unliquidated damage case at all. It was a case where the damages were fixed, certain and computable. It was a condemnation action. The jury made an award based upon twenty-nine miles of fencing at so much per mile. On the motion for new trial both the defendant and plaintiff agreed that the computation by the jury was incorrect, and that there were 31½ miles of fencing. The motion for a new trial was denied on condition that the condemnor consent to the increase for the extra miles, which he did. There was no appeal from this increased judgment, but defendant sought to attack the judgment collaterally by attempting to enjoin, as a taxpayer, the construction of the road. The increase in the award against such an attack was up-

3. See 44 Yale Law Journal 318. 32 Michigan L.Rev. 538; 23 Cal.L.Rev. 536; 35 Cal.L.Rev. 150; 14 So.Cal.L.Rev. 490;

McCormick on Damages, § 19, p. 76; 2 McBaine on California Trial and Appellate Practice, p. 161, § 799.

held, and properly so. Aside from the fact that this was a collateral attack on the judgment, it is well settled that, where the verdict is the result of a measurable mistake, the trial court has the power to raise the verdict, in order to correct the mistake. *County of Los Angeles v. Rindge Co.*, 53 Cal.App. 166, 200 P. 27; *Eaton v. Jones*, 107 Cal. 487, 40 P. 798; see, also, *Engle v. Farrell*, 75 Cal.App.2d 612, 171 P.2d 588. For these reasons the *Secreto* and *Adamson* cases constitute no authority on the subject under discussion.

There are several other California cases that should be mentioned. In *Werner v. Bryden*, 84 Cal.App. 472, 258 P. 138, in an action for breach of promise to marry and seduction, the jury found for the defendant—thus finding impliedly, that no promise of marriage had been made. On motion for a new trial by the plaintiff, the trial court found the evidence insufficient to support that implied finding, and conditioned the denial of plaintiff's motion for a new trial upon defendant consenting to a judgment against him for \$1,500. Defendant consented, and the new trial was denied. Plaintiff appealed. The court reversed, holding that the uncontradicted evidence showed a promise to marry, so that plaintiff was entitled to damages, and also holding that plaintiff had a constitutional right to have her unliquidated damages assessed by a jury. This case, of course, involved a situation where the trial court on motion for a new trial, attempted, by a conditional order, to not only decide the issue of damages entirely, but also the issue of liability. While it does not present a true additur situation, where only an increase of the verdict is involved, the case does serve to emphasize the point that in unliquidated damage cases the constitutional provision guaranteeing a jury trial requires the jury and not the court to fix the amount of damages.

Blackmore v. Brennan, 43 Cal.App.2d 280, 110 P.2d 723, contains some pertinent language. In this action for wrongful death the jury brought in a verdict of \$2,500 and the trial court entered its conditional order granting plaintiff's motion for a new trial unless defendant consented

to raising the verdict to \$3,500. The defendant consented. So far, the case is on all fours with the instant one. But after the new trial was denied and judgment entered for plaintiff in the increased amount, the *defendant* appealed contending that he had been deprived of his right to a jury trial. Of course, by consenting to the increase, the defendant had waived his rights. *Phelan v. Superior Court*, 35 Cal.2d 363, 373, 217 P.2d 951. That is what the court held and that holding has no application to the present problem. But in the course of its discussion, the court, in the *Blackmore* case, stated 43 Cal.App.2d at page 289, 110 P.2d at page 728: "It is the established rule of the courts of this state and of other jurisdictions to uphold the authority of trial judges, under proper circumstances, to modify judgments on motions for new trials by either reducing or increasing the judgments to conform to the evidence, conditioned upon the written consent of the parties unfavorably affected thereby. 95 A.L.R. 1164, note; 53 A.L.R. 779, note. We perceive no essential difference between allowing a trial judge to decrease the amount of damages awarded by a jury, to conform to the evidence, and increasing that amount, even though the case may involve unliquidated damages which appear to have been awarded through passion and prejudice or when it is clearly in conflict with the evidence. In either event the judgment must accord with the evidence adduced. *It is true that either party who is prejudiced by such an order, so as to deprive him of the constitutional privilege of submitting his cause to a jury, may object to that procedure.* But there are many decisions which hold that, when a person who is unfavorably affected by such a conditional order with respect to a motion for new trial, consents in writing thereto, he is not deprived of his constitutional right to have the amount of damages which are assessed against him submitted to a jury, for he has thereby waived that right. In the present case the appellants consented to the increase of damages in the manner required by law, and they may therefore not complain." (Italics added.) Although there is some language in the

opinion that is somewhat confusing, it is a possible interpretation of the italicized portion above quoted that the majority of the court believed that before a verdict could be validly increased, the consent of the plaintiff as well as that of defendant is required. The concurring opinion in that case is directly in point. In that opinion the concurrence is unequivocally placed on the ground that the exercise of the power of additur, without the consent of the plaintiff, violated plaintiff's constitutional right to a jury trial. In this connection the concurring justice unequivocally approved the majority opinion in *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603. Thus, in this case, the majority broadly indicated, and the concurring justice expressly held, that the trial court was without power to increase conditionally the jury's award unless the plaintiff consents.

The last California case which need be mentioned is *Taylor v. Pole*, 16 Cal.2d 668, 107 P.2d 614. There, one of the plaintiffs, Austin Taylor, in a personal injury action, received a verdict in his favor in the sum of "\$ No." The uncontradicted evidence showed that Austin had spent \$117.64 to repair his car, and had suffered other and general damages. The trial court denied Austin's motion for a new trial on condition that the defendant consent to an award of \$117.64. The defendant consented and Austin appealed. The Supreme Court reversed, holding that the jury's verdict in favor of Austin had settled the issue of liability, and that the trial court was without power to award by conditional order special damages only. The court stated 16 Cal.2d at page 674, 107 P.2d at page 617. "There is a conflict of authority as to the extent of the power of a trial court to assess damages or increase the amount of an inadequate award made by jury verdict, as a condition of denial of motion for new trial. [Citing cases and authorities.] The question need not be here determined because even the application of the broadest rule to which we have been cited would not sustain the trial court's action in the present cause. This is so because in ordering the increase to cover the item of property damage the court failed to take cog-

nizance of the fact that Mr. Taylor also sought compensation for personal injuries."

The rule of this case might well be applicable to the present case. As already pointed out, in the instant case, the jury allowed only what the uncontradicted evidence showed were the special damages of plaintiffs. The jury either overlooked the item of general damages or disbelieved the uncontradicted evidence of general damages. In either event, the trial judge, by fixing the amount of the award in his conditional order, clearly substituted his judgment for that of the jury on the issue of general damages. In a very real sense, in the instant case, the trial court awarded general damages where nothing had been awarded for that item of damages by the jury.

Although it could be argued that the above cases support the conclusion that the power of additur does not exist in this state, there appears to be no clear-cut holding on the issue and the question would appear to be an open one. The leading case on the subject in United States is *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603. That case is on all fours with the instant one. There a jury, in a personal injury action, brought in a verdict for \$500. The plaintiff moved for a new trial on various grounds, including inadequacy of damages. The trial court ordered a new trial upon the ground that the damages were inadequate unless defendant would consent to an increase to \$1,500. The defendant consented, and the new trial was denied. Plaintiff appealed. The Supreme Court of the United States, by a five-to-four decision, reversed the judgment, holding that such procedure violated the Seventh Amendment to the United States Constitution, guaranteeing, in the federal courts, the right to a jury trial in civil actions. The opinions filed, both majority and minority, are lengthy and exhaustively discuss the question involved. The majority came to the conclusion that, while there were a few limited situations, not here analogous, at common law in which a court was permitted to increase jury awards, the power of additur did not

generally exist at common law in unliquidated damage cases; that the fixing of damages in such cases was, at common law, a jury function; and that for the trial judge to attempt to fix the damages in such cases was a direct violation of the constitutional guarantee. The majority agreed that the power to remit conditionally a portion of the judgment with the consent of plaintiff existed in the federal courts, but held that were this question before them for the first time it was quite doubtful whether it would be upheld. Certainly, said the court, the power should not be extended to increase the verdict. The minority were of the view that the power of additur was a corollary to remittitur; that since the power to remit existed, the power to add should be recognized; that in either case the matter was one of procedure and not of substance.

In the present case, in support of the action of the trial court, the defendant argues that the courts of United States generally, and the courts of California in particular, have long recognized the power of remittitur, and urges that the power of additur is the corollary of that rule. It is true that the power of remittitur is recognized in many states, and reluctantly by the United States Supreme Court. See annotations 53 A.L.R. 779; 95 A.L.R. 1163. Whether such power existed at common law is a debatable question. In 1884 the Queen's Bench Division upheld the power of remittitur without the consent of defendant. *Belt v. Lawes*, L.R. 12 Q.B.D. 356. But in 1905 the House of Lords expressly overruled *Belt v. Lawes* in *Watt v. Watt*, L.R. [1905] A.C. 115, holding that the power of remittitur did not exist unless both parties consented. The basis of the holding was that the right of the jury to fix the amount of the damages in unliquidated damage cases is a fundamental part of the right to a jury trial.

In California several cases have recognized the power of the trial court to remit conditionally a portion of the verdict with the consent of plaintiff and against the will of defendant. *Hepner v. Libby*, *McNeill & Libby*, 114 Cal.App. 747, 300 P. 830; *Werner v. Bryden*, 84 Cal.App. 472, 258 P. 138. It may be that it is now the law in

California that the power of remittitur exists, although there appears to be no case in which the matter has been thoroughly discussed. The United States Supreme Court distinguished between remittitur and additur in the *Dimick* case on the ground that the power of remittitur may have been recognized at common law in 1791 when the Seventh Amendment to the Constitution was ratified, while the power of additur was not. As already stated, the majority indicated that, were the problem of remittitur one of first impression, it probably would not have been sustained.

[8] We think the answer to this argument based on the attempted analogy between remittitur and additur is this: If it is true that the pin-pointing of damages in unliquidated damage cases between the broad limits of inadequacy and excessiveness is fundamentally a power of the jury, then it would follow that the trial judge has no power, against the will of either party, to raise or lower the verdict. The only possible legal basis for upholding the power of remittitur is that such power existed at common law in 1849 when our Constitution was first adopted, and therefore, the constitutional guarantee was limited by the existence of this power. That is a weak prop with which to attempt to support the argument in view of the decision of the House of Lords in *Watt v. Watt*, *supra*, holding that no such right existed at common law. So far as the existence of the doctrine in United States is concerned, it appears that in some early cases—notably one by Mr. Justice Story, *Blunt v. Little*, Fed.Cas.No.1,578, 3 Mason 102—which case seems to be the key case on the subject—the courts simply assumed, without analysis and without discussion, that the power of remittitur existed. This decision of Mr. Justice Story was blindly followed by the federal courts and by many state courts without question or analysis. See discussion in *Dimick v. Schiedt*, 293 U.S. 474, 482, 483, 55 S.Ct. 296, 79 L.Ed. 603. The only argument offered in any of those cases in support of the power of remittitur is not based upon an investigation of the common law rule, or upon any analysis of the relative rights of a

judge and jury in such cases, but is simply an argument of expediency—that is, that unless the power of remittitur exists, new trials will be required with the result that litigation will be protracted, the litigants will be subjected to the expense of new trials, and the time of busy courts will be consumed unnecessarily in trying cases anew. It is more efficient, so goes the argument, to permit the trial judge to fix, conditionally, the amount of damages than it is to require a new trial. Of course, these arguments might well lead to the conclusion that it is more “efficient” and more “expedient” to abolish jury trials entirely. The argument of expediency cannot justify the invasion of a fundamental and constitutional right. If expediency is to be the test, we might as well abolish written constitutions entirely. The argument that the end justifies the means should never be advanced as a justification for disregarding a constitutional mandate.

[9, 10] Thus, we are very doubtful of the soundness of the cases upholding the doctrine of remittitur, and believe that, upon proper analysis, the doctrine would and should be repudiated. As already pointed out, the only conceivable justification for the doctrine is that such doctrine existed at common law, and that argument is very doubtful indeed. No one can successfully argue that the doctrine of additur existed at common law. Just because the doctrine of remittitur has been held to exist, is no sound reason for extending the doctrine to include additur if the basis for remittitur is unsound. Simply because the courts improperly may have invaded the province of the jury in recognizing the power of remittitur does not justify the further invasion by the recognition of the power of additur. A precedent that at best is doubtful should not be blindly extended by analogy if the result will be to weaken constitutional guarantees. It is certainly a *non sequitur* to argue that, because the constitutional guarantee of a jury trial has been once disregarded, a second violation is not only justified but compelled.

[11] The real question is whether the fixing of damages by a jury in controverted

unliquidated law cases is a fundamental part of a jury trial or whether it is a mere matter of procedure. On principle there would appear to be no reasonable doubt but that the fixing of damages in a controverted and unliquidated damage case is fundamentally a jury power and not a power of the trial court. It further seems clear that this right to have a jury fix damages is substantive and not procedural. As was said by the United States Supreme Court in *Dimick v. Schiedt*, 293 U.S. 474, 485, 55 S.Ct. 300.

“The right of trial by jury is of ancient origin, characterized by Blackstone as ‘the glory of the English law’ and ‘the most transcendent privilege which any subject can enjoy’ (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), ‘* * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.’ With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton v. United States*, 281 U.S. 276, 312, 50 S.Ct. 253, 74 L.Ed. 854.

“The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is

excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept ‘an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.’”

[12, 13] These arguments are most convincing. It seems clear to us that in a controverted and unliquidated law case it is fundamental that the jury within certain broad limits has the power to fix the amount of damages. The boundaries between what is excessive and what is inadequate are widely separated. There is a broad band, not a thin line, within which the determination of the jury is conclusive. In terms of dollars it is not a pin point. It is not a specific figure, carried out to the second number beyond the decimal point. It is a wide range of figures, any one of which, in law, would be adequate, and neither inadequate nor excessive. It is a jury and not a court function to pin point the damages within this wide range. Certainly, if the legislature should attempt to provide that it was a court function to fix the amount of damages in such cases in the first instance, no appellate court would sustain such legislation. If a trial judge instructed a jury in such a case to

bring in a verdict in a fixed sum, the resulting judgment would be reversed. In a very real sense that is what was done here. Once the trial judge came to the conclusion that the jury verdicts were inadequate as a matter of law and fact, he was required to set those verdicts aside. Having so determined, the jury verdicts could not stand and were, in legal effect, wiped out. To then fix the precise amount of the unliquidated damages without the consent of plaintiffs was for the trial court to fix those damages, and to deprive the plaintiffs of their constitutional right to have a jury fix those damages within the broad limits of the range permitted. The awards here under review are those of the court, not those of the jury. Once the court found that the damages were inadequate, the plaintiffs, as a matter of law, were entitled to a new trial. This was not a matter of grace or discretion of the trial court, but a right guaranteed by the Constitution itself. No amount of argument can change the fact that the judgment here appealed from is the result of improper verdicts brought in by the jury, plus arbitrary increases made by a court that just had no power to assess the increases.

[14] The realities of such an invasion of a fundamental and constitutional right cannot be disregarded by rationalizing the process and calling it a “mere” matter of “procedure” and not one of substance. We all know that in some respects our legal procedure is slow and cumbersome and should be streamlined. We all agree that delays should be curtailed and unnecessary expense prevented. But under the guise of improving procedure the courts should not impair constitutional rights. The courts should be ever vigilant to uphold and to enforce constitutional guarantees, and should not impair them by calling the impairment a mere procedural matter. If there is to be a change in the substance of a jury trial in civil cases, that change should be accomplished by amendment of the Constitution, and not by the judicial fiat of a court. The right to a jury trial in all of its substantial parts is by no means an unimportant right to be disregarded at the whim or caprice of an appellate court

because it is argued, rightly or wrongly, that it is more "expedient" and "efficient" for a trial judge to fix damages than it is to require them to be fixed by a jury.

This is not a case where the trial court has held that the *maximum* verdict that could be sustained by the evidence is \$1,500 for Josephine and \$3,000 for Beatrice. It may be that a trial court could properly find that a verdict is inadequate and then by conditional order fix the amount of the maximum verdict (i. e., a verdict any larger would be excessive) that could be sustained by the evidence. In such a case, it may be that if the defendant consents to this maximum figure the plaintiff could not legally object because he has received the maximum amount that the evidence would support. But no such finding was made in the instant case, and, had such a finding been made, it would not have been sustained by the evidence. Assuming that plaintiffs are entitled to general damages, and the trial court in its conditional order necessarily so found, as already pointed out, the judgment appealed from awards Josephine about \$800 and Beatrice about \$1,500 for general damages. The evidence of general damages has already been set forth. According to that evidence it is apparent that the record would support verdicts substantially in excess of the amounts fixed in the judgment. In other words, verdicts substantially in excess of the \$1,500 and \$3,000 could not be held to be excessive. What the trial court did in the present case was not to determine the uppermost boundary beyond which the damages would be excessive, but to pin point the damages somewhere between the broad limits of inadequacy and excessiveness. That is not a trial court power, and its exercise denied to plaintiffs their constitutional right to have the jury determine that figure. This requires a reversal of the judgment against Vincent Barba and renders it unnecessary to consider plaintiffs' contention that even the awards made by the trial court were inadequate as a matter of law.

[15] Although a reversal of the judgment against Vincent Barba is required, the

retrial should be limited to the issue of damages. Vincent has not seen fit to appeal from the judgment. The jury has found that the negligence of Vincent was the proximate cause of the injuries sustained. That finding is amply and substantially supported. Under such circumstances it is unnecessary to try the issue of liability again. *Taylor v. Pole*, 16 Cal.2d 668, 675, 107 P.2d 614.

The judgment in favor of Catherine Barba is affirmed; the judgment against Vincent Barba is reversed on the appeal of both plaintiffs, and as to Vincent Barba the cause is remanded for a new trial solely upon the issue of the amount of damages, and the trial court is directed, upon the settlement of that issue, to enter judgment in favor of the plaintiffs for the amount so fixed.

FRED B. WOOD, J., concurs.

BRAY, Justice (dissenting).

I dissent from the majority opinion on the question of additur. As pointed out in that opinion, most of the writers on the subject favor the conclusion that additur does not violate the constitutional guarantee.¹ In the true sense, there never has been an absolute right to jury trial in civil cases. Jury trials have always been subject to a certain amount of restriction by the court. Thus, the court always has had the right to set aside a jury verdict for insufficiency of the evidence, including excessiveness and inadequacy of damages. True, a new jury trial followed. But the second trial was also subject to the same restriction. Moreover, "it appears to be standard practice in California for trial courts to 'impose terms and conditions on granting or denying motions for new trial,' in actions tried to a jury as well as in those tried to a court." *Engle v. Farrell*, 75 Cal.App.2d 612, 620, 171 P.2d 588, 593, citing 20 Cal.Jur. 207. See *Brooks v. San Francisco & N. P. Railway Co.*, 110 Cal. 173, 42 P. 570, where the court made an order granting a new trial for insufficiency of the evidence conditional upon the payment to the opposing party of

1. See majority opinion, 226 P.2d 683.

a sum of money for counsel fees and costs. Requiring terms for a new trial after a jury verdict is certainly a limitation on the right to jury trial, yet the court said, 110 Cal. at page 174, 42 P. at page 571: "That a *nisi prius* court has the power to impose terms as a condition of making an order for a new trial is too well settled to need argument in its support." The majority opinion, in a sense, makes a fetish out of the words "right to a jury trial" completely out of line with the historical and somewhat restrictive nature of that right, and with the realities and requirements of modern trial procedures.

The analysis of the California cases in the majority opinion shows that the power of additur over the objection of a plaintiff has not clearly been passed on in this state. Throughout the United States there seems to be a dearth of cases passing on the subject. In Ohio, Massachusetts and Pennsylvania, the right has been denied.² In New Jersey and Washington³ the right has squarely been upheld over the objection of the defendant. Apparently Minnesota and Delaware follow the same rule.⁴ (I can see no practical difference between an objection by a nonconsenting defendant and one by a nonconsenting plaintiff.) In *American Ry. Ex. Co. v. Bender*, supra, footnote, 152 N.E. 197, 198, there is an implication that additur with consent of defendant is permissible. The Wisconsin practice has been discussed in the majority opinion.

California is squarely faced with the problem—shall additur be permitted? I am of the opinion that it should. One of the serious objections to our court system is that litigation can be, and is, unduly protracted. As said in 44 *Yale Law Journal* 318, "The efficiency of judicial administration is hampered by the granting of new trials, with their concomitant delays in final adjudication and increased costs to litigants." It is incumbent on the courts to

streamline, to some extent, at least, their procedures, and to do away with situations which cause unnecessary delays. Other conditions being equal, the court should control the litigation and reasonably curtail its length. Of course, in doing so the courts should not deny a litigant any of his fundamental rights. Trial by jury is a fundamental right. But, it has already been held in this state, as well as in most jurisdictions, that in exercising remittitur the courts are not denying a litigant that right. He has had his jury trial. The jury has fixed the liability and the court has merely designated the greatest amount which under the evidence could be allowed to stand. As said in *Florida East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 64 So. 504, 506, 7 A.L.R. 1310, it is to the end of saving vexatious, expensive and prolonged litigation. "In this practice the court is not 'substituting its judgment for that of the jury, * * * for this is not indicating what amount the court would have given, but only such amount as it would not feel at liberty to pronounce excessive.'" So, in additur, the court is allowing the amount which it feels would not be excessive. Were it not for this power, the case could drag on interminably. The court has the power to grant a new trial where the verdict is either excessive or inadequate. Without the power of additur the case might come back time after time until the jury fixed an amount which the court felt was neither excessive nor inadequate. Instead of going through this circumlocution, why should the court not indicate this amount the first time?

I find it hard to distinguish on principle between remittitur and additur. Nor can I find any real difference in the distinction claimed, namely, that where the court reduces a jury award, the reduction is within the amount found by the jury, but where the court increases the amount it is beyond

2. See *American Ry. Ex. Co. v. Bender*, 20 Ohio App. 436, 152 N.E. 197; *Shanahan v. Boston & N. St. Ry. Co.*, 193 Mass. 412, 79 N.E. 751; *Lemond v. Campbell*, 136 Pa.Super. 370, 7 A.2d 643; *Raymond L. J. Riling, Inc., v. Schuck*, 346 Pa. 169, 29 A.2d 693.

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3. See *Gaffney v. Illingsworth*, 90 N.J.L. 490, 101 A. 243; *Clausing v. Kershaw*, 129 Wash. 67, 224 P. 573.

4. See *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182, 99 N.W. 630; *Rudnick v. Jacobs*, 7 W.W.Harr.Del. 348, 183 A. 508 (plaintiff's appeal).

the amount found by the jury. This distinction is given in the quotation from *Goldsmith v. Detroit, J. & C. Ry.*, 165 Mich. 177, 130 N.W. 647, found in *Werner v. Bryden*, 84 Cal.App. 472, 475, 258 P. 138. In either event, the objecting litigant has been deprived of the right to have the amount of the final award fixed by a jury. In either event, strictly speaking, it is the court's, rather than the jury's, award. Yet, not only in California, but in most of the states and in the federal jurisdictions, the right of the court to decrease a jury's award has been upheld. This, too, in the federal jurisdictions and in certain states where the right of the court to increase the jury's award has been denied. I like the reasons for allowing additur given by Stone, J., in the dissent in *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L. Ed. 603, joined in by Hughes, C. J., Brandeis, J. and Cardozo, J.: "The other, which is implicit in the first, is that it has power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted and the authority to set aside a verdict which is not within those limits." 293 U.S. at page 488, 55 S.Ct. at page 302. "The trial judge who denies a motion for a new trial, because the plaintiff has consented to reduce, or a defendant has consented to increase, the amount of the recovery, does no more than when, sitting in equity, he withholds relief upon the compliance with a condition, the performance of which will do substantial justice. See *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338, 53 S.Ct. 602, 77 L.Ed. 1208." 293 U.S. at page 497, 55 S.Ct. at page 305.

As said in *Rudnick v. Jacobs*, supra, footnote, 183 A. 508, where the court stated that it was unable to understand the distinction between remittitur and additur, "There can be no doubt that the purpose in each instance is to promote justice between litigants. Why then, should the court grant a remittitur reducing the amount of an excessive verdict, thus saving the parties the expense of a new trial, and not take a similar course with respect to inadequate verdicts by making an order increasing the amount of such verdicts?" 183 A. at page

510. Actually, both additur and remittitur are only a method of controlling the findings of the jury (a power which the courts have always had) and are not destructive of the substance of jury trial.

The majority opinion agrees, in effect, that additur should be permitted. It indicates that it would approve a type of additur in which the trial court, finding that a verdict is inadequate, could fix the maximum figure which it would permit the plaintiff to receive. Even in the case of such a conditional order, the plaintiff thereby is being deprived of the right to a jury trial. While, in our case, the judge did not state that the amount allowed was the maximum figure which, in his opinion, the evidence would support, it must be presumed that it was, because a judge, in passing on the adequacy or inadequacy of a verdict, must have that in mind. Paraphrasing what is said in *Stone, J.'s* dissenting opinion in *Dimick v. Schiedt*, supra, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603,—in the proper exercise of the power of additur the trial judge is determining, as a matter of law, the upper limits in which recovery by a plaintiff will be permissible, and exercising his authority to set aside a verdict which is not within those limits. The majority opinion indicates that the evidence would have supported a higher verdict. In doing so, it had in mind undoubtedly the cold record which the appellate court sees. It overlooks the fact that it is the trial judge who saw the witnesses who determines in the first instance what is the maximum amount. There were no permanent injuries in this case, other than scars (most of which would be removed by the plastic surgery for which the cost was allowed). Obviously the trial judge, whose duty it is to determine the credibility of the witnesses, did not believe that the temporary injuries were as serious as the plaintiffs testified. He, far better than this court, could determine what was the maximum figure the evidence justified.

As to the California Constitution guarantee of jury trial, the language of *Stone, J.*, in the *Dimick* case, supra, concerning the federal Constitution, is appropriate;

namely, that the constitutional provision did not have "any purpose but to preserve the essentials of the jury trial as it was known to the common law * * * For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts * * *." 293 U.S. at page 490, 55 S.Ct. at page 303. "It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791." 293 U.S. at page 491, 55 S.Ct. at page 303. "* * * [I]t is evident that the jury's function has not been curtailed. After the issues of fact had been submitted to the jury and its verdict taken, the trial judge was authorized to entertain a motion to set aside the verdict and, as an incident, to determine the legal limits of a proper verdict. A denial of the motion out of hand, however inadequate the verdict, was not an encroachment upon the province of the jury as the common law defined it." 293 U.S. at page 492, 55 S.Ct. at page 303. Stone, J. also pointed out that the fact that no English judge had considered the possibility of denying a new trial where the defendant had consented to increase the amount of recovery (except in mayhem and battery cases where it had been allowed) should not be controlling, for "if we must deny any possibility of change, development, or improvement, then it must be admitted that search of the legal scrap heap of a century and a half ago may commit us to the incongruous position in which we are left by the present decision: A federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount, but it is powerless to deny the motion if its judgment is influenced by the defendant's consent to a comparable increase in the recovery." 293 U.S. at page 495, 55 S.Ct. at page 304. Substitute "state trial court" for "federal trial court" in the foregoing sentence, and we have our present situation. Stone, J. also points out that

one of the principles of the common law, "certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it. * * * [T]he common-law rules, governing the admissibility of evidence and the competency of witnesses in the federal courts are not the particular rules which were in force in 1791, but are those rules adopted to present day conditions, 'in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past.' Funk v. United States, supra, 290 U.S. [371] 382, 54 S.Ct. 212, 215, 78 L.Ed. 369; see also Wolfe v. United States, 291 U.S. 7, 12, 54 S.Ct. 279, 78 L.Ed. 617; Holden v. Hardy, supra, 169 U.S. [366], 385-387, 18 S.Ct. 383, 42 L.Ed. 780." 293 U.S. at pages 495-496, 55 S.Ct. at page 305.

"To me it seems an indefensible anachronism for the law to reject the like principle of decision, in reviewing on appeal denials of motions for new trial, where the plaintiff has consented to decrease the judgment or the defendant has consented to increase it by the proper amount, or to apply it in the one case and reject it in the other. It is difficult to see upon what principle the denial of a motion for a new trial, which for centuries has been regarded as so much a matter of discretion that it is not disturbed when its only support may be a bad or inadequate reason, may nevertheless be set aside on appeal when it is supported by a good one: That the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict." 293 U.S. at page 497, 55 S.Ct. at page 305. Again, I point out that Hughes, C. J., Brandeis, J. and Cardozo, J. concurred in the views of Stone, J.

"In neither the case of remittitur nor of additur of damages is the original amount of damages as fixed by the jury retained. Hence, if a remittitur is not regarded as a substantial deprivation of trial by jury on the question of damages, an additur

realistically cannot be regarded as such, in spite of the argument that the jury has already passed on the lower amount when it granted the greater sum.

"It is further contended that the plaintiff is prejudiced to a greater degree in a case of additur than the defendant is in a case of remittitur—the loss occasioned by a denial of the chance to have a more favorable verdict from a second jury. It is submitted that this is unsound because in both instances the loss is the same—each party loses the chance of a more favorable verdict on a re-trial." (14 So.Cal.L. Rev. p. 491.)

In view of the long continued practice of compelling remittitur to excessive damages as the alternative to a granting of a new trial, courts should not hesitate to compel additur to inadequate damages as the alternative to the granting of a new trial, thereby saving further litigation, long delays, additional costs, and the fact that the case might return again and again for the court's decision on inadequate damages.



101 Cal.App.2d 871

TRICKEY v. CITY OF LONG BEACH et al.
Civ. 17733.

District Court of Appeal, Second District,
Division 3, California.

Jan. 25, 1951.

Rehearing Denied Feb. 15, 1951.

Hearing Denied March 22, 1951.

E. B. Trickey sued the City of Long Beach, a municipal corporation, and others to enjoin the transfer of funds from the city's gas revenue fund to its general purpose fund and to require the retransfer of funds previously unlawfully so transferred, on the ground that such funds were subject to trust and could only be used for harbor purposes and not for general municipal purposes. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment denying the relief sought, and the petitioner appealed. The District Court of Appeal, Vallée, J., held that all moneys de-

rived by the city from the sale of hydrocarbon substances produced upon tidelands granted to the city by the state in trust for specified purposes could only be used in furtherance of trust purposes and not for general municipal purposes unconnected therewith, and that the taxpayer, as one of the owners in equity, of the trust fund, had legal capacity to maintain the proceeding, but that the City Attorney, the Assistant City Attorney and the Deputy City Attorney were not proper parties defendant.

Affirmed in part and reversed in part.

1. Injunction ⇨152

In absence of general demurrer in return to order to show cause for preliminary injunction, question for decision on hearing is whether, balancing the respective equities of parties, defendant should or should not be restrained pendente lite from exercising rights claimed by him.

2. Injunction ⇨158

In absence of general demurrer in return to order to show cause for preliminary injunction, granting or denial of preliminary injunction does not amount to adjudication of ultimate rights in controversy, and all questions decided on hearing of order to show cause are open for review on final hearing.

3. Navigable waters ⇨37(8)

By virtue of grant of tidelands by state to city of Long Beach, for harbor purposes city is empowered to drill for, extract, and dispose of any oil, gas, and other hydrocarbon substances discovered on those tidelands and submerged lands owned by it, but all moneys derived by city from sale of such hydrocarbon substances produced from those lands are trust funds and can only be used in furtherance of trust imposed for harbor purposes and not for general municipal purposes unconnected therewith. Gen.Laws, Act 4401; Stats. 1949, p. 2855.

4. Navigable waters ⇨37(8)

Where city of Long Beach entered into contract by which it elected to take all dry gas processed from natural gas derived from tidelands granted, subject to trust for harbor purposes, to city by state in lieu of receiving percentage of any sales

of such dry gas by purchaser, and city sold such dry gas and received revenue therefrom, such revenue was impressed with trust imposed upon tidelands. Gen. Laws, Act 4401; Stats.1949, p. 2855.

5. Municipal corporations ⇨995(1)

Action to obtain judgment restraining and preventing any illegal expenditure of funds of city may be maintained against officer, agent, or other person acting in its behalf by any citizen residing therein who has within one year before the commencement of action paid taxes to such city. Code Civ.Proc. § 526a.

6. Municipal corporations ⇨995(1)

Where tidelands were granted to city of Long Beach in trust for specified purposes, taxpayers of city would be, in equity, owners of trust fund realized from hydrocarbon substances produced upon such tidelands, and therefore such taxpayers would have sufficient interest to restrain city officials from making unlawful use of trust fund and to compel retransfer of trust funds unlawfully transferred. Gen. Laws, Act 4401; Stats.1949, p. 2855.

7. Abatement and revival ⇨8(1)

In order that second action be abated because of pendency of a prior action, issues in two actions must be substantially the same, and in determining whether such issues are substantially the same, test applied is whether final judgment in first action could be pleaded in bar as former adjudication.

8. Abatement and revival ⇨8(2)

In action by taxpayer to enjoin city officials from transferring harbor-purpose trust funds derived from sale of dry gas from Gas Revenue Fund to City's General Purpose Fund to be used for general municipal purposes unconnected with trust purposes, abatement of proceeding because of pendency of another action, in which it was' sought to require Board of Harbor Commissioners to account for diverting wet gas to be sold in city and permitting funds to be used for the general account of the

City of Long Beach, was improper. Stats. 1937, p. 2924 et seq.

9. Municipal corporations ⇨1000(4)

In taxpayer's action to enjoin transfer of certain trust funds derived from sale of dry gas to general purpose fund to be used for general municipal purposes unconnected with trust purposes city auditor was properly joined as party defendant, but city attorney, assistant city attorney, and deputy city attorney were not proper parties defendant. Stats.1921, p. 2115; Stats.1937, pp. 2931-2934.

Matot, Gabrielson & Manley and Harry B. Seelig, all of Los Angeles, Shinberg & Shinberg, Washington, D. C., for appellants.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., Atlee S. Arnold and Dewey L. Strickler, Deputy City Attys., all of Long Beach, for respondents.

VALLIE, Justice.

Appeal by petitioner from a judgment (denominated judgment and order) denying him any relief, entered on the hearing of an order to show cause for a preliminary injunction in an action for a writ of mandate and an injunction.

Petitioner, a taxpayer and resident of the city of Long Beach, filed a "Petition For Writ of Mandate" against the city of Long Beach, the members of the City Council, the members of the Board of Harbor Commissioners, the City Treasurer, the City Auditor, the City Attorney, and two of his deputies, seeking, among other things, to compel them to "cease" transferring funds from the city's "Gas Revenue Fund" to its "General Purpose Fund" and to retransfer funds from its "General Purpose Fund" to the "Gas Revenue Fund," on the ground that they were trust funds which could be used only for harbor purposes and not for general municipal purposes.

The petition is predicated upon the decision in City of Long Beach v. Morse, 31 Cal.2d 254, 188 P.2d 17, 18,¹ rendered De-

1. The City of Long Beach sought a writ of mandate to compel its treasurer to

transfer revenue derived from the production of oil and gas from tidelands

ember 30, 1947, which is made a part of the petition by reference. The petition alleges that after the rendition of the Morse decision the defendants "conspired to divert and appropriate funds, the proceeds of said so-called tideland oil wells, of the City of Long Beach, in disregard of the rule announced in said decision, and ever since said time have continued and have pursued a policy of causing said public funds of the City of Long Beach to be diverted and appropriated in contravention of the law established by said decision in this, that the defendants, the Board of Harbor Commissioners of said City of Long Beach have caused the dry gas from tidelands to be turned over to the City Gas Department of the City of Long Beach and said gas has been sold at a profit to the citizens of the City of Long Beach, and the proceeds of the sale of this gas, which is part of the trust funds of said City, have been transferred from said Gas Department to the General Purpose Fund of the City of Long Beach at the following times and places [amounts], as follows, to-wit: January 31, 1948, the sum of \$55,000; June 30, 1948, the sum of \$23,500; June 30, 1948, the sum of \$26,250.05; June 30, 1948, the sum of \$2,850,000; June 30, 1949, the sum of \$4,600,000"; that all such transfers of funds were done by resolution of the City Council of the City of Long Beach, concurred in by all the other defendants, notwithstanding the fact that defendants knew that they could not be used

and submerged lands claimed by the city under legislative grants from the State of California, from its "Harbor Revenue Fund" to its "Public Improvement Fund", under a charter amendment providing for the transfer of 25% of the fund in question to the "Public Improvement Fund." The city treasurer refused to make the transfer on the ground it would be in violation of the charter provision because the revenue transferred to the "Public Improvement Fund" would be used for general municipal improvements unconnected with the purposes and uses provided for in the grants. It was conceded that if the transfer were made, the money would be used for general municipal improvements not limited to the purposes specified in the legislative grants. In denying the petition, the court

for general municipal purposes but were a trust fund for harbor purposes as determined by the Supreme Court in the Morse case; that the transfer of these funds "was in violation of the terms of the trust under which the City of Long Beach holds title to the lands * * * and that the defendants * * * had no right, power or authority whatever to make said transfers and expenditures * * * and any orders or directions of said City Officials * * * purportedly authorizing said transfers and expenditures * * * was in violation of their oath of office and constitutes malfeasance on the part of the defendants * * *."

The petition prayed that an alternative writ of mandate be issued requiring defendants to immediately "desist" from transferring or diverting "trust funds" into its "General Purpose Fund" for general municipal purposes "or for any purposes whatever excepting for harbor purposes in furtherance of the terms of the trust under which it holds title to certain tidelands which were the subject of the mandate proceedings" in the Morse case; to re-transfer all funds heretofore paid into the "General Purpose Fund" and, in the event of any deficiency, to repay the amount which had been unlawfully transferred from the "Gas Revenue Fund" until such time as the trust has been fully restored and "all funds which properly belong to said trust fund placed in the proper fund and held exclusively for the purpose of

held that the revenue derived from the production of oil and gas from the tidelands and submerged lands were trust funds subject to the trust under which the city held the lands, and, being so, could "not be used for any purposes other than those specified in the trust conveyances under which the City claims title to the lands."

In a footnote the court stated "The United States is not a party to this proceeding and the extent to which the State of California could validly grant to the City of Long Beach any right in the lands in question under the decision of the United States Supreme Court in *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 1664 [91 L.Ed. 1889], is not in issue."

said trust." Although the petition is de-nominated one for writ of mandate, it is obvious that it seeks injunctive relief as well.

An order issued, requiring defendants to show cause why they should not be restrained from transferring from the "Gas Revenue Fund" to the "General Purpose Fund" "monies derived from the proceeds or income from the tidelands," to be used for general municipal purposes or any purposes except those set forth in the trust conveyance and under which the city holds title to the tidelands. Defendants filed a return to the order to show cause. The return, among other matters, challenged the legal capacity of the petitioner to maintain the action and the sufficiency of the petition, and alleged that there was another action pending between the same parties for the same cause. Attached were an affidavit of the superintendent of the Long Beach Municipal Gas Department and a specimen contract under which the city, through its Board of Harbor Commissioners, sells the natural gas derived from wells located on the tidelands and submerged lands and retains the "resulting dry gas."

The affidavit and the specimen contract reveal the following:

The Municipal Gas Department was created in 1923. The Municipal Gas System serves the entire area of the city of Long

Beach with both domestic and industrial gas for fuel purposes. It is self-supporting, and the gas rate structure is maintained at a sufficiently high level to insure a substantial surplus profit. Since 1932 substantial sums of surplus moneys have been transferred from the Gas Department fund to other city funds to meet some of the general expenses of the city. The gas which the Municipal Gas Department distributes to its customers is obtained from several sources. Since 1939, the city has purchased "considerable" gas from independent suppliers and, in addition, by virtue of various contracts entered into between it and purchasers of natural gas produced from wells located on city-owned land and from wells located on tidelands granted to the city by the state, it has had "available" large quantities of dry gas. "[A]s of June 30, 1949, the City had the right to receive a quantity of dry gas equal to the resulting surplus dry gas derived from processing of the natural gas processed by the purchasers of the natural gas from 574 wells in the harbor area," of which 506 are located on the tidelands.

Under its contracts for the sale of natural gas derived from wells located on the tidelands, the purchaser pays the city 62% of the "gross proceeds derived * * * from the sale by it of natural gasoline, liquified gas and other products, excepting 'resulting dry gas.'" Under the contracts,*

2. "16. The dry gas resulting from the treatment of the natural gas hereunder and remaining after [various deductions] * * * shall be deemed 'resulting dry gas' hereunder and shall be available for sale by Purchaser (except as hereinafter provided), and Purchaser agrees to use its best efforts to sell, at the highest price obtainable, all of said 'resulting dry gas', or any portion thereof, which the City of Long Beach does not elect to take in kind, as herein provided. In the event of the sale by Purchaser of all or any portion of said 'resulting dry gas', Purchaser agrees to pay to Board, or as directed in writing by said Board, as additional compensation for said natural gas purchased by Purchaser hereunder, seventy-five per cent (75%) of the total gross proceeds derived by Purchaser from such sale of said 'resulting dry gas'. * * *

"17. It is further understood and agreed that, notwithstanding any other provision in this agreement, the City of Long Beach shall have the right, from time to time hereafter, to elect to take, without charge to it, all or any portion of the 'resulting dry gas', in kind, obtained from the treatment of the natural gas hereunder. * * * provided, however, that it is understood and agreed that by the execution of this agreement said City does elect to take, until further notice to said Purchaser, as hereinabove provided, all of the 'resulting dry gas' obtained from the treatment of the natural gas sold and delivered to Purchaser hereunder. Purchaser agrees to deliver all of said 'resulting dry gas' which said City so elects to take * * * in kind, to City as the Gas Department of said City shall require the same, such deliveries to be made through and by means

the city elects to take all of the "resulting dry gas" (which is that gas remaining after deducting unavoidable plant loss, unavoidable shrinkage, plant fuel reasonably used only in the collection of the natural gas and in the extraction of gasoline and other products from the natural gas, and the dry gas returned to the respective parcels from which the natural gas is recovered); in the event the city does not elect to take all, or any portion, of the "resulting dry gas," the purchaser is entitled to sell it and, as "additional compensation for said natural gas purchased," is required to pay the city therefor 75% of the total gross proceeds derived from the sale. Under the contracts, monthly written reports are required to be filed by the purchaser with the Board of Harbor Commissioners, showing the amount of natural gas received, the amount of natural gas sold and the proceeds derived from such sales, the proportion of gasoline extracted from the natural gas, the "disposition of the total dry gas derived from the natural gas received by Purchaser from the wells on each of said parcels of land * * * (separately, by parcels)," and a statement of the total compensation, both in cash and in kind, due under the contract.

After hearing arguments on the order to show cause, the court entered a judgment reading in part, "the Court * * * finds that an injunction and writ of mandate should not be granted for the reason that the case of *City of Long Beach v. Morse*, 31 Cal.2d 254, [188 P.2d 17] is not applicable to the relief sought herein and for the further reason that there is now another action pending entitled '*Albert v. Abrams et al. v. The City of Long Beach et al.*' in the Superior Court of the State of California, being case No. 546,583 in which the City of Long Beach is also a defendant and which seeks the same relief as that applied for herein. Therefore, the

Writ of Mandate applied for by petitioner is denied, and the Court hereby concludes as a final judgment herein that petitioner is not entitled to the relief sought," from which judgment petitioner appeals.

[1,2] In the absence of a general demurrer in return to an order to show cause for a preliminary injunction, the question for decision on the hearing is whether, balancing the respective equities of the parties, the defendant should or should not be restrained pendente lite from exercising rights claimed by him. In such a case the granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. All questions decided on the hearing of the order to show cause are open for review on the final hearing. *Marsh Bros. & Gardener v. United States Fidelity & Guaranty Co.*, 97 Cal.App. 474, 478, 275 P. 886. Defendants did not demur to the complaint. In view of the fact that a final judgment was entered on the hearing of the order to show cause, it would appear that the court treated the return as a demurrer.

The "Gas Revenue Fund" was created by amendment in 1937 of the Charter of the City of Long Beach. Stats.1937, p. 2924 et seq. All moneys received from the use, sale or distribution of gas in connection with the operation of the Gas Department are deposited with the city treasurer to the credit of the "Gas Revenue Fund." The moneys in this fund may only be used to defray the expenses of operating the Gas Department, to pay the principal and interest on all outstanding municipal bonds issued, or to be issued, by the city for or on account of the gas plant and system of supply and distribution, and for the establishment of a fund to be known as the "Gas Reserve Fund," the latter fund to be used for such costs or expenses of operation as have not been provided for in the budget of the city or Gas Department.

of City's facilities at the plant or plants of Purchaser used for the treatment of the natural gas hereunder. All such deliveries of 'resulting dry gas' to City shall be made by Purchaser in substantially even daily quantities, at a substantially uniform pressure of not less than thirty

(30) pounds per square inch gauge pressure at the meters of the Gas Department of City to be installed on the pipe line through which such delivery is made on the lands where said plant or plants of Purchaser is or are located."

Surplus moneys in the "Gas Revenue Fund" may, by a vote of $\frac{2}{3}$ ds of the City Council, be used for general expenses of the city. Stats.1937, p. 2924 et seq.; Charter of Long Beach, sec. 215a. It is alleged, and not denied, that the "General Purpose Fund" is used for the payment of general expenses of the city.

[3] Prior to 1939, the State of California by grants to the city of Long Beach transferred all of its right, title and interest in and to the tidelands and submerged lands within the boundaries of that city, in trust for certain uses and purposes connected with the development of Long Beach Harbor. Stats.1911, p. 1304, as amended in 1925 (Stats.1925, p. 235) and in 1935 (Stats. 1935, p. 793); 2 Deering's Gen. Laws 1944, Act 4401; City of Long Beach v. Marshall, 11 Cal.2d 609, 82 P.2d 362. By virtue of these grants, the city is empowered to drill for, extract, and dispose of any oil, gas, and other hydrocarbon substances discovered on these tidelands and submerged lands owned by it. City of Long Beach v. Marshall, supra. All moneys derived by the city from the sale of oil, gas, and other hydrocarbon substances produced from these lands are trust funds and can be used only in furtherance of the trust purposes and not for general municipal purposes unconnected with the trust purposes. City of Long Beach v. Morse, 31 Cal.2d 254, 257, 188 P.2d 17. All money derived by the city from the development of oil, gas, and other hydrocarbon substances from lands acquired by grant from the State of California must be paid into one of three funds: 1) if bonds are outstanding for harbor purposes, not less than 50% derived from such lands in the Harbor District must be paid into the "Harbor Bond Redemption and Interest Fund" and used exclusively for the payment of principal and interest on such bonds; 2) the balance must be paid into the "Harbor Revenue Fund", Stats.1937, p. 2939, as amended by Stats.1943, p. 3097, Stats.1949, p. 2855; 3) money derived from such lands not in the Harbor District must be paid into the "Tideland Oil Fund", Stats. 2d Ex.Sess. 1946, p. 367, as amended by Stats.1949, pp. 2855, 2857. Money in the "Harbor Re-

venue Fund" and in the "Tideland Oil Fund" may only be used in furtherance of the trust purposes. Stats.1931, p. 2807, sec. 229d; Stats. 2d Ex.Sess.1946, p. 367, as amended by Stats.1949, pp. 2855, 2857; City of Long Beach v. Morse, supra, 31 Cal.2d 254, 188 P.2d 17.

[4] Accordingly any revenue derived from the sale of dry gas processed from natural gas derived from oil wells located on tidelands and submerged lands granted by the state are impressed with the trust and are trust funds. That the city recognizes this fact is evident from its contracts whereby the purchasers of natural gas derived from these lands, in the event they sell the dry gas, are required to pay, as additional compensation therefore, 75% of the gross proceeds derived from sales of such dry gas, which sums must be paid into the "Harbor Revenue Fund" or into the "Tideland Oil Fund," as the case may be, to be used in furtherance of the trust purposes. The fact that under its contracts the city elects to take all of the dry gas processed from natural gas derived from the tidelands and submerged lands, in lieu of receiving a percentage of any sales of such dry gas by the purchaser, does not alter the situation. *A fortiori*, if the city, in turn, as it does, sells this dry gas and receives revenue therefrom, such revenue is likewise impressed with the trust and becomes trust funds, which may not be used for general municipal purposes, but only in furtherance of trust purposes. Although respondent contends otherwise, it is obvious from the specimen contract before us that the amount of dry gas obtained from the natural gas from tidelands and submerged lands and allocated to the city's gas department is determinable, and the money paid therefor is traceable and capable of segregation.

[5,6] Respondent challenges the legal capacity of petitioner to maintain the instant proceeding, arguing in effect that since these funds are claimed to be impressed with a public trust, any enforcement thereof must be by the state. An action to obtain a judgment restraining and preventing any illegal expenditure of the funds of

a city may be maintained against an officer, agent, or other person acting in its behalf by a citizen resident therein who has within one year before the commencement of the action paid a tax to such city. (Code Civ.Proc., sec. 526a; *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530; *Osburn v. Stone*, 170 Cal. 480, 150 P. 367; *Wirin v. Horrall*, 85 Cal.App.2d 497, 504, 193 P.2d 470; *Brown v. Boyd*, 33 Cal.App.2d 416, 423, 91 P.2d 926. See *Fox v. City of Pasadena*, 9 Cir., 78 F.2d 948. The taxpayers of the city are in equity the owners of the trust fund. The officials of the city can only hold and apply moneys derived from oil and gas produced from tidelands and submerged lands to the legitimate purposes of the trust, and a taxpayer has a sufficient interest to restrain the officials from making unlawful use of the trust funds and to compel the retransfer of trust funds unlawfully transferred. 6 *McQuillan, Municipal Corporations*, 2d Ed. Revised, sec. 2761. Petitioner is not seeking to enforce a public trust. The object of his action is merely to prevent the defendants from transferring trust funds in the "Gas Revenue Fund" to the "General Purpose Fund" to be used for general municipal purposes in violation of the terms of the trust and to compel them to retransfer trust funds heretofore illegally paid into the "General Purpose Fund." Appellant makes no point that the transfers were illegal because irregular in that they were not made in conformity with the provisions of the charter relating to funds collected by the Gas Department; the basis of his action is that some of the moneys in the "Gas Revenue Fund" are trust funds which can be used only for harbor purposes. This being so, any expenditure of the trust funds for general municipal purposes would be illegal in the sense that it is, and would be, a violation of the trust. Cf. *Mulvey v. Wangenheim*, 23 Cal.App. 268, 137 P. 1106.

Predicated on the fact that the petition alleges that the money transferred to the "General Purpose Fund" was expended for general municipal purposes, respondent argues: "If it be true that said money so transferred was expended for general mu-

nicipal purposes, such money would otherwise have been raised by taxation and appellant as a taxpayer would clearly not be injured but would, in fact, be benefited thereby," therefore, he does not have a cause of action. This argument is answered in *Mines v. Del Valle*, supra, 201 Cal. 273, at page 279, 257 P. 530, at page 534, where the court said: "If money belonging to the city is illegally paid out by its officers, the inevitable result would be a detriment to the taxpayers of said city, with a corresponding increase, either directly or indirectly, of the burden of taxation upon the property owners therein. The fact that the funds unlawfully withdrawn from the public treasury were not raised by direct taxation, but represented receipts from a public utility operated by the city, would not change this result. * * * Must a taxpayer, when he sees the money of the city being unlawfully applied and paid out for unlawful purposes, sit idly by, and is he without right either to stay the illegal expenditures or recover the same on behalf of the city after they are made, simply because he cannot show that he thereby sustained some special damage? This court has repeatedly held that he is not so helpless (*Crowe v. Boyle*, 184 Cal. 117, 193 P. 111, and citations found on page 152 thereof)."

[7] Appellant contends that the issues in *Abrams v. City of Long Beach*, which the trial court found "seeks the same relief as that applied for herein," are not substantially similar to those involved here. We agree. In order that a second action be abated because of the pendency of a prior action, it is elementary that the issues in the two actions must be substantially the same. In determining this question, the test applied is whether a final judgment in the first action could be pleaded in bar as a former adjudication. *Lord v. Garland*, 27 Cal.2d 840, 848, 168 P.2d 5; 1 Cal.Jur. 28, sec. 8. With this test in mind, it appears that the issues in the *Abrams* case are not the same as in the instant case and that if a judgment were rendered in that case it could not be pleaded in bar as a former adjudication.

The Abrams case seeks injunctive relief on behalf of taxpayers. The first count seeks to enjoin the city of Long Beach, the City Council, the Board of Harbor Commissioners, the Auditor and the Treasurer from expending *any* funds received as royalties from the development of oil, gas, and other hydrocarbon substances underlying the tidelands and submerged lands granted the city by the state on the ground that defendants have no right, title or interest in the lands and the minerals lying thereunder because the United States is possessed of paramount rights. The second count seeks to enjoin "the defendants" from enclosing public lands belonging to the United States because they are trespassers and are acting in violation of an Act of Congress. The third count charges the Board of Harbor Commissioners with "misusing and misappropriating" the funds of the city, and seeks an accounting "of all the books of the Harbor Commissioners" on the ground that the "Board of Harbor Commissioners is diverting the wet gas derived from the operation of said property to the Wilmington Gas Treating Plant and then causing the same to be sold in the City of Long Beach and without accounting for said funds in the Harbor Department of the City of Long Beach, but permitting said funds for the general account of the City of Long Beach." The complaint prays judgment 1) that the city of Long Beach, the City Council, the Board of Harbor Commissioners, the Auditor, and the Treasurer be enjoined from expending *any* funds received from the operation of said lands "for any purposes whatsoever"; 2) that "defendants" be permanently enjoined from drilling, producing or selling any products of any kind extracted from said lands; 3) that the Board of Harbor Commissioners be required to make a full accounting of all moneys received from the illegal operations of the city and that the funds be permanently impounded.

[8] That the two actions are totally dissimilar is at once apparent. The third count of the Abrams action, relied on by respondents as supporting the trial court's finding, charges that the Board of Harbor Commissioners is diverting certain *wet* gas

(*natural* gas) and causing it to be sold in the city "without accounting for the funds." It seeks an accounting only from the Board of Harbor Commissioners. The present proceeding seeks (1) to enjoin "the defendants" (including the City Council, City Treasurer, and Auditor) from transferring certain trust funds in the "Gas Revenue Fund," derived from the sale of *dry* gas, to the "General Purpose Fund" to be used for general municipal purposes unconnected with the trust purposes for which said funds may be used, and (2) the retransference and restoration of such funds so transferred and that such funds "[be] placed in the proper fund and [be] held exclusively for the purpose of said trust." The court, therefore, erred in its finding that the present proceeding should be abated by reason of the pendency of the Abrams case.

[9] Respondents contend that the Auditor, the City Attorney, Assistant City Attorney, and Deputy City Attorney were improperly joined as parties defendant. Among the duties of the Auditor are to audit the funds of the city and if he discovers any irregularities to file a written report thereof; all demands and claims must be presented to and audited by him and he must satisfy himself "whether the payment thereof is authorized by law"; if any demand or claim is payable out of a fund under the jurisdiction of any board and he disapproves the same, it must be transmitted to such board, together with the auditor's reasons for disapproval. Stats. 1937, pp. 2931-2934. It is obvious that the Auditor is a proper party defendant. We have not been referred to any statute, nor have we found any, prescribing any duty of the City Attorney or his deputies with respect to the transfer or retransfer of the moneys in question. The charter provisions fixing the duties of the City Attorney do not prescribe any such duty. Stats. 1921, p. 2115. The City Attorney, the Assistant City Attorney and the Deputy City Attorney are not proper parties defendant.

The judgment, insofar as it denies plaintiff any relief against the City Attorney,

the Assistant City Attorney and the Deputy City Attorney, is affirmed. In all other respects it is reversed for further proceedings not inconsistent with the views herein expressed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



101 Cal.App.2d 890

PEOPLE v. SAYIG et al.

Civ. 14385.

District Court of Appeal, First District,
Division 1, California.

Jan. 26, 1951.

Hearing Denied March 26, 1951.

Proceeding by the People of the State of California, acting by and through the Department of Public Works against John Sayig, and others, to condemn for highway purposes interests of defendants in a 15 foot strip of land fronting the properties of defendants. From an adverse judgment in the Superior Court, in and for the County of Santa Clara, M. G. Del Mutolo, J., the defendants appealed. The District Court of Appeal, Peters, P. J., held that the evidence established a dedication of the strip involved by defendant and public use thereof for more than the five year period and that the construction of a divided highway did not entitle defendants to compensable damages.

Judgment affirmed.

1. Highways ☞1

If the public acquires any right to use of a strip for highway purposes such right is acquired under doctrine of implied dedication not by prescription.

2. Dedication ☞20(3)

A public easement arises only by dedication but adverse user by the state for the five year prescriptive period may be evidence of a dedication.

3. Dedication ☞15, 31, 63(1)

In order to constitute a dedication of a public easement or abandonment thereof

by the owner, his intention to that effect must appear, and it may not be manifested by any contract, writing, or expressed declaration of the owner, but may be implied from its conduct, and acceptance by the public need not be manifested by any direct action ordinance or declaration of the public authorities but may be shown by mere user without any formal action in relation thereto by the municipal authorities.

4. Appeal and error ☞1008(1)

Easements ☞36(1)

There is a general presumption that a use by other than the owner of an easement is adverse and not permissive and while presumption is not as strong when the land is open, uncultivated and remote as when it is enclosed, cultivated and developed, the presumption exists in either case and the problem is one of fact for the trial court.

5. Highways ☞17

Evidence supported findings that a public easement for public travel had attached over strip claimed by defendants.

6. Adverse possession ☞8(2)

Once a public easement for highway purposes attached over a strip, title by adverse possession could not be adjudged against the state.

7. Highways ☞17

Evidence did not establish that use of strip for highway purposes made by the public after buildings were constructed on lots by defendant was permissive and not adverse.

8. Adverse possession ☞8(2)

Where highway sign was not erected on strip until a public easement on the strip for highway purposes was acquired, title by adverse possession of strip could not be acquired against the state.

9. Adverse possession ☞50

Evidence that vehicles were displayed for sale on a strip on which easement was claimed for highway purposes by the owner of the lot did not establish an adverse use thereof where upon demand of the highway employees, the owner removed the vehicles.

10. Adverse possession Ⓒ60(2)

Even if signs had been erected prior to time public easement on strip for highway purposes had attached they would only be a factor to be considered and would not be conclusive on the issue of permissive or adverse use by defendants of the strip.

11. Dedication Ⓒ44

Evidence supported a finding of intent to dedicate a strip for highway purposes.

12. Eminent domain Ⓒ107

It is not every depreciation in value of property not taken that can be made the basis of an award of damages in condemnation proceedings and injury to the business of the occupant of the property is not compensable and only damage to the property itself may be considered.

13. Eminent domain Ⓒ107

An abutting owner has no right to compensation by reason of diversion of traffic away from his property by relocation of a highway.

14. Highways Ⓒ85

An abutting owner has the right to a free and convenient right of access to the property on which his property abuts and such right attaches to the lot and is a property right as fully as the lot itself.

15. Highways Ⓒ85

While property owners have no property rights in any particular flow of traffic over highway adjacent to their property they do possess a right of direct access to highway and an easement of reasonable view of their property from such highway.

16. Eminent domain Ⓒ221

It is for the trial judge and not the jury to determine whether a property owner's right of access is substantially impaired by relocation of highway and if such impairment is found the extent of impairment is for the jury.

17. Eminent domain Ⓒ107

Where owner locates his business on a main highway and secures his main business from traffic thereon and state changes highway route so that his property is no

longer located on the main highway and business of the owner is totally destroyed, resulting damage is not compensable.

18. Eminent domain Ⓒ2(6)

The state under its police power may regulate traffic without becoming liable for damages for impairment to businesses that may be adversely affected.

19. Eminent domain Ⓒ106

Property placed in a cul-de-sac by reason of an improvement is entitled to compensation for depreciation of the property.

20. Eminent domain Ⓒ106

The construction of a divided highway in front of a property does not legally damage it.

21. Eminent domain Ⓒ106

Where improvement relocated highway in front of defendants' lots, making the highway a divided highway so that the lots had direct access only to a one-way highway in front of their properties where traffic was proceeding towards San Francisco and to get to the one-way highway going the opposite direction, defendants had to travel distances from 500 to 1000 feet to the cross over, defendants were not legally damaged by the construction of the highway so as to authorize recovery of compensation in condemnation proceedings by the state. Vehicle Code, § 1 et seq.

Rea, Jacka & Frasse and J. E. Bean, Jr., all of San Jose, for appellants.

Holloway Jones, Jack M. Howard, Joseph F. DeMartini, Roger Anderson and John P. Horgan, all of San Francisco, Robert E. Reed, Sacramento, for respondent.

PETERS, Presiding Justice.

The State brought this proceeding in eminent domain to condemn, for highway purposes, defendants' interests, if any, in a fifteen-foot strip of land fronting defendants' properties. Admittedly, defendants have title to the underlying fee of the strip in question. The complaint, as amended, alleged that all of the property sought to be

condemned "is subject to an easement or prescriptive right of the public for public travel thereover by vehicular and pedestrian traffic." The trial court found this allegation to be true, and further found that the bare fee title, subject to the public easement, was of no value. The court also found that none of the defendants suffered any damages to the remainder of their properties by the changes made in the highway by the new improvement. The defendants appeal. They admit that they offered no evidence of the value of the underlying fee subject to the easement, and admit that the findings that their underlying titles, if they are subject to the easement, are of no value, are supported. They contend, however, that the findings that there was a public easement for highway purposes over the strip are totally unsupported by any evidence. They further urge that, regardless of the questions involving the fifteen-foot strip, the changes made in the highway have substantially impaired their right of access to their remaining lands, and they claim that they are entitled to compensation for this impairment.

The fifteen-foot strip which was taken for highway purposes extends across the front of the five pieces of commercial property owned by defendants. These properties are located on the El Camino Real in Sunnyvale near the junction of El Camino Real with the Sunnyvale-Saratoga Road. El Camino Real is one of the main highways between the cities of San Francisco and San Jose, and has existed substantially in its present location for many years. It runs generally north and south, but in the area here involved runs substantially east and west. The five pieces of property owned by defendants are located on the north side of the highway, and on each lot the respective owner operates a commercial establishment. Fronting each lot is a fifteen-foot strip, title to which is in the owner of the lot to which the strip is adjacent. The parties, for purposes of convenience at the time of trial, divided this strip into five parcels and designated them as parcels one, two, three, four and five. The lots behind each parcel will be

designated as lots one, two, three, four and five. Parcels and lots one, two and three are contiguous and extend between Taaffe Street and Frances Street, two streets that join El Camino Real from the north. Parcels and lots four and five are contiguous and are located across Frances Street to the east of parcels and lots one, two and three. Between the lots and parcels there is a cement curb and gutter.

El Camino Real, certainly since 1910, and probably from a much earlier date, has run past the properties here involved. Originally, the highway was a two-lane paved highway twenty feet in width, and subsequently it became a three-lane paved highway. Adjoining the highway to the north was a shoulder which was oiled and gravelled. The fifteen-foot strip adjoins this shoulder, then (since 1926) comes the curb and gutter, and then defendants' lots. There is evidence that from the center of the highway to the curb line was about fifty feet. The present improvement relocates the highway in certain respects, and in front of defendants' lots makes the highway a divided highway, so that such lots have direct access only to a one-way highway in front of their properties where the traffic is proceeding towards San Francisco. To get to the one-way highway to go to San Jose defendants have to travel various distances from 500 to 1,000 feet to the cross-over. Under the new improvement, the fifteen-foot strip becomes an integral part of the one-way highway on which the traffic is travelling towards San Francisco.

Prior to 1925 the lots and parcels of defendants were part of an orchard abutting the highway and its shoulder. There is some evidence that prior to 1925 some automobiles occasionally travelled along the fifteen-foot strip to avoid the heavy traffic on the highway and its adjacent shoulder. There is also substantial evidence, however, that prior to 1925 the strip was covered with fruit trees, and admittedly was covered with weeds. Prior to 1926 there was no physical division between the parcels and lots. In 1925 the orchard was subdivided and the trees removed. The subdivider, in 1926, saw fit to construct a

six-inch high cement curb and a gutter between the lots and the strip in question. Later a sidewalk was constructed in front of several of the lots and behind the curb line. Thus, since 1926, there has been a physical barrier between the lots and the parcels constituting the strip here involved. The original deeds to the subdivided area which carried title to the parcel fronting each lot contained a restriction against using the front twenty-five feet of the property for building purposes, but this restriction died in 1936.

Shortly after the property was subdivided the subdivider gravelled the fifteen-foot strip, and later permits were granted to the owners of several of the lots here involved to oil the parcel in front of their lots. After this was done the fifteen-foot strip, physically, was simply a continuation of the surfaced shoulder and indistinguishable from the shoulder.

Gradually, after the orchard was subdivided in 1925, the various lots here involved became improved with various types of commercial buildings. Before buildings were constructed on all of the lots here involved there is some evidence that some substantial amount of traffic travelled up and down the fifteen-foot strip to avoid the heavy travel on the main highway and its adjacent shoulder. As the area developed commercially the strip more and more came to be used for parking purposes, and it was so used until it became part of the new development of the highway. There is substantial evidence that the parking was public parking and was unrestricted.

A brief description of each parcel and lot follows:

Parcel and Lot One:

These are owned by John Sayig. In 1935 a grocery store was constructed on the lot, and since that time the parcel in front of the lot has been used primarily for diagonal parking.

Parcel and Lot Two:

These are owned by Clarence Kay. There was a great deal of evidence introduced as to the use of these properties. Part of this lot was unimproved. On

this unimproved portion Kay displayed motor vehicles and farm equipment for sale. The balance of the lot was used by Kay for a garage and service station. The portion of the parcel in front of the unimproved part of the lot was sometimes used by Kay to display his equipment, but there is substantial evidence that several times a state highway official demanded that Kay remove such equipment from the strip, and that Kay always removed the equipment upon demand. The parcel in front of the garage and service station was sometimes used by Kay for the purpose for parking cars while batteries were checked, etc. Kay commenced his business on this lot in 1937. In 1938 at the east end of the parcel there was constructed a Texaco sign which was erected on a concrete abutment or platform about twenty inches high. This abutment was about two feet wide at the highway end and bigger on the lot side. This abutment ran from the buildings on the lot and across part of the parcel in front of the lot. There is evidence that this abutment ran a little more than halfway across parcel two, which means that it ran eight to ten feet across the fifteen-foot strip.

Parcel and Lot Three:

These were purchased by Kay in 1948, about a year before the trial. Since 1931 the lot has been used for restaurant purposes, and parcel three has been used primarily for diagonal parking.

Parcel and Lot Four:

In 1930 or 1931 a fruit stand was built on this lot. Later a lunch stand was added and the building gradually became a restaurant, which it is today. Parcel four is used primarily for parking purposes. These properties are owned by Peter Pangracs.

Parcel and Lot Five:

These are owned by Rufino Yglesias. The building on the lot, constructed in 1928 or 1929, harbors a barber shop, a bus depot, a restaurant and a taxi stand. Busses and taxis parked on parcel five.

The State contends that its evidence supports the finding that a public ease-

ment for highway purposes.—i. e., a dedication by the owners and an acceptance by the public—attached long before the properties were fully improved. The State produced substantial evidence that prior to the building of the present improvements on the lots the witnesses could, did, and saw others drive over the fifteen-foot strip. This travel over the strip existed before the orchard was subdivided in 1925, but certainly has existed since the construction of the curb and gutter in 1926, and the gravelling of the area in 1927 or 1928. Since the property has been improved the strip has been used primarily for parking. The evidence on the part of the State supports the inference that such parking was public unrestricted parking, and not limited to customer parking.

In addition to this testimony of use the State produced some other evidence which it claims supports the conclusion that the property owners, or some of them, recognized that the State controlled the strip in question. Lawrence Robinson, the Assistant Maintenance District Engineer of the State and formerly Maintenance Superintendent of the San Jose territory, testified that in 1938 the owner of parcel five applied to the State to improve the parcel in front of his property from the curb line out, by oiling the surface. This request was denied, but permission was granted the owner to improve the surface at his own expense. The owner of parcel three, in 1941, filed an application to improve the surface of the strip in front of lot three, which application was granted. Obviously, if the strip was not subject to a public easement, and if the owners of parcels three and five claimed to be the absolute owners of the parcels, there was no necessity of applying to the State for permission to gravel or otherwise improve the parcels. Such actions certainly support the inference that these owners recognized an interest in the State in the parcels in question.

Laird Geddes, a state highway engineer, testified that on several occasions he asked Kay to remove his vehicles displayed for sale on parcel two, and that Kay complied with these requests. He also testified that on

one occasion he asked Kay to remove gravel from the gutter in front of the curb between lot and parcel two because it was obstructing the flow of water, and Kay had done so. He also testified that the State had granted permission to Kay to install a water drainage pipe in the gutter. Such actions, of course, support an inference that Kay recognized an interest of the State in the strip in front of his lot.

[1-3] The parties to this appeal agree as to the applicable law, but differ as to the application of that law to the facts. The trial court referred to the public acquiring an "easement by prescription" in the strip in question. Technically, that is not correct. If the public did acquire any right to the use of the strip for highway purposes, such right was acquired under the doctrine of implied dedication and not by prescription. (See 9 Cal.Jur. p. 41, § 32.) A public easement arises only by dedication. But adverse user by the State for the prescriptive period—5 years—may be evidence of a dedication, and many of the rules applicable to private easements are applicable to public easements. The case of *Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 181 P. 658, presents a good summary of the various principles applicable to the law of implied dedication. At page 450, of 180 Cal., page 660 of 181 P., these principles are summarized as follows: "In order to constitute such dedication, or such abandonment, by the owner, his intention to that effect must appear. Such intent need not be manifested by any contract, writing, or express declaration of the owner. It may be implied from his conduct. 'If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete.' *People v. Marin County*, 103 Cal. [223] 228, 37 P. 203, 26 L.R.A. 659. In that case it is said that, in the case of an express dedication by words or acts, 'the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose,' but that an implied dedication may be proved 'by acts or conduct not directly

manifesting the intention, but from which the law will imply the intent.' As stated in *Helm v. McClure*, 107 Cal. [199] 204, 40 P. 437, the question 'whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called "the public."' [Citing cases.] It is not necessary that the acceptance by the public be manifested by any direct action, ordinance, or declaration of the public authorities. 'Such acceptance may be shown by mere user without any formal action in relation thereto by the municipal authorities.' *Monterey v. Malarin*, 99 Cal. [290] 293, 33 P. 840. 'The use of the street by the public for a reasonable length of time' is sufficient evidence of acceptance. *Smith v. City of San Luis Obispo*, supra, 95 Cal. [463] 470, 30 P. 591." See, also, cases collected and commented upon in 9 Cal.Jur. p. 45, § 35.

In *Barnes v. Daveck*, 7 Cal.App. 487, 491, 94 P. 779, 781, the proper rule is stated as follows: "* * * where prescriptive title to land is claimed, it has been said that the hostile possession must be open and notorious, and with intent to usurp the place of the true owner and put him out of possession [citing a case]; but the rule as to highways requires only such adverse use and occupation as is inconsistent with the owner's right to claim the exclusive use of the land; i. e., such adverse use as carries with it the assertion of an equal right by the public to use the highway."

[4] There is a general presumption that a use by other than the owner is adverse and not permissive. While this presumption is not as strong when the land is open and uncultivated and remote, as when it is enclosed, cultivated and developed, *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62; *Whiteman v. City of San Diego*, 184 Cal. 163, 193 P. 98; *City of San Diego v. Hall*, 180 Cal. 165, 179 P. 889; *Schwerdtle v. County of Placer*, 108 Cal.

589, 41 P. 448, the presumption exists in either case. The problem is one of fact for the trial court. See *O'Banion v. Borba*, 32 Cal.2d 145, 149, 195 P.2d 10; *Weideman v. Staheli*, 88 Cal.App.2d 613, 616, 199 P.2d 351; *Pratt v. Hodgson*, 91 Cal.App.2d 401, 404, 204 P.2d 934.

[5] Tested by these standards we think that the evidence supports the findings that a public easement over the strip attached. Appellants argue that the evidence would not support a finding that there was an implied dedication prior to 1925. While there is some evidence of public travel over the strip prior to that date, such evidence is not very satisfactory. There is substantial evidence, including that of the farmer that operated the orchard, that, prior to the subdivision, trees grew on the strip and that it was impassable. However, the State does not have to rely upon the public easement having come into existence prior to 1925. There is ample evidence to support the conclusion that a public easement came into existence after 1925.

[6-8] Appellants argue that any use of the strip made by the public after the buildings were constructed on the lots was permissive and not adverse. It is urged that the evidence shows that the owners of the lots and parcels used the strip for their own convenience. Great emphasis is placed on the admitted fact that the Texaco sign was erected and the abutment constructed across half or more of the strip in front of lot two. That sign was not erected until 1938, and, as the State correctly points out, the evidence shows that the public easement was acquired long before that date. Of course, once the public easement for highway purposes attached, title by adverse possession could not be acquired against the State. *Hoadley v. City & County of San Francisco*, 50 Cal. 265; *People ex rel. Alvord v. Pope*, 53 Cal. 437; *County of Sacramento v. Lauszus*, 70 Cal. App.2d 639, 161 P.2d 460. The evidence shows that an adverse use commenced about 1926, and long before 1938 had continued long beyond the required five-year period.

The evidence that vehicles displayed for sale were placed on the strip by the owner of lot two also deals with acts after 1935. Moreover, there is evidence that this owner, upon demand of highway employees, removed these vehicles. The portion of the strip in front of lot five used as a taxi stand and bus stop is certainly not inconsistent with that parcel being part of the highway. Appellants also urge that most of the strip was used for customer parking and for parking by the owners and their employees. The evidence, while in conflict, supports the inference that the parking was public unrestricted parking. Appellants seem to argue that even if there was public unrestricted parking, that would not create a public easement for highway purposes because the parked cars prohibited public travel over the strip. It is too clear to require further discussion that the portion of a street or highway used for public parking is as much devoted to a highway or street use as the portion over which vehicles travel.

[9] Appellants also place much reliance on certain signs erected by the owners of the lots, and urge that these signs show that any use by the public for parking was permissive and not adverse. The evidence as to these signs is not very clear. The sign adjacent to parcel one was on a watermelon stand built on a portion of lot one, and purported to reserve some area for the parking of customers of the stand. It is by no means clear from the evidence whether the space reserved for customers was inside the lot or on parcel one. Certainly, the evidence is susceptible of the inference that a portion of lot one and not parcel one was reserved for customers. The sign on parcel two read "No parking behind this point, keep driveway clear," and in 1938 was attached to the Texaco sign. Later, exactly when is not clear, the sign was moved and attached to the building on the lot. It must be remembered that these signs were erected after the public easement had attached. Even if they had been erected prior to that time they would only be a factor to be considered and would not be conclusive on the issue of permissive or adverse use. *Pratt v. Hodgson*, 91 Cal. App.2d 401, 405, 204 P.2d 934.

[10] The general picture we get from the record is this: Since 1910, and probably prior thereto, the strip has been within or on the boundary of the highway. Prior to 1925, it is most difficult to ascertain the precise boundaries of the travelled area. Then in 1926, all doubt of the area intended to be included by the owners within the highway area was set at rest. The construction of the uniform curb and gutter in front of these properties removed all doubt. It is apparent that it is, to say the least, a reasonable inference that the subdivider intended that the strip should thereafter be part of the highway and should be used for travel and parking. A short time later the subdivider graded and gravelled the strip, thus making it an indistinguishable part of the shoulder adjacent to the paved highway. It is no answer to say that such actions are also consistent with an intent to reserve the strip for parking, for public parking is a highway use. After the strip was gravelled there was no physical feature to indicate any reservation for permissive use—in fact, the physical setup indicated, if it did not demonstrate, that the strip was part of the highway. This supports the finding of intent to dedicate. Public use and acceptance for far longer than the five-year period are also shown by the evidence already summarized. It follows that insofar as the judgment determines the existence of a public easement over parcels one, two, three, four and five, it must be affirmed.

The second major contention of appellants involves claimed compensable damages because, so it is averred, the appellants' right of access to their respective lots has been materially impaired by the improvement. Prior to the present improvement the old highway had three lanes. Traffic travelling in either direction on this highway as it then existed could turn directly from the highway proper to any of appellants' commercial establishments. The precise nature of the present improvement is somewhat difficult to describe. While lots four and five are somewhat differently affected than lots one, two and three, for practical and legal purposes it can be stated that the highway is now phys-

ically divided in front of the properties, so that there is one highway with traffic flowing towards San Jose, and a separate highway, divided from the other by an impassable "island," with traffic flowing from San Jose. So far as lots one, two and three are concerned, the new improvement in no way affects traffic proceeding towards San Francisco. As to those three lots, such traffic has direct access to the establishments operated by the owners. This is also substantially true as to lots four and five, although some slight circuitry of travel is required for San Francisco-bound traffic to reach those lots. None of the lots has direct access to the traffic lane where the traffic is proceeding south towards San Jose. Because of the center dividing strip, any vehicle travelling south towards San Jose that desires to reach any of appellants' lots has to travel past appellants' properties 500 to 1,000 feet, to where there is a cross-over to the San Francisco traffic lane and proceed back to the properties. It is appellants' theory that by thus putting their properties on a one-way street, their rights of ingress and egress in one direction have been materially impaired, and that this constitutes a compensable injury. For a general discussion of the problem see 32 Cal.L.Rev. 95; 18 So.Cal.L.Rev. 42; note in 100 A.L.R. 491.

In contending that they are entitled to damages for this impairment of their right of access, appellants cite and place their sole reliance on the rules announced in *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799. In that case the defendants owned business property on a main highway. The State constructed an underpass directly in front of defendants' property. Direct access to the main highway was entirely cut off, but a service road was constructed for the use of the property. The Supreme Court held that the damage to the right of ingress and egress was compensable. In so holding, the court stated several important principles:

[11,12] 1. "Not every depreciation in the value of the property not taken can be made the basis of an award of damages." 23 Cal.2d at page 395, 144 P.2d at page

802. The court pointed out 23 Cal.2d at page 396, 144 P.2d at page 802, that the injury to the business of the occupant of the property is not compensable. Only damage to the property itself may be considered. The court then held, citing *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *People v. Gianni*, 130 Cal.App. 584, 20 P.2d 87; *City of Stockton v. Marengo*, 137 Cal.App. 760, 31 P.2d 467, that "an abutting owner has no right to compensation by reason of diversion of traffic away from his property." 23 Cal.2d at page 396, 144 P.2d at page 802.

[13] 2. The court then cited many cases in support of the rule that the abutting owner has the right to a free and convenient right of access to the highway on which his property abuts. This right of ingress and egress attaches to the lot and is a property right as fully as the lot itself.

[14,15] 3. 23 Cal.2d at page 399, 144 P.2d at page 804, it is stated: "We recognize that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i. e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' pri-

vate property rights in and to that highway are to be taken and damaged. It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on diversion of the highway from direct access to defendants' property."

4. It is for the trial judge, not the jury, to determine whether the property owner's right of access is substantially impaired. If such an impairment is found, then the extent of the impairment is for the jury.

[16] Another case that appellants might have cited in support of these same general principles is *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818, which holds that a property owner suffered compensable damage when, as a result of a public improvement, his property, which was formerly located on a street running in both directions in front of his property became located in a cul-de-sac—i. e., ingress and egress to the next intersecting street in one direction was cut off.

The question with which we are presented is whether the rule of these cases should be extended to a situation where the highway runs past the property in both directions but traffic is permitted to flow only in one direction. There is undoubtedly language in the *Ricciardi* and *Bacich* cases that supports the contentions of appellants in the instant case, and the rule of those cases could easily be extended so as to apply to the situation here presented.

[17, 18] However, those cases recognize that diversion of traffic or mere circuitry of travel, even where they result in impairment of value, are not compensable. Those cases also recognize that where an owner locates his business on a main highway and secures his main business from traffic travelling on the highway, and the State changes the highway route so that his property is no longer located on a main highway so that the business of the owner is totally destroyed, the resulting damage is not compensable. We also know that the State, under its police power, may regulate traffic without becoming liable

for damages for impairment to businesses that may be adversely affected. It may create freeways or limited access highways and relocate existing highways, without conferring the right to damages on property owners adversely affected. *Holloway v. Purcell*, 35 Cal.2d 220, 217 P.2d 665. If a property owner is entitled to compensation because a divided highway is constructed in front of his property, then the same result would logically follow when one-way streets are created in cities to control traffic, or even where a double white line is placed in a highway which prohibits traffic from crossing that lane lawfully, and thus permits only one-way traffic in front of the property. The Vehicle Code abounds with other regulations that result in permitting the property owner to proceed only in one direction when emerging from his property.

While it might be argued that the rules of the *Ricciardi* and *Bacich* cases should be extended so as to apply to the factual situation here involved, it is obvious that those cases do not necessarily control the factual situation here presented. The degree of impairment of the right of access was greater in those cases than in the instant one. The nature of the impairment is different. We are not without authority on the precise point involved. In *Holman v. State of California*, 97 Cal.App.2d 237, 217 P.2d 448 (hearing denied by the Supreme Court), a divided highway was constructed. Plaintiffs' property was located on this highway, but, because of the divided highway, northbound traffic was entirely cut off from plaintiffs' property. Such traffic, in order to reach plaintiffs' property, had to proceed to a cross-over located a considerable distance from plaintiffs' property. Plaintiffs operated on their property the business of servicing trucks and highway equipment. They contended that they were entitled to damages occasioned by the building of the dividing strip which interfered with their access to their property. They also alleged that vehicles leaving their property could no longer make an immediate left-hand turn and proceed north, which resulted in a depreciation of the reasonable market value of the land.

The court held that plaintiffs were not legally damaged. It distinguished the Ricciardi case on the ground that in the Holman case, the plaintiffs had access from every point on their property to the highway. The Bacich case was distinguished on the ground that that case involved the creation of a cul-de-sac. Many other cases were also cited and discussed, 217 P.2d 449-450. The court stated, in the Holman case, 217 P.2d at page 450: "In all of the foregoing cases in which it was held that compensation must be paid there was either physical injury to an owner's property itself, as in the Reardon case [Reardon v. City and County of San Francisco, 66 Cal. 492, 6 P. 317], or a physical impairment of access from the property to the street, whether caused by change of grade * *, or by physical impairment of the property to the street by the means of the construction of a physical barrier as in the McCandless case [McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139], or by removing the property from the through highway and placing it on a side or service road as in the Ricciardi case, or by the creation of a dead end street as in the Bacich case. None of these cases involve the division of a highway into separate roadways by concrete islands or division strips and all are factually different from the case at bar."

The court 217 P.2d at page 451, cited, with approval, the following passage from Beckham v. City of Stockton, 64 Cal.App. 2d 487, 502, 149 P.2d 296: "'Regulations such as the prescribing of one-way traffic or the prohibiting of left-hand turns may interfere to some extent with right of access without furnishing a basis for recovery of damages even by an abutting owner. See note, 100 A.L.R. 487, 491-493. In Eachus v. Los Angeles etc. Ry. Co., supra, [103 Cal. 614, 37 P. 750], the court said: 'The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or dis-

comfort in its use, will not constitute the damage contemplated by the constitution; * * *'"

The court then said, 217 P.2d 451, that "the real basis of plaintiffs' claim is diversion of traffic from their business", and under the rule stated in Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505, and other cases, such damages are not compensable, as a landowner has no property right in the continuation or maintenance of the flow of traffic past his property.

On page 451, of 217 P.2d the court continues: "Damages resulting from the exercise of police power are not compensable. [Citing a case.] It seems quite clear that the division of a highway is an exercise of the police power being directly intended for the public safety."

The opinion then quotes, with approval, the following passage from Mr. Justice Edmonds' concurring opinion in the Bacich case, at page 452, of 217 P.2d: "'But the traveling of additional distances occasioned by modern traffic engineering to make travel more safe and to adapt the highway system to the adequate disposal of the increasingly heavy burden of automobile traffic—as, for example, by the construction of divided highways for various types of traffic, or the re-routing of traffic by one-way regulations or the prohibition of left-hand turns—is an element of damage for which the property owner may not complain in the absence of arbitrary action * * * and therefore, in testing the merits of the majority rule, mere 'circuitry of travel,' in the sense that it refers to the additional distance required to be traversed because of a proper highway construction, should not be used to justify the allowance of compensation to the owner abutting upon the street in the block where the obstruction exists.'"

The court, in the Holman case, concluded that plaintiffs' property was open to the highway, and that "once on the highway to which they have free access, [plaintiffs] are in the same position and subject to the same police power regulations as every

other member of the traveling public. * * * They are liable to some circuitry of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right.

"* * * The damage of which plaintiffs complain would be the same if no division strip had been constructed on the highway in question but that double white lines had been painted on the highway and a 'no left turn' sign had been erected, or if the entire highway had been designated as a one-way street." 217 P.2d at page 452.

[19-21] This case involves precisely the problem involved in the instant case. The Ricciardi and Bacich cases are applicable only by way of analogy. It is obvious that no general rule can be laid down to cover all situations. We know that property placed in a cul-de-sac by reason of an improvement is entitled to compensation for the depreciation of the property. Bacich case. We know that if property is divided from the highway by an underpass and the only access to the highway is a service road, the property located on the service road has been legally damaged. Ricciardi case. We also know that mere relocation of a highway thus diverting traffic from the property does not legally damage the property. *Holloway v. Purcell*, supra. We also know that the construction of a divided highway in front of the property does not legally damage it. *Holman* case. The distinctions between these various situations and their impact on the actual value of the property is simply one of degree. Our case falls within the rule of the *Holman* case. For that reason the trial court correctly held that the owners of lots one, two, three, four and five were not legally damaged by the construction of the divided highway.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

GIANNINI v. BANK OF AMERICA et al.

Civ. 14428.

District Court of Appeal, First District,
Division 1, California.

Jan. 22, 1951.

Action by Ethel W. Giannini against the Bank of America, and others, to quiet title to certain shares of corporate stock. The Superior Court, in and for the City and County of San Francisco, Frank T. Deasy, J., rendered an adverse judgment, and the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported an implied finding that plaintiff failed to prove consummation of a gift of the stocks to her during the owner's lifetime.

Judgment affirmed.

1. Evidence ⇨594

Witnesses ⇨311, 315, 316, 363(1)

Trial court need not accept as true and accurate in every particular the testimony of witnesses, who are unimpeached, but in passing on credibility and weight to be given their testimony, trier of fact is entitled to consider witnesses' interest in result of case, their motives, manner in which they testify, and contradictions appearing in evidence.

2. Gifts ⇨49(6)

In action to quiet title to shares of corporate stock, evidence supported implied finding that plaintiff failed to prove that decedent failed to consummate gift of stocks to plaintiff during decedent's lifetime.

Walter E. Hempstead, Jr., Los Angeles, for appellant.

Phillip Barnett, Wesley M. Kergan, San Francisco, Robert L. Dreyfus, San Francisco, of counsel, for respondent.

FRED B. WOOD, Justice.

Plaintiff appeals from a judgment rendered for defendant, the executor of the will of Joseph D. Osborne, in an action to quiet title to certain shares of corporation stock.

Appellant claims that these shares, evidenced by certificates of stock issued to and in the name of Osborne, were given to her by Osborne in his lifetime; that her testimony shows, without contradiction, that he did give them to her; that such testimony must be accepted as adequate proof of her claim; and, therefore, that the judgment is against the evidence and must be reversed.

[1] It is not the law that a trial court must accept as true and accurate in every particular the testimony of a witness who is unimpeached. "In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence." *Huth v. Katz*, 30 Cal.2d 605, 609, 184 P.2d 521, 523. It is necessary, therefore, to examine the record and ascertain what the trial judge had before him when he decided that appellant had not met the burden of proving the consummation of the asserted gift of these shares of stock.

[2] It appears that Osborne operated a small grocery store at 13th Avenue and Clement Street in San Francisco. Appellant lived on Judah Street near 38th Avenue. She first entered the store in June 1942, on her way home from a club meeting. Thereafter, and until September 1943, she shopped at Osborne's store two or three times a month, especially for canned goods, and because his prices were satisfactory. She first met Osborne formally at the home of one Pulos about a year after first going to the store. Until that meeting she did not know Osborne's name, and believed he did not know her name. After that meeting, on several occasions appellant drove Osborne to the bank and to a doctor's office. He never visited in her home nor she in his.

During the summer of 1943, Pulos and appellant's husband, Nick Giannini, met with Osborne several times and discussed the financing by Osborne of a business. Pulos and Nick were interested in opening on the desert at Amboy, San Bernardino

County. Osborne advanced money for the venture. Pulos and Nick moved to Amboy in October 1943. Osborne followed a few months later and stayed with them at Amboy until his death in June 1946. Appellant continued to live at San Francisco.

In November 1945, according to appellant, she received a telephone call from Nick who connected her with Osborne; Osborne informed her he had been sick, was going to make a will and would make her the beneficiary. Then, in February 1946, she received another call from Nick, who called Osborne to the telephone, and Osborne told her he had been very sick and was mailing her a package; that he wanted her to keep it; that it was hers. Nick testified that he placed each call at Osborne's request but did not listen in or hear any of the conversation between Osborne and appellant.

Next, according to appellant's testimony, on March 15, 1946, she received in her mail box a package addressed to her and bearing the return address "Joseph Osborne, Amboy, California." She did not look at the postmark but she did notice cancelled stamps on the package. She did not keep the wrapping. Enclosed in the package, within an envelope, on which was written "To Ethel Giannini," were the stock certificates which are the subject of the action. She did not recognize the handwriting on the envelope. It was not Osborne's nor hers, nor Nick's. Her receipt of this package was corroborated by one Rose Thomas, a friend who accompanied her upon her return to her home on the evening of March 15 and who was with her when she opened the mail box.

Appellant testified that on the following day, March 16, 1946, she telephoned Nick and had him call Osborne to the telephone; told Osborne she had received the package but that the stocks were not signed; that he replied she need not worry about it, that the first time he came to San Francisco he would take her to the bank and would take care of it for her; also, that he was awful sick, did not think he would be here very much longer and he wanted her to get those stocks because they were

negotiable and if he should die before he got to San Francisco she was to take them to the Bank of America and she could trust the bank. (The stock consisted, principally, of shares issued by Bank of America and by Transamerica Corporation.) She never heard from Osborne again after that conversation.

As the trial progressed, some rather significant conflicts developed in the testimony of the witnesses. Nick came on after appellant and Rose Thomas had testified. He said, upon cross-examination, that he was in San Francisco in the neighborhood of a week before or after March 15, 1946, because of his son; did not know where the son was; appellant was sick over the son's absence, and Nick had to come home. Upon redirect, he said it could have been in May instead of March 1946, and that he had not been in San Francisco previous to that time.

Appellant was then recalled to the stand and testified that after Nick went down to the desert in 1943 he came up to San Francisco to see her in December 1944, and again in May 1946, the latter occasion being when their son ran away; also, that Nick was not in San Francisco all during 1945 and 1946 except that occasion in May 1946.

Pulos, a witness on behalf of the respondent, testified that Nick made two trips to San Francisco in 1946; one in March and one in May. He did not know the reason for Nick's coming in March. The visit in May was because Nick's boy had disappeared. The witness had a way of checking the dates because when Nick went away he usually asked Pulos for \$200 or \$300, and he drew \$200 or \$300 in March; if Pulos had his records with him, he could tell when in March it was.

Nick was recalled by appellant, in rebuttal, and testified it was in May 1946 that his son went away and he, Nick, came to San Francisco; also, that he was in San Francisco in March of the same year, around the middle of March; could not say if it was the forepart or the latter part of March; he thought he was there around 8 or 10 or 12 days; he visited his wife,

stayed at home, on that occasion, except when he went down to San Jose to see his brother, who was sick; could not say if he was in San Francisco on March 15; also, that he was again in San Francisco in October.

It further developed from Pulos' testimony that this stock while in Osborne's possession was accessible to Nick and that some time after Nick's visit to San Francisco in March 1946, Osborne told Pulos he had lost his stocks and did not know where they had gone to, and seemed upset about it, but said he would probably find out where they had gone and that Pulos need not worry about it "because even if they are lost, we have the duplicates at the bank." Osborne never told Pulos that he had given them to anybody.

According to Pulos, Osborne kept his personal effects in boxes. Included was a can of money, also a Chesterfield carton in which he kept his stocks and other papers. At first, during his stay at Amboy, Osborne slept in the living room of the living quarters next to the store, and kept these boxes of his in an adjoining bedroom occupied by Mr. and Mrs. Pulos. About two and one-half months before Osborne died, he moved his belongings to a cabin occupied by Nick and then kept them there; took them over himself, some two or three boxes, including the carton that contained the stock. Osborne had access to that cabin, for he had a key to it and went there quite frequently, which would be when he would shave, two or three times a week.

Pulos knew about these belongings of Osborne's, including the stock, and how and where they were kept, because Osborne had show them to him on a number of occasions; also, that that stock was similar in appearance to and was folded in the same manner as the certificates in evidence in this action.

Nick had previously testified, upon cross-examination, that Osborne had personal belongings in Nick's cabin, some boxes, which were in the cabin for two or three months, but that he never had occasion to see what was in them; never saw any

money in the box, nor any stock certificates; also, that subsequent to the time Nick was in San Francisco, on or about March 15, 1946, Osborne told Nick he was missing some personal property, said he had some stocks and they were missing. When recalled, in rebuttal, Nick said he never saw these stocks until yesterday; never saw them in Amboy; Mrs. Pulos told him Osborne had them there; Nick did not know where they were; always thought Mrs. Pulos had them in the safe, keeping them for Osborne; assumed that they were there; also, when Osborne told about the stock being missing Osborne did not seem to be upset; he came into the cabin and said, "My stocks are gone," and Nick said, "No! Joe, you better report to the bank," and then Osborne smiled and went out and Nick thought he was just fooling, because he never mentioned after that any more about the stock.

An additional circumstance was Osborne's long acquaintance with Pulos and his relatively short acquaintance with the Gianninis. Pulos testified that he had known Osborne some 22 years, and that Osborne discussed all his personal affairs with him; that Pulos discovered this deal down in the desert, interested Osborne in it and worked out the details of it with Osborne before Nick ever heard about it; that after Osborne decided he would help Pulos buy the place Pulos told him he would like to have Nick as a partner but Osborne objected to Pulos having any partners, saying that if Pulos wanted to go alone he, Osborne, would help Pulos and give him all the money he needed; that Pulos then gave Osborne his word he would never go into partnership with anyone; and, accordingly, Pulos took Nick as an associate in the enterprise, not as a partner. Nick had previously testified that he and Pulos were partners, but when later recalled in rebuttal did not testify on this subject.

Another circumstance is the fact, according to Pulos, that Osborne disapproved of Mrs. Giannini's not moving down to the desert when her husband had to be there all the time; also, that Osborne "has always told us [Mr. and Mrs. Pulos] what he possessed was ours, and if I brought him down to the desert, and he lived [there] the rest of his life, everything he possessed would go to us."

Thus, it appears that appellant's testimony is not in all respects uncontradicted by the testimony of other witnesses. Her testimony that all during 1945 and 1946 her husband was in San Francisco but once (in May of 1946) and the testimony of Pulos and Nick that he visited San Francisco both in March and May, and of Nick that he stayed with appellant while there in March, produced a conflict which the trial judge well may have deemed significant in view of her testimony that she found the stock certificates in her mail box on the 15th of March, 1946. Then, the fact that Osborne did not endorse the certificates over to appellant; that he told both Nick and Pulos that he had lost his stocks and did not know where they had gone, and never told Pulos he had given them to anybody, tended to cast doubt upon appellant's claim that Osborne delivered the certificates to her with the specific intent of giving them to her, of vesting title in her. These factors, coupled with the relatively brief period during which Osborne had known the Gianninis and his relatively slight acquaintance with them, contrasted with his long acquaintance with and closer personal relationship to Mr. and Mrs. Pulos, were circumstances, among others, which amply support the implied finding of the trial court that appellant failed to prove that Osborne consummated a gift to her of these stocks during his lifetime.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

102 Cal.App.2d 39

In re MORELLI'S ESTATE

Civ. 7802.

Sac. 6085.

District Court of Appeal
Third District, California.

Jan. 26, 1951.

Hearing Denied March 26, 1951.

Maria Morelli filed an account, report and petition for partial distribution in the matter of the estate of Angelo Morelli, deceased, and Aida Morelli Hood, and others objected. The Superior Court, Sacramento County, Shields, J., entered an order by which he allowed the account, and granted partial distribution, but ordered that a balance sufficient to protect amounts of claims be paid into court, and claimants appealed except as to portion of order requiring the deposit. The District Court of Appeal, Deirup, J., pro tem., held distribution of the estate would not be delayed upon mere suggestion by claimants that a civil action might be brought against petitioner on ground that she held certain funds in trust.

Order affirmed.

1. Wills $\hookrightarrow$ 721

Where testator's widow was sole beneficiary under his will, title to all property which belonged to testator became vested in widow as sole beneficiary at moment of his death, subject to payment of his debts and all charges against his estate.

2. Executors and administrators $\hookrightarrow$ 295

It is policy of law to deliver specific property into possession of the heir as soon as it can be done consistently with payment of debts and charges.

3. Executors and administrators $\hookrightarrow$ 295, 314(5)

The law favors delivery of a legacy or specific property to a legatee, devisee or heir by partial distribution as soon as it can be done without jeopardizing rights of other persons interested in the estate, and application may be made at any time after four months from the issuance of letters. Probate Code, § 1000.

4. Executors and administrators $\hookrightarrow$ 296, 299

Where an estate is "but little indebted" and inheritance taxes have been paid or

provided for, and distribution may be made without loss to creditors or injury to estate or any person interested therein, probate court can distribute property, but must require a bond if time for presentation of claims has not expired. Probate Code, §§ 1000, 1001.

5. Executors and administrators $\hookrightarrow$ 296

Under statute providing that, if estate is "but little indebted" and if inheritance taxes have been paid or provided for and distribution may be made without loss to creditors or injury to estate or any person interested therein, court shall make an order distributing the property, quoted words are a relative term, and an estate is "but little indebted" when amount of estate, over and above the debts, is sufficient to allow distribution to be made without danger to creditors.

See publication Words and Phrases, for other judicial constructions and definitions of "But Little Indebted".

6. Executors and administrators $\hookrightarrow$ 296

Where testator's widow was sole beneficiary under his will, and she was appointed executrix without bond, and testator's children by a previous marriage opposed a partial distribution on ground that they believed realty was devised to executrix in trust for them, but such a trust could only be established in a civil action, distribution of estate would not be delayed upon mere suggestion by children that a civil action might be brought.

7. Witnesses $\hookrightarrow$ 270(1)

Cross-examination is never permissible if it does not bear upon an issue before the court.

8. Executors and administrators $\hookrightarrow$ 314(12)

Where testator's widow was appointed executrix without bonds, and testator's children by a previous marriage opposed a partial distribution on ground that they believed realty was devised to executrix in trust for them, and executrix deposited a sum in court sufficient to protect children fully, refusal by trial judge to permit children to inquire into administration of the estate was not prejudicial to children's rights.

9. Executors and administrators 314(12)

Where true situation was set out in petition of estate and in its order for distribution, and trial court found all allegations in petition to be true, and testator's children by a previous marriage who opposed the distribution did not object to form of petition, children could not object to sufficiency of trial court findings.

Eli D. Langert and W. P. Dwyer, Jr.,
Sacramento, for appellant.

Leo F. Granucci and Reynolds J. Gualco,
Sacramento, for respondent.

DEIRUP, Justice pro tem.

On July 18, 1941, Angelo Morelli executed a will by which he left all of his property to the respondent, his widow. He died on March 28, 1947. Respondent was appointed executrix without bonds and proceeded with the administration of the estate. Appellants are four daughters of the testator by a previous marriage. Each of them presented a claim against the estate, based on a promissory note for \$500, signed by the testator and payable ten years after date without interest. All of the claims were rejected. The notes were dated July 18, 1941 (the date of the will), so suits cannot be filed on the claims until July 18, 1951.

On April 21, 1949, the respondent filed an account, report and petition for partial distribution. It appears therefrom that the time for the presentation of claims had expired and that all inheritance taxes and debts and expenses of administration, including the statutory fees of the executrix and her attorney, had been paid excepting the claims of the appellants, amounting to \$2,000. The cash in the estate being less than the total charges, the respondent had deposited with herself as executrix \$2,448.05 to cover the deficit and leave a balance of \$2,000 to cover the claims. She asked for partial distribution of stocks, bonds and securities appraised at \$620, and real property appraised at \$4,000.

Appellants filed numerous objections. When the matter came on for hearing the trial judge heard the respondent's testimony

and, being satisfied that the account was correct and that the appellants would be fully protected by the deposit of a fund in court, announced that he would impound the money for their protection. He refused to permit counsel for appellants to cross examine the respondent and entered an order by which he allowed the account and granted partial distribution but ordered that the \$2,000 balance plus \$100 for costs be paid into court. The appellants have appealed from the order except as to the portion thereof requiring the deposit in court of \$2,100.

It will be noted that the unpaid debts of the estate amounted to nearly half of the property that remained in the estate but that the respondent, who was entitled to the entire residue, had paid to herself as executrix a sum sufficient to leave a net balance equal to the total claims of the appellants.

We have found no reported case which has dealt with a similar factual situation. We suspect that such situations have often arisen but that creditors, feeling content with the security for the payment of their claims, have not taken appeals.

[1,2] The title to all of the property that belonged to the testator became vested in the respondent as the sole beneficiary under his will at the moment of his death, subject to the payment of his debts and all the charges against his estate. It is the policy of the law to deliver the specific property into the possession of the heir as soon as this can be done consistently with the payment of the debts and charges. 11a Cal.Jur. 139. Very often the residuary legatee and devisee, to avoid the sale of specific property, advances enough money to the personal representative to pay debts, charges and legacies, so that the specific property can be distributed to him.

[3,4] The law also favors the delivery of a legacy or specific property to a legatee, devisee or heir by partial distribution as soon as this can be done without jeopardizing the rights of other persons who are interested in the estate. "It is his property, and he has the right to enjoy the same at the earliest possible moment consistent

with the proper administration of the estate." In *re Estate of Glenn*, 153 Cal. 77, 80, 94 P. 230, 231. Application may be made at any time after four months from the issuance of letters. Probate Code, § 1000. If it appears that the estate is "but little indebted," that inheritance taxes have been paid or provided for and that distribution may be made "without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order" distributing the property. The court must require a bond if the time for the presentation of claims has not expired, but after that time it may dispense with the bond if there is sufficient security left in the estate. Probate Code, § 1001.

[5] The expression "but little indebted" is a relative term. Though the debts may, in the aggregate, amount to a large sum the creditors cannot prevent partial distribution if enough assets remain in the estate to render them secure. In *re Estate of Hinkel*, 176 Cal. 563, 169 P. 70. "An estate is little indebted when the amount of the estate, over and above the debts, is sufficient to allow the distribution to be made without danger to creditors." In *re Estate of Fields*, 94 Cal.App.2d 233, 237, 210 P.2d 247, 250. Where a fund is deposited in court out of which the claims, if valid, will be paid, there is no danger to the creditors. The question whether the sum of \$2,100 ordered by the trial court to be impounded is sufficient to protect the appellants fully is not before us. In their objections the appellants asked the court to impound the sum of \$2,000. They did not object at the hearing to the impounding of that sum plus \$100 for costs, and in their notice of appeal they except the portion of the order which provides for the deposit of \$2,100 in court.

[6] One of the grounds of opposition to the petition is that the appellants were informed and believed that the real property was devised to the respondent upon her agreement to hold it in trust for the use and benefit of the appellants and that therefore it should be held in the estate and finally distributed to respondent impressed with the

trust. But such a trust can only be established in a civil action. *Sears v. Rule*, 27 Cal.2d 131, 163 P.2d 443, and the distribution of an estate should not be delayed upon the mere suggestion that a civil action might be brought. In *re Estate of King*, 199 Cal. 113, 248 P. 519.

[7, 8] Counsel complains bitterly about the refusal of the trial judge to permit him to cross examine the respondent and cites cases to the effect that the right to cross examine is inviolate. What he desired to cross examine her about does not appear in the record. If it was in respect to the alleged constructive trust every question that he might have asked would have been subject to objection, for cross examination is never permissible if it does not bear upon an issue before the court. If it had reference only to the account it would have been permissible only to show that there were less assets than the respondent had accounted for or more debts than had been shown, and then only in order to prove that distribution could not be made without danger to appellants. For they were before the court only as creditors; though they were in fact heirs at law, they had been disinherited in the will. Inasmuch as their claims were protected by the deposit in court any refusal by the trial judge to permit them to inquire into the administration of the estate could not have been prejudicial to any of their rights.

[9] Counsel for appellants contends that the allegations in the petition for partial distribution are insufficient and that the trial court did not find the necessary facts. The true situation is set out in the petition; if there was any objection to the form it should have been raised in the trial court. In its order the trial court found all of the allegations in the petition to be true. There can therefore be no objection to the sufficiency of the findings.

The order is affirmed, respondent to recover her costs on appeal.

ADAMS, P. J., and VAN DYKE, J., concur.

COOKE et ux. v. RAMPONI et ux.**Civ. 7796.****District Court of Appeal, Third District,
California.****Jan. 27, 1951.****Rehearing Denied Feb. 26, 1951.****Hearing Granted March 26, 1951.***

Charles M. Cooke and Mary Louise Cooke, husband and wife, brought an action against Antonio Ramponi and Eda Ramponi, husband and wife, to enjoin defendants from obstructing or interfering with plaintiffs' use as owners of an easement of a roadway over defendants' lands and the defendants filed a cross-complaint. The Superior Court, Sonoma County, Hilliard Comstock, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Peek, J., held that plaintiffs did not have an irrevocable right by estoppel to use the road.

Judgment reversed.

1. Licenses ⇨51, 58(4)

Where a licensee has entered upon lands of licensor under a parol license and has expended money, or its equivalent in labor, in execution of license, license becomes irrevocable, and licensee has right of entry upon lands of licensor for purpose of maintaining his structures or, in general, his rights under license, and license will continue for so long a time as nature of it calls for.

2. Estoppel ⇨56, 118

When a party relies upon expenditure upon faith of a license as an estoppel, evidence of facts constituting estoppel should be clear, and expenditure should not be trivial in amount.

3. Estoppel ⇨62(2)

Where state, which owned land across which ran only useable roadway permitting access to plaintiffs' land from public highway, only became aware of plaintiffs' activities in substantially improving plaintiffs' land after plaintiffs began improvements, and sole basis for plaintiffs' reliance on faith of a license to use roadway was letter from Deputy Director of Department of Institutions that state would not object to plaintiffs' use of roadway, and authority of

Deputy Director was not shown, plaintiffs did not have irrevocable license on theory of estoppel to use road.

4. Licenses ⇨58(4)

Fact that plaintiffs, in reliance upon license, contributed \$27.50 to total amount of \$42.50 expended to remove accumulation of trash and debris from ditches along road did not create in plaintiffs an irrevocable license by estoppel to use road which ran from plaintiffs' land across defendants' land to public highway.

5. Licenses ⇨49

Any license given to plaintiffs by defendant to use roadway which ran across defendants' land and was the only roadway permitting access to plaintiffs' land from public highway was permissive only under evidence and was not irrevocable.

Earl C. Berger, San Francisco, for appellants.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondents.

PEEK, Justice.

The defendants have appealed from a judgment enjoining them from obstructing or in any way interfering with plaintiffs' use as owners of an easement of a roadway over defendants' lands.

In 1937 plaintiffs purchased approximately 160 acres of land in Sonoma county. The only useable roadway permitting access to the property from a public highway was a dirt and gravel road which crossed adjoining lands then owned by the State of California and used by the state as a part of the Sonoma State Home. The state property contained something in excess of 200 acres and is now owned by defendants Antonio and Eda Ramponi. This property was originally acquired by the state in 1920 and was conveyed to Gerald Foster in 1944 who, later that same year, transferred the same to defendants. The roadway, which is the subject of this litigation, connects plaintiffs' property with what is referred to as the Lovall Valley Road and was in existence as early as 1886

* Subsequent opinion 239 P.2d 638.

and was then used by the Cookes' predecessors in title, one Herbert Tracy. According to Tracy it was not used from 1907, when he acquired the property, until he did so about the time the state acquired the property presently owned by the Ramponis. A second road known as the Tracy Road, which approached plaintiffs' property from a different direction than the litigated roadway, has fallen into complete disrepair and has been unused for a considerable length of time.

Just prior to plaintiffs' purchase of the property Charles Cooke corresponded with Carl E. Applegate, Deputy Director of the Department of Institutions of the State of California, inquiring as to the use of the roadway crossing the state lands. The record contains no evidence of the contents of this letter other than the statement by Cooke that it was to confirm the "understanding I had regarding this right of way." Applegate wrote in reply that the state had never objected to the use of the roadway by the prior owner of the adjoining land, and would make no objection to the Cookes' use of the roadway.

Between 1937 and 1941 the Cookes did little to improve their property. However, starting in the middle of the year 1941 they constructed a residence and made other improvements on their land, spending in excess of \$15,000.00. During the process of this construction Mary Louise Cooke called upon Dr. F. O. Butler, Medical Superintendent of the Sonoma State Home, and H. H. Waterhouse, Business Manager of the Home, to inquire whether the state would bear a portion of the cost of improving the roadway. She was informed by said officials that although they believed the state was not justified in bearing any part of the expense she and her husband could make whatever improvements they wished without interference from the state.

In 1944 the State of California conveyed the land upon which the litigated roadway is situated to Foster. Shortly after Foster acquired title he and Mary Louise Cooke discussed the Cookes' use of the roadway and reached an agreement that he would bear one-third and the Cookes two-thirds of the cost of maintenance and repair of the

roadway. The Cookes hired a bulldozer to scrape the road, they contributing \$27.50 and Foster about \$15.00 as their respective shares of the cost.

In the Fall of 1944 Foster conveyed his land to the Ramponis, defendants herein. Soon thereafter Mary Louise Cooke had a conversation with Antonio Ramponi respecting the maintenance and repair of the roadway but Ramponi refused to bear any portion of the cost. The end result of the conversation was that the Cookes could do what they wished about the maintenance of the road so long as they did not bother the Ramponis. Subsequently, and prior to the commencement of this litigation, the Cookes had the ditches cleaned and deepened, the road scraped and graded again and surfaced with oil, and installed culverts. Following this, Ramponi indicated to the Cookes that the roadway was his private roadway, that the Cookes did not have the right to use it, and that he would not permit their free use of it. Plaintiffs then filed their action by which they sought to have a prescriptive easement to the use of the road and enjoin defendants from interfering with plaintiffs' use thereof.

The findings pertinent to the issues raised were (1) that shortly before plaintiffs purchased their property they were informed by a letter addressed to them from the Deputy Director of the Department of Institutions that the State of California did not object to the use of the road by the previous owners and would not object to plaintiffs' use. (2) That after plaintiffs began construction of a residence on the property Mrs. Cooke spoke to the Medical Superintendent of the Sonoma State Home and to the Business Manager thereof asking if the state would bear a portion of the cost of repair and maintenance of the litigated road. The state, knowing of the improvements and of the substantial sums being expended by plaintiffs on their property and knowing that said plaintiffs were using said roadway as their only means of ingress and egress, informed plaintiffs that they might do whatever they wished in regard to such maintenance and repair of said road, even to the building of a new one. (3) That plaintiffs entered

into an agreement with G. E. Foster, the successor in interest to the state and the predecessor in interest to the defendants Ramponi, that Foster would bear one-third and plaintiffs two-thirds of the cost of the maintenance of the road and that Foster in turn would not interfere with plaintiffs' use thereof, and (4) that defendants Ramponi informed plaintiffs they could do anything they wished as to the repairs of the road but that he would not share in the expenses. The judgment which was thereafter entered decreed that plaintiffs had an irrevocable license to use the road for the purposes of ingress and egress to and from their property for so long as the nature of their use required the continuance of the license, and defendants were estopped to deny plaintiffs' rights. The court further enjoined defendants, their agents and those acting for them from hampering plaintiffs' use of the road.

[1,2] As stated in *Stoner v. Zucker*, 148 Cal. 516, 520, 83 P. 808, 810, it is a well recognized principle in this state that "where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for." (See also 13 C.L.R. 166.) It is also the rule that "When a party relies upon expenditure upon the faith of a license as an estoppel, the evidence of the facts constituting the estoppel should be clear, and the expenditure should not be trivial in amount." *McCarthy v. Mutual Relief Ass'n*, 81 Cal. 584, 588, 22 P. 933, 934; See also 16 Cal. Jur. 288, and *Baum v. Denn*, 187 Or. 401, 211 P.2d 478.

[3] Here the record shows that plaintiffs purchased their property during the ownership of the "servient" tenement by the state. However it was not until approximately three years thereafter that they made any substantial or permanent improvements to the property or made ex-

penditures of money sufficient to come within the rule as stated. Furthermore the record shows that the state, through its agents, only became aware of plaintiffs' activities and their project *after* it was under way. Also it appears that the sole basis for the reliance of plaintiffs was a letter by the Deputy Director of the Department of Institutions previously quoted. Although the transcript contains numerous comments that the authority of the Deputy Director would be shown there is nothing in the record to show that this was actually done. While it is true that the state may be subject to the principle of estoppel in a proper case, in no event will an estoppel operate against the state where the act or contract relied upon to create the estoppel is outside of the powers of the officials involved, see *Wheeler v. City of Santa Ana*, 81 Cal.App.2d 811, 185 P.2d 373, nor will the doctrine be "lightly invoked" where the state is involved. *Pacheco v. Clark*, 44 Cal.App.2d 147, 153, 112 P.2d 67. It is therefore apparent that plaintiffs have not sustained the burden upon this theory of their case.

[4] Proceeding to an examination of the facts and the circumstances surrounding the period of Foster's ownership the record shows that a bulldozer was used for a day and laborers were employed to remove the annual accumulation of trash and debris from the ditches along the road; that for such work Foster expended \$15.00, and \$27.50 was paid by plaintiffs. It further appears that all buildings or other substantial improvements relating to the home of the plaintiffs had been completed prior to Foster's acquisition of the property. Such facts do not appear sufficient under the rules as enunciated in the cited cases.

[5] It is our further conclusion that at most, any license given to plaintiffs by the Ramponis was merely permissive in character. No substantial improvements of any character were undertaken until the disagreement of the parties, or was there any appreciable expenditure of money or other detriment suffered by plaintiffs during such period. The grading and surfacing of the road following their disagreement with the

Ramponis is wholly immaterial to the question herein presented.

It should be noted also that Mrs. Cooke, when asked upon cross-examination whether she had ever notified either Foster or the Ramponis that she and her husband contemplated making certain improvements upon their property which would not be made if there were any difficulty over the roadway, she replied in the negative and that she was not in the habit of discussing her affairs with either of them.

The judgment is reversed.

ADAMS, P. J., and VAN DYKE, J.,
concur.



102 Cal.App.2d 28

**LOVELADY v. SACRAMENTO
CITY LINES et al.**
Civ. 14556.

District Court of Appeal, First District,
Division 2, California.
Jan. 26, 1951.

Charlsie Lovelady brought action against the Sacramento City Lines, a corporation, and Ray C. Condit, to recover for injuries sustained by plaintiff in automobile collision. The Superior Court for the State of California in and for the County of Alameda, Donald K. Quayle, J., rendered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeals, Dooling, J., held that verdict of \$13,500.00 for back injuries was not excessive.

Judgment affirmed.

1. Damages ☞132(3)

Award of \$11,868 for general damages and \$1,632 for special damages to 32 year old woman for permanent and painful back injuries which required the wearing of a brace was not excessive.

2. Appeal and error ☞1002

Where witnesses differ, decision of jury is final.

Donahue, Richards, Rowell & Gallagher, Bryant M. Bennett, Joseph A. Woods, Jr., Oakland, for appellants.

Nichols, Richard, Allard & Williams, Oakland, for respondent.

DOOLING, Justice.

Plaintiff was awarded \$13,500 by a jury for personal injuries received in an automobile collision. On appeal the sole point made is that the damages are excessive. Plaintiff in June 1948, the time of the collision, was thirty-two years of age, married and the mother of young children, with a life expectancy of 36 years. 58 C.J.S., Mortality Tables, page 1212. Her special damages were \$1632, leaving a balance of \$11,868 for general damages.

She received an injury to her lower back and neck which her physicians testified was a muscle injury due to extreme stretching that resulted in a rupture of the fibres which in healing formed scar tissue. The pain in her back and neck proved so stubborn that in September 1948 she was sent to a hospital and placed in traction for approximately a month after which she was encased in a full body cast for another month. This gave her some relief but in November 1949, the time of the trial, while the neck pains were no longer serious her back had stiffened up and was giving her more trouble. She was still wearing a steel support, her back was never free from pain and as a result she was only able to do part of her housework. Her orthopedist testified that the painful and impaired condition of her back "is a permanent thing. It will have its ups and downs, of course, some days worse and some days better, but it will continue."

[1] For an expected 36 years of a continuously painful back which requires the wearing of a brace and with restriction of motion the jury awarded a young wife and mother \$11,868. We cannot agree with appellants that this is excessive.

[2] Appellants produced an expert who testified that X-rays showed osteochondritis of the vertebrae and osteitis condensans, a condition of the pelvis following

childbirth, neither of which was caused by injury. This expert testified that the continued pain and loss of motion in plaintiff's back were due to these conditions. The jury weighed the evidence and chose to believe plaintiff's experts who testified that the plaintiff's impairment and pain were caused by muscle stretching and scar tissue. Where witnesses differ, under our system, the jury's decision is final. It appears futile to repeat this statement which, though it runs through the decisions like a monotonous refrain, seems never to reach the consciousness of attorneys for appellants.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.



101 Cal.App.2d 841

DENTON v. SMITH.

Civ. 4169.

District Court of Appeal, Fourth District,
California.

Jan. 23, 1951.

Marshall Denton, Jr., brought action against Milton Smith on contract for attorney's fees. A judgment for defendant was entered in the Superior Court of San Bernardino County, Carl B. Hilliard, J., and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that under the circumstances attorney representing administrator of a deceased was not entitled to recover for his services pursuant to written contract with client providing for payment of a percentage of appraised value of the estate, rather than receiving fees as set forth in Probate Code.

Judgment affirmed.

1. Attorney and client ☞147

Written contract under which client agreed to pay attorney a sum equal to one-fourth of appraised value of part of estate

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of client's deceased wife recovered for client was without consideration to client under circumstances.

2. Attorney and client ☞143

Where attorney did not explain to client the limitations of attorney's fees allowed in probate matters at time of entering into contract to represent client in connection with estate of client's deceased wife, attorney was precluded from recovering more than a reasonable sum as attorney's fees for his services.

3. Executors and administrators ☞216(2)

Allowance of \$100 for ordinary fees and \$50 for extra fees for services of attorney for administrator of estate of a deceased was a reasonable amount under the circumstances.

4. Attorney and client ☞166(2)

The contract of employment between attorney and client, where an advantage is obtained, is presumptively invalid, undue influence is presumed, and burden is cast upon attorney to prove that his transaction with his client was fair.

5. Attorney and client ☞147

Under the circumstances, attorney representing administrator of estate of deceased was not entitled to recover for his services pursuant to written contract with client for payment of a percentage of appraised value of the estate rather than the fees set forth in Probate Code.

Marshall Denton, Jr., Los Angeles, in pro. per.

Milton Smith, in pro. per.

MUSSELL, Justice.

Action on contract for attorney's fees.

Plaintiff, an attorney at law, filed the instant action for the sum of \$1,361.56 alleged to be due him for legal services rendered to the defendant in connection with "determining the extent of and recovering the interest of the defendant" in and to the estate of his deceased wife. In addition to the above amount, plaintiff asked for reasonable attorney's fees in the instant action, interest and costs.

The trial court concluded that the contract sued upon was without consideration, invalid and unenforceable and judgment was rendered that plaintiff recover nothing by reason of the said contract. Plaintiff appeals, claiming that the evidence was insufficient to support the findings and judgment.

On or about October 9, 1946, the defendant Milton Smith called at plaintiff's office in Los Angeles to obtain advice relative to the probate of his (defendant's) deceased wife's estate. Defendant stated, among other things, that he and deceased had been separated for some time and prior to separation had purchased certain improved real property at Fontana, California; that at the time of the separation, the property had not been paid for in full but that the deceased wife had completed payments thereon and had received a deed thereto in her name alone. Plaintiff promised, upon further investigation, to advise the defendant as to his rights and on October 18, 1946, the parties met at another conference. Plaintiff then advised the defendant that he was entitled to be appointed as administrator of the estate in place of his son who had applied for letters. On October 26th the defendant again went to plaintiff's office, where he signed a petition for letters of administration and written objections to the application of the son on file. On December 2, 1946, plaintiff Denton filed a petition for revocation of the letters of administration which had been issued to Amos R. Smith on November 18th, and on January 10, 1947, Milton Smith was appointed as administrator of the estate.

On November 18, 1946, the plaintiff and defendant executed a contract which provided, so far as material here, that in consideration of "all legal services to be rendered" by the plaintiff Marshall Denton, Jr. "in connection with determining the extent of and recovering the interest of" the defendant in the estate of his deceased wife, the defendant agreed to pay plaintiff a sum equal to one-fourth of the appraised value of the part of the estate recovered; said amount to be paid "within a reasonable time after the suit, determining the extent" of defendant's interest in the estate. No

such suit was ever brought by the plaintiff, and at the time this contract was executed, he had investigated and ascertained the facts and he took the usual proceedings in an estate matter knowing that no suit was necessary.

On December 2, 1947, the plaintiff prepared and filed the first and final account and report, petition for distribution and for final discharge, in which account and report, signed by Marshall Denton, Jr., as attorney for petitioner and the estate, it was recited, among other things, that the plaintiff, as attorney for the estate, was entitled to the sum of \$310.62 as the statutory attorney's fees and was entitled to the further sum of \$200 for extraordinary legal services rendered. On January 30, 1948, a judge of the superior court, by his order, settled the said first and final account and signed the decree of distribution and ordered the estate closed.

In February, 1948, Denton filed a petition in the probate matter to revoke letters of administration, alleging, among other things, that he had repeatedly demanded payment of the sums allowed as attorney's fees from the administrator of the estate and that his demands had been refused. He then alleged upon information and belief that the administrator, Milton Smith, had wasted, embezzled and mismanaged the funds and property of the estate and asked that a citation be issued to revoke the letters issued to Milton Smith. Smith then procured another attorney, and, after various proceedings had in the estate matter, the court, in its final order settling the final account and decree of distribution, awarded to plaintiff Denton attorney's fees in the sum of \$100 and extraordinary fees in the sum of \$50 for his services in the estate matter. The decree recited that Denton had received on account of his fees the sum of \$134.70.

[1] It appears from the record before us that at the time the contract was presented to the defendant Smith for his signature, its terms were not explained to or understood by him. While he stated that he read the contract, it does not appear that Denton informed him that the fees al-

lowed to an attorney in the probate of an estate were as set forth in the Probate Code. It would seem unreasonable to suppose that if Smith were informed of the percentage allowed as attorney's fees by law in probate proceedings, he would then have signed an agreement to pay several times that amount for services which would have been unnecessary under the circumstances disclosed. If, as is apparent, Amos R. Smith had been appointed administrator of the estate, it is to be presumed that the estate would be properly administered and that Smith's interest would be determined and his share of the estate distributed to him. The activities of Denton in securing the removal of the son as administrator could in no wise affect the ultimate disposition of the property involved. It does not appear that Denton agreed to perform any services for Smith which would not be performed by the attorney for the administrator of the estate.

Denton knew or should have known that defendant's interest in the estate was readily ascertainable and was recoverable (probably without requiring any legal services on Denton's part). Under such circumstances the trial court correctly found "that said written contract was without consideration to defendant."

[2] The court's finding that at the date said written contract was executed and for more than a month prior thereto plaintiff was and had been attorney for defendant in the matter of the estate involved, is supported by substantial evidence. In this connection it should be noted that defendant Smith had no independent advisor at the time and did not understand the contract; that plaintiff did not explain to him the limitations of attorney's fees allowed in probate matters. Under such circumstances, plaintiff was precluded from recovering more than a reasonable sum as attorney's fees for his services. *McNeal v. Foreman*, 117 Cal.App. 155, 157, 158, 3 P.2d 583; In *Estate of Mallory*, 99 Cal.App. 96, 102, 278 P. 488, 490, the court said: "The rule has been many times declared that no one who holds a confidential relation towards another shall take advantage of that relation in

favor of himself or deal with the other to his own advantage upon terms of his own making; that in every such transaction the law will presume that he who held an influence over the other exercised it unduly to his own advantage, and that the transaction will not be upheld unless it appears that such other had independent advice and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect."

[3] The trial court had jurisdiction of the subject matter of the attorney's fees to be allowed in the probate matter, *O'Keefe v. Superior Court*, 133 Cal.App. 99, 100, 23 P.2d 523, and the allowance of \$100 for ordinary fees and \$50 for extra fees for the services of plaintiff as administrator was more than a reasonable amount, under the circumstances disclosed by the record.

[4,5] The contract of employment between an attorney and his client, where an advantage is obtained, is presumptively invalid, undue influence is presumed, and the burden is immediately cast upon the attorney to prove that his transaction with his client was fair. Denton failed to make proof that the transaction between himself and Smith was fair and equitable and that no advantage was taken by him, and also failed to establish that Smith was fully informed of all matters relating to the transaction or that he fully comprehended his rights or duties to the estate. Under the circumstances, plaintiff cannot recover on the contract sued upon. *Estate of De Barry*, 43 Cal.App.2d 715, 728, 111 P.2d 728; *Moore v. Hoar*, 27 Cal.App.2d 269, 288, 81 P.2d 226.

As was said in *Clark v. Millsap*, 197 Cal. 765, 785, 242 P. 918, 926: "Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts of violation or excess of authority, and acts of impropriety, inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties." 6 Corp.Jur. 722, 723."

Plaintiff Denton's conduct with respect to the matter of his fees herein cannot be said to meet the standard of fairness required to entitle him to recover on the contract sued upon.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



102 Cal.App.2d 63

WILSON v. GRAY et al.

Civ. 7825.

District Court of Appeal,
Third District, California.

Jan. 29, 1951.

As Modified on Denial of Rehearing
Feb. 27, 1951.

Hearing Denied March 26, 1951.

Alex E. Wilson brought action against Joe Gray, Charles A. Gray, Joe Gray & Son, a co-partnership consisting of Joe Gray and Charles A. Gray, co-partners, for breach of contract. The Superior Court, Yuba County, Warren Steel, Judge, rendered a judgment for defendants and an order denying plaintiff's motion for a new trial, and plaintiff appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that there was no breach of contract.

Judgment and order affirmed.

1. Brokers ⇨11

In action to recover damages for breach of contract whereby plaintiff was to attempt to obtain financing for proposed purchase by defendants of timber land, and providing that the defendants would also attempt to obtain a loan, and that if plaintiff should be the first to obtain the financing his rights under expired contract would be reinstated, evidence sustained finding that defendants negotiated a loan before plaintiff obtained any financing, and that therefore no rights accrued to plaintiff under the contract.

2. Appeal and error ⇨1010(1)

Where findings of trial court are supported by substantial evidence, those findings will not be disturbed on appeal.

3. Brokers ⇨11

Where defendants, who obtained option for seven days to purchase timber land, contracted with plaintiff, a lumber broker, and gave him exclusive option to secure a certain sum to be used in the purchase of timber land, and plaintiff was unsuccessful in procuring financing within seven days, and thereafter the parties agreed that plaintiff should continue his efforts to obtain financing and that defendants would likewise attempt to obtain a loan, and that if the plaintiff should be first to get loan, his rights under original agreement would be reinstated, and before plaintiff was able to obtain financing, defendants obtained a promise from lender to loan defendants money, defendants obtained "financing" before plaintiff, and therefore defendants did not breach contract by obtaining loan themselves.

See publication Words and Phrases, for other judicial constructions and definitions of "Financing".

4. Contracts ⇨154

Where one construction will make contract unreasonable or unfair, and another construction, equally consistent with the language, will make it reasonable, fair and just, latter construction must be adopted.

5. Trial ⇨66

Where evidence, which the plaintiff sought to introduce when plaintiff made a motion to reopen case, would not have been material to plaintiffs' case, denial of motion to re-open was not error.

Arthur S. Powell, Marysville, Louis J. Glicksberg and Sterling Carr, San Francisco, for appellant.

Rich, Weis, Carlin & Fuidge, Marysville, Walter McGovern and Frank Ilgenfritz, San Francisco, for respondents.

PEEK, Justice,

This is an appeal by plaintiff from a judgment in favor of defendants in an action for breach of contract, and from the order denying his motion for a new trial.

The record, viewed in the light most favorable to defendants, shows that in 1946 Joe Gray and his son, Charles A. Gray, were operating a lumber business under the firm name of Joe Gray & Son. In the summer of that year the Grays became interested in certain timber land lying in Yuba, Butte and Plumas counties, and subsequently obtained an oral option to purchase the same for \$185,000.00 provided the partnership could arrange the financing within two weeks. At the outset of negotiations the Grays conferred with appellant Alex E. Wilson, a lumber broker, who indicated that certain sources of financing were available to him and he believed that he could obtain a loan for the purchase price of the timber land. On July 2, 1946, Wilson and the Grays entered into an agreement which, among other things, provided that Wilson was to have an "exclusive option for Seven days" to secure the sum of \$270,000.00 to be used to purchase the timber land in question and the balance to be used for certain refinancing and the building of additional mill facilities.

Shortly after the expiration of the seven day period provided in the agreement it appeared that Wilson would not be successful in procuring the financing as the parties had originally contemplated. It was thereupon decided that the amount would be reduced to \$185,000.00; that a new understanding was reached whereby Wilson would continue his efforts to obtain financing; that the Grays would likewise attempt to obtain a loan, and if Wilson should be the first to get the money his rights under the July 2nd agreement would be reinstated. On August 15, 1946, respondent Charles A. Gray discussed the loan with the Stockton Box Company and on the 18th day of August that company agreed to make the loan. On August 19, 1946 Wilson, for the first time, obtained a commitment by one A. H. Land to lend to the Grays \$185,000.00, which information he communicated by telephone to Joe Gray on the afternoon of the same day. Gray informed Wilson that the deal was off. Plaintiff met the Grays early the following morning and was again told

that the deal was off. A telegram was delivered to Wilson on August 20, 1946, signed by the Grays stating that the deal was definitely off. Plaintiff then instituted this action for damages for breach of the agreement.

[1,2] He first contends that there is nothing in the record to support the trial court's finding that "on or about August 15, 1946, defendants acting independently of plaintiff and at a time when Plaintiff had not secured the sum of \$185,000.00, or any other sum for the purposes aforesaid, negotiated a loan with the Stockton Box Company, as a result of which defendants purchased the property in question." To the contrary the record shows testimony by Charles A. Gray that he first contacted the Stockton Box Company on August 15, 1946; that on the following day a representative of the box company contacted him indicating definite interest; that on the 17th the company's representative drove through the timber tract, and on the following day telephoned to the Grays stating that the company would make the loan. Wilson's own testimony was that he did not obtain Land's agreement to make the loan until August 19, 1950. Hence there was substantial evidence in the record to support the finding that the Grays negotiated the loan before Wilson had obtained any financing. This is the essential issue of fact in the case, since it is conceded that Wilson's rights under the agreement depended upon his being the first to obtain the loan. August 19th being the critical date, it appears that there is substantial evidence to support the finding of the trial court that the Grays independently negotiated a loan for the purchase price on or about August 15, 1946. Where the findings of the trial court are supported by substantial evidence, those findings will not be disturbed on appeal. *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970.

Appellant further contends that the mere negotiation of a loan resulting in the purchase of the property by defendants, as found by the trial court, was not sufficient to terminate appellant's rights under the agreement but that an actual com-

pletion of the loan was necessary in order to cancel his rights.

[3, 4] The trial court found that the agreement made by the parties following the expiration of the original written agreement of July 2, 1946 was that "should plaintiff secure the necessary financing before the same should be secured by defendants the parties would consider themselves bound by the original agreement of July 2, 1946." That finding is amply supported by the record, and is not questioned in this appeal. We are convinced that a reasonable construction of the words "secure the necessary financing" when read in the light of the entire arrangement between the parties, cannot be construed to require more than an agreement on the part of a prospective creditor to make the loan contemplated. To interpret the words so used as appellant would have us do would only lead to more confusion. Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one that must be adopted. *Cohn v. Cohn*, 20 Cal.2d 65, 123 P.2d 833. Applying the same rule to the further finding of the trial court that defendants, acting independently of plaintiff and at a time when plaintiff had not secured the sum in question, "negotiated a loan with the Stockton Box Company, as a result of which defendants purchased the property" was in effect a finding that defendants had secured the necessary financing within the meaning of the agreement between the parties. We therefore conclude that the trial court correctly interpreted the agreement and that appellant's rights thereunder were terminated on August 18, 1946 when respondents reached an agreement with the Stockton Box Company.

[5] At the conclusion of the trial appellant made a written motion to re-open the case to introduce testimony to the effect that the Stockton Box Company had placed no part of the purchase price in escrow until August 20, 1946, when it deposited \$10,000.00, and that the lend-

ing transaction was not completed until September 4, 1946. In view of our interpretation of the agreement, this evidence would not have been material to plaintiff's case, and the trial court's denial of the motion to re-open was not error.

The judgment and order are affirmed.

ADAMS, P. J. and VAN DYKE, J.,
concur.



101 Cal.App.2d 811

WILMS et al. v. HAND et al.

Civ. 14510.

District Court of Appeal, First District,
Division 2, California.

Jan. 22, 1951.

Action by Martin Wilms, and others, against P. H. Hand, and another, to restrain the defendants from permitting dogs harbored and maintained by them at their place of business to annoy and disturb the peace and comfort of plaintiffs and their guests. The Superior Court, in and for the County of San Mateo, A. R. Cotton, J., granted a preliminary injunction, and defendants appealed. The District Court of Appeal, Schottky, J., Pro Tem., held that there was ample evidence to justify granting a preliminary injunction.

Order affirmed.

1. Appeal and error ⇐688(1)

In action by operators of motor court against operators of nearby animal hospital to restrain defendants from permitting animals to annoy and disturb plaintiffs and their guests, record did not support defendants' contention that trial court had denied fair and impartial hearing by rendering decision before defendants' case was concluded.

2. Evidence ⇐380

In action by operators of motor court against operators of nearby animal hospital to restrain defendants from permitting

animals to annoy and disturb plaintiffs and their guests, where witness testified that sounds recorded were typical of those on an average day, court could properly permit playing of plaintiffs' recording of barking of defendants' dogs.

3. Appeal and error ⇨1050(1)

In action by operators of motor court against operators of nearby animal hospital to restrain defendants from permitting animals to annoy and disturb plaintiffs and other guests, ruling of court permitting playing of plaintiffs' sound recording of barking of dogs, if erroneous, was not prejudicial in view of other evidence.

4. Appeal and error ⇨954(1, 2)

Injunction ⇨135

Granting or denial of preliminary injunction on verified complaint, together with oral testimony or affidavits, even though evidence with respect to absolute right therefor may be conflicting, rests in sound discretion of trial court, and order may not be interfered with on appeal, except for abuse of discretion.

5. Nuisance ⇨31

Since granting of preliminary injunction in nuisance cases rests in discretion of court, court must balance hardships, and if that resulting to defendant greatly exceeds benefits which will accrue to plaintiff court must refuse such relief until there can be a complete hearing on pleadings and proof, but preliminary injunction may be properly issued whenever questions of law or fact are grave or difficult and injury to moving party will be immediate, certain and great if denied, while loss to opposing party will be trivial if granted.

6. Nuisance ⇨31

Where there was evidence that operators of motor court were suffering substantial damage to business and were having peace and comfort destroyed by barking of dogs kept in nearby animal hospital, and operators of hospital claimed that sound proof building prevented any noises from escaping, little damage could result to defendants, and hence court properly issued preliminary injunction restraining

them from permitting dogs to annoy and disturb peace and comfort of plaintiffs.

Carl William Anderson, Cyrus J. McMillan, Burlingame, for appellants.

J. W. Coleberd, Richard P. Lyons, South San Francisco, for respondents.

SCHOTTKY, Justice, Pro Tem.

Defendants appeal from a preliminary injunction restraining them from permitting the dogs harbored and maintained by them at their place of business "from annoying and disturbing the peace and comfort of plaintiffs and such guests as plaintiffs Martin Wilms, Sara Wilms, Earl M. Wilms and Marilyn Wilms may have in the motor court operated by said plaintiffs."

Plaintiffs Wilms operate a motor hotel at Millbrae. In the motor hotel, which faces El Camino Real, a well-known public highway, there are 37 apartments designed for use and occupation by persons as temporary places, and plaintiffs Earl Wilms and Marilyn Wilms, also reside there. Defendant P. H. Hand is a veterinarian and he and defendant Anna Lee Hand conduct a dog and cat hospital on property adjacent to said motor hotel.

Plaintiffs commenced an action against defendants alleging, in addition to the facts hereinbefore set forth, that defendants have kept, harbored and maintained between 80 and 100 dogs; that on April 22, 1949, and from day to day thereafter, these dogs barked, howled, yelped and whined intermittently both during the daytime and at night, and have interfered with and disturbed the comfort, rest and sleep of plaintiffs Earl Wilms and Marilyn Wilms and also have disturbed many guests of the motor hotel in their sleep, causing them to leave said motor hotel to the detriment of plaintiffs Wilms. The complaint contained a second cause of action in which the other plaintiffs also alleged annoyance and disturbance caused by the dogs.

Defendants filed an answer in which they alleged that defendant P. H. Hand was a veterinarian and had operated his said business prior to the commencement of

the erection of any buildings on land belonging to plaintiffs Wilms; that the number of dogs kept by them in their place of business never at anytime exceeded 65; that they had invested more than \$80,000 in their improvements and that the improvements have been constructed to prevent escape of any noises; and they denied the allegations of the complaint as to the noise and disturbance, and annoyance.

A hearing was held on plaintiffs' application for a preliminary injunction. Plaintiffs introduced a number of affidavits and also called several witnesses, and the affidavits and testimony substantiated the allegations of the complaint. Stephanie S. Shea, one of the plaintiffs, testified that at a distance of 1000 feet from defendants' pet hospital she could hear the dogs barking. She testified that "the noise is absolutely terrific. You can't explain it, it is just a perfect bedlam." She stated that she heard it in the morning and in the afternoon and that before the suit was filed she had also heard it at night. The evidence in support of plaintiffs' complaint is so overwhelming that we deem it unnecessary to detail it further.

Defendants introduced 14 affidavits and called one witness. Thirteen of the affidavits were virtually identical in form and substance, the affiants residing at varying distances from defendants' place of business and stating that they did not object to the operation of defendants' business and that they had not been disturbed or annoyed by the alleged noise made by the dogs in defendants' pet hospital; and that it did not interfere with their comfort, rest or sleep. It is worthy of note that none of said affiants state that they did not hear the dogs barking. The affidavit of defendant P. H. Hand stated that the only portion of the pet hospital which had not been sound proofed is the area containing outside runs and that the outside runs are used only between 9:30 a. m. and 3 p. m. This area, according to defendants' witness Albert B. Mann, is 40 feet by 40 feet. The witness, Mann, also testified that defendants' building was sound proofed and that the noise of the dogs barking was

not audible outside of the building. He did, however, state on cross-examination, that he had observed as many as 15 dogs in the outside runway and had heard them barking during the daytime.

[1] Defendants first contend that the trial court denied them a fair and impartial hearing by rendering its decision before defendants' case was concluded. Defendants state: "After plaintiffs had called seven witnesses and had concluded their case, and defendants had called only their first witness, the Court announced, 'I am inclined to grant the writ.' Despite the statements of counsel for defendants that witnesses were present in Court to testify on behalf of defendants, the Court refused to allow defendants to proceed and granted the injunction *pendente lite*. Several of the witnesses present resided in close proximity to defendants' place of business yet they were denied the right to testify as to the effect, if any, of the operation of the pet hospital on the comfortable use and enjoyment of their property."

This statement is without support in the record and counsel deserves censure for making it. Such statements reflecting upon a trial court should not be made thus lightly. After the cross-examination of defendants' witness Mann had been completed the record shows the following:

"Mr. Coleberd: That is all.

"Mr. Anderson: That is all.

"The Court: I am inclined to grant the writ.

"Mr. Anderson: I would like the record to show that I have presented thirteen affidavits and have witnesses here who will come forward and testify in this court that they live within 50 feet of the premises and they aren't annoyed by these dogs, they don't bother them.

"The Court: That may be.

"Mr. Anderson: I mean as far as the weight of the evidence is concerned. They are people that live within 50 feet of the property and aren't annoyed. Certainly then these complainants—

"The Court: (Interrupting) I don't care about that. Those people may like

it. Some people have dogs go to bed with them."

The record fails to show that defendants were denied the right to have additional witnesses testify but it does show that all defendants expected the witnesses to testify to was what was already contained in affidavits introduced by defendants. All that the court indicated was that upon the evidence before him he was inclined to grant the writ. It is clear to us that defendants were not denied the right to produce further testimony. If an attorney intends to rely upon a contention that he was denied the right to produce further testimony he should make his offer of proof in a proper manner. This defendants' counsel did not do and he should not attempt to blame the trial court for an oversight of his own.

[2,3] Defendants next contend that the court committed prejudicial error amounting to a miscarriage of justice in permitting the introduction of a purported recording without a proper foundation being laid. Plaintiff Earl Wilms testified that he had made a sound recording of the barking of the dogs on a Western Electric machine that he had rented. He produced the record that was made and it was played in court over defendants' objection. Defendants now complain that sound machines are subject to mechanical manipulation by the operator, amplifying or modifying the sounds that actually were made. The witness testified that the sounds recorded on the machine and played in court were typical of an average day. There was no error in permitting the record to be played, but in any event, in view of all the other evidence, there could be no possible prejudice even if the ruling of the court had been erroneous.

The final contention of defendants is that the court abused its discretion in granting the preliminary injunction.

[4] In *People v. Black's Food Store*, 16 Cal.2d 59, at page 61, 105 P.2d 361, at page 362, the Supreme Court says: "The authorities are numerous and uniform to the effect that the granting or denial of a preliminary injunction on a verified

complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion." See also *Kendall v. Foulks*, 180 Cal. 171, 174, 179 P. 886; *Remillard Brick Co. v. Dandini*, 47 Cal.App.2d 63, 67, 117 P.2d 432.

[5] Defendants do not question this rule but argue that it was the duty of the court to balance the hardships and if the hardship resulting to the defendants greatly exceeds any benefits which will accrue to the plaintiffs from the granting of temporary relief or any hardship caused by its denial, a preliminary injunction should be denied. Defendants quote from 39 Am.Juris. 431, which states what is undoubtedly the general rule, as follows: "Since the granting of a preliminary injunction in nuisance cases rests in the discretion of the court, upon the application for relief of this character, it is clearly the duty of the court to balance the hardships, and, if the hardship resulting to the defendant greatly exceeds any benefits which will accrue to the plaintiff from the granting of temporary relief, or any hardship caused him by its denial, it is the duty of the court to refuse temporary relief and refrain from interfering with the operations of the defendant until there can be had a full and complete hearing on the pleadings and proofs; and, on the other hand, a preliminary injunction may be properly issued whenever the questions of law or fact are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss to the opposing party will be trivial if it is granted."

[6] While it is true that courts will often "balance the conveniences" or consider the relative hardships to the respective parties of the granting of a preliminary injunction where the loss to a defendant resulting from the injunction would be entirely out of proportion to the damage suffered by the plaintiff, see *Rest. Torts*

§ 941, this can give little comfort to defendants in the instant case. For it is clear from the evidence that plaintiffs Wilms are suffering substantial damage to their business and are having their peace and comfort disturbed, while if defendants' claim that his soundproof building prevents any noises from escaping is correct, they will suffer little damage from the preliminary injunction because it merely restrains them from permitting the dogs kept by them "from annoying and disturbing the peace and comfort of plaintiffs."

Our conclusion is that there was ample evidence to justify the trial court in granting the preliminary injunction.

The order granting the preliminary injunction is affirmed.

NOURSE, P. J. and DOOLING, J., concur.



102 Cal.App.2d 114

WARD et al. v. SILVERIA et al.

HJERTAGER et al. v. SILVERIA et al.

Civ. 7814.

District Court of Appeal,
Third District, California.

Jan. 31, 1951.

Rehearing Denied March 2, 1951.

Action by Ralph Ward and Elizabeth A. Ward against Joseph F. Silveria, and another, to recover for the loss of their household furniture and personal apparel by fire on theories of negligence and breach of warranty, and action by E. J. Hjertager, and another, against the same defendants for damages sustained when dwelling houses owned by them were destroyed by the same fire. The two causes were consolidated for trial. The Superior Court, Siskiyou County, James M. Allen, J., rendered a judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that questions of negligence

of defendants as lessors of a home propane gas system were for the trial court sitting as trier of fact.

Judgment affirmed.

1. Negligence ⚡121(2)

Application of doctrine of *res ipsa loquitur* does not give plaintiff absolute right to judgment in every case.

2. Negligence ⚡121(2)

Application of doctrine of *res ipsa loquitur* does not shift burden of proof, and when defendant produces evidence to rebut inference of negligence, it is ordinarily a question of fact whether inference has been dispelled.

3. Negligence ⚡121(2)

Inference of negligence created by doctrine of *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury, and which, in absence of any other evidence as to negligence, necessitates verdict in favor of plaintiff, and defendant must rebut *prima facie* case so created by showing that he used care required of him under circumstances.

4. Negligence ⚡121(2)

Notwithstanding inference of negligence which may have arisen under doctrine of *res ipsa loquitur*, defendant may still rebut the inference, and when he introduces evidence as to care he has taken, it may become a question of fact for the trial court sitting as trier of fact to determine whether such proof did rebut the inference.

5. Gas ⚡29(2)

In actions by lessees of home propane gas system and by owners of houses against lessors of system for damages sustained in fire, lessors' testimony as to care in inspection and testing of equipment before and after installation, and as to general fitness from standpoint of safety and use, authorized a determination that lessors had not been guilty of lack of due care.

6. Gas ⚡20(4)

In actions by lessees of home propane gas system and by owners of houses for damages sustained in fire allegedly caused by negligence of lessors of system, it could not be said as a matter of law that installa-

tion of apparatus in such proximity to house that upon release of safety valve tank would discharge large amounts of gas close to wall below projecting eaves was negligent.

7. Bailment 33

In action by lessees of home propane gas system against lessors of system for damages sustained in fire, brought on theory of breach of warranty, whether equipment as furnished and installed was reasonably fit for purposes for which it was to be used was a fact question.

Tebbe & Correia and Mark M. Brawman, Yreka, for appellants.

Floyd Merrill, and J. Everett Barr, Yreka, for respondents.

VAN DYKE, Justice.

Ralph and Elizabeth Ward, plaintiffs and appellants, brought action against defendants and respondents to recover damages suffered through loss, by fire, of their household furniture and personal apparel. E. J. and Erling Hjertager, plaintiffs and appellants, also brought action against defendants and respondents for damage suffered by destruction of two dwelling houses owned by them, occurring in the same fire that destroyed the Ward property. The Wards occupied one of the two dwellings.

The actions were based upon negligence; that of the Wards also upon warranty. The two causes were consolidated for trial. Judgment went for defendants, and the plaintiffs in each action appealed.

Respondents Silveria and Arnberg, as copartners, were engaged in the business of renting and supplying gas tanks to consumers of liquid propane for domestic use, and of keeping such tanks supplied with liquid propane. On the day preceding the fire, respondents had leased to appellants Ward, and had installed next to the cottage they were occupying, a tank with supplemental equipment, which they attached to the Wards' stove within the cottage. The lease obligated them to install the equipment properly, connect it for use, maintain it in proper safe working condition, and

to keep an adequate supply of liquefied gas in the tank. The installation was completed late in the evening, the tank being set up within a foot of an exterior wall of the house. The fire occurred on the afternoon of the following day. Both houses, and the contents of the Ward house, were completely destroyed.

One Pelham testified that he witnessed the actual start of the fire. He said that his attention was attracted by a loud, hissing noise from outside the Ward house. He looked toward the Ward house and the gas tank. He saw vapor blowing out of the top of the gas tank and against the outside wall of the house. It was being forced up the wall to the projecting eaves, which forced it back downward. As he looked, it started burning all at once. He likened the start of the flames to an explosion. Mrs. Ward said that just before the fire started she was using the stove for cooking and that there was no fire anywhere else around the house; that while at the stove she heard a loud, whistling sound from without; that she ran outside, and found the tank in flames and the wind blowing the fire toward the house; that at first only the tank was flaming and the house had not yet caught; that the flames seemed to be coming from the top of the tank. Appellant Erling Hjertager saw the fire. He said he heard the hissing sound while 200 feet away and saw flames shooting from the top of the tank to the eaves of the house some 6 or 8 feet above the tank; that the flames continued to shoot from the tank until the house was completely destroyed by fire. It further appeared that the tank and accessory fittings were made so as to withstand substantial internal expanding pressure which would vary as the temperature varied; that the internal pressure rose as the outside temperature rose. The tank came from the manufacture equipped at the top with an exhaust valve to take care of any pressure greater than normal operating pressure that might be formed in the tank. The valve was set to open at 250 pounds pressure per square inch. The normal operating pressure in the tank approximated 150 pounds. Respondent Arnberg, who installed the tank and fittings, testified that in

order to raise the pressure in the tank to 250 pounds there would have to be heat enough to raise the temperature within the tank to approximately 134 degrees; that the released gas would go out into the air and be harmlessly dissipated unless fired by some ignition source such as an open flame or an electric spark after the gas had sufficiently mixed with air to reach the combustion point. Respondents further furnished testimony to the following effect: After such equipment is installed the consumer is not required to make any adjustments of the regulators or valves in order to make use of the gas; the only time they are to touch the tank is when they want to turn off the fuel into the house and the only thing they have to do in order to use the gas is to turn it on at the user's appliance, in this case the kitchen stove (Mrs. Ward testified that except to use the stove she had not touched the equipment up to the time of the fire and did not know of any one else having done so); that before installing the equipment respondents had inspected the same and found it in good shape; that they opened up the valves, made sure there were no leaks anywhere and that the valves were all tight; that they filled the tank at their plant; that it had not been used prior thereto; that they inspected the regulator and found it worked properly, testing the flow of gas and the registration of pressure; that on arriving with the equipment at the Ward dwelling they selected the place of installation, set up the tank on its ready-made foundation, connected the tank with the Ward stove and then tested for leaks throughout the equipment, using a flame test; that such a test was adequate, although very slow leaks were sometimes better found by using the soap bubble test; that they did not test the release point of the escape valve by raising the pressure in the tank to 250 pounds; that if the valve opened and gas was blown out as it would be, it would not ignite unless it came in contact with an ignition agency such as a flame, a spark, or a hot wire, and then only after mixing with air so as to attain a combustible stage—approximately ten parts air to one part gas; that

even then it would probably only flash and blow out.

The trial court found as follows: That respondents installed the tank and complementary equipment, using reasonable care and caution; that they filled the tank with propane gas; that respondents did not have after such installation and filling of the tank, exclusive control of the equipment; that after the installation was complete and before any damage occurred the appellants Ward had the use, control and management of the gas container with its regulator, valves, pipes and connections; that respondents did not either negligently or carelessly allow or permit the gas to escape, ignite and burn, and that the damage from the destruction of the houses and contents was not caused by any carelessness or negligence of respondents.

As to the action based on warranty, the court found generally against the allegations of breach of the claimed warranty, finding that allegations to the effect the fire was caused by negligence of respondents and that the equipment leased was defective or unfit for the purpose for which leased, were untrue. The court further found that the equipment did not "leak" gas and that respondents had carefully, and properly, done all things in and about the installation, equipping, fitting and connecting of the tank, tubing, valves and fittings, all of which the court found to be, when installed, in sound and safe condition and free from defects.

Appellants contend that the findings of the court against liability of respondents are not sustained by the evidence. They contend that on the issue of negligence they made a case coming within the doctrine of *res ipsa loquitur* and therefrom they argue that the trial court was compelled to draw the inference of negligence and to grant them judgment for their damages because of the failure of respondents to produce sufficient proof in rebuttal.

[1-3] We will concede for the purpose of testing the validity of appellants' contentions that the doctrine of *res ipsa loquitur* was in part at least applicable under

the facts of this case and that therefore an inference of negligence on the part of respondents would be warranted. However, it is well settled that "the application of the doctrine does not give a plaintiff an absolute right to a judgment in every case. *Raymer v. Vandenberg*, 10 Cal.App.2d 193, 51 P.2d 104; *Nicol v. Geitler*, 188 Minn. 69, 247 N.W. 8; *Sweeney v. Erving*, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815. It does not shift the burden of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled." *Druzanich v. Criley*, 19 Cal.2d 439, 444, 122 P.2d 53, 56. It is equally well settled "that the inference of negligence which is created by the rule *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the *prima facie* case so created by showing that he used the care required of him under the circumstances." *Ales v. Ryan*, 8 Cal.2d 82, 89, 64 P.2d 409, 417.

[4, 5] Notwithstanding the inference of negligence which may have arisen, it is still open to the defendant to rebut the inference, and when he introduces evidence as to the care he has taken it may become, and we think in this case it did become, a question of fact for the trial court, sitting as the trier of fact, to determine whether or not such proof did rebut the inference. *Hinds v. Wheadon*, 67 Cal.App.2d 456, 154 P.2d 720 (explosion of dehydrator tank); *Holt v. Henry*, 58 Cal.App.2d 168, 136 P.2d 97 (collapse of platform); *Johnston v. Black Co.*, 33 Cal.App.2d 363, 91 P.2d 921 (collapse of fluoroscopic table); *Raymer v. Vandenberg*, 10 Cal.App.2d 193, 51 P.2d 104 (skidding on rainy night); *Rayl v. Syndicate Building Co.*, 118 Cal.App. 396, 5 P.2d 476 (break in elevator cable); *Pontecorvo v. Clark*, 95 Cal.App. 162, 272 P. 591 (fall from roller coaster); *Frederick v. San Francisco-Oakland Terminal Rys.*, 48 Cal. App. 336, 191 P. 1020 (overturned street

car). As hereinbefore noted, respondents produced testimony as to their care in the inspection and testing of the equipment before and after installation and as to the general fitness of the equipment from the standpoint of safety in use. The showing made was sufficient, we hold, to authorize the trial court to determine that they had not been guilty of a lack of due care.

[6] Appellants specifically charge that they have proven negligent conduct on the part of respondents in the premises by proof that the tank was installed in close proximity to the outer wall of the Ward residence. They say that installing an apparatus of this nature which, upon the release of the safety valve, would discharge large amounts of propane gas close to the wall below projecting eaves, was negligence in that it would create a condition such that the gas might be ignited and thus fire the building. But here again we think that whether or not such installation was negligent was a question of fact for the trial court. There was testimony that a discharge of gas through release from the escape valve would be of short duration and would ordinarily be rapidly and harmlessly dissipated into the surrounding air; that it could not be ignited even if in part at least it attained a combustible mixture with air, unless there was open flame or spark in contact with that part of the mixture which was combustible and that no such ignition agency was reasonably to be anticipated. We think it cannot be said as a matter of law that the installation complained of was negligent.

[7] What we have said on the issue of negligence applies equally to the claim of warranty as to which the court found, as above noted, that the warranty had not been breached, but on the contrary that the equipment as furnished and installed was reasonably fit for the purposes for which it was to be used and we must, therefore, hold that this assignment of error likewise must be held to be invalid.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

102 Cal.App.2d 34

SAPIRO v. MARQUIS.

Civ. 17737.

District Court of Appeal, Second District,
Division 3, California.

Jan. 26, 1951.

Aaron Sapiro sued Elvira T. Marquis to recover attorney's fees for services rendered on the behalf of defendant in annulment proceedings. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustain the trial court's finding that plaintiff had agreed to look to defendant's alleged husband for payment, and that defendant was not indebted to plaintiff for attorney's fees.

Affirmed.

1. Attorney and client ☞166(3)

In action by attorney to recover fees for services rendered in representing client in annulment suit, evidence would not sustain trial court's finding that services rendered by plaintiff had not been worth any sum at all.

2. Attorney and client ☞166(2)

In action by attorney to recover fees for services rendered on behalf of client in annulment proceedings, evidence sustained trial court's finding that plaintiff had agreed to look to his client's alleged husband for payment, and that defendant was not indebted to plaintiff for attorney's fees.

L. M. Cahill, Los Angeles, for appellant.

Nathan Kline, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff Aaron Sapiro appeals from a judgment for defendant Elvira T. Marquis, in an action to recover attorney's fees. The court, sitting without a jury, decreed that plaintiff take nothing.

[1] The trial court found that defendant had retained plaintiff for advice, consultation and the filing of any action deemed advisable against Leonard J. Mar-

quis, whose wife she claimed to be and that these services were rendered to defendant by the plaintiff at defendant's request. The court found further that plaintiff agreed to "obtain such compensation, if any, from Leonard J. Marquis, * * * by negotiations with counsel for said Leonard J. Marquis, or by application to the court in which said case was filed for such compensation * * *" and that defendant had not agreed to compensate plaintiff for his services. It was also found that "it is not true that said services were worth the sum of Seven Thousand Five Hundred Dollars (\$7,500) or any sum at all." (Emphasis added.) Although we are of the opinion that the evidence does not support the emphasized portion of the above-quoted finding the decisive question is whether there was substantial evidence to support the finding that plaintiff agreed to look to defendant's alleged husband for payment.

Defendant and Leonard J. Marquis were married in Juarez, Mexico, in 1936, the day after Mr. Marquis had obtained a divorce there from Mrs. Blanche Marquis. Defendant and Mr. Marquis then returned to New York where, in 1937, Mrs. Blanche Marquis brought an action for separate maintenance against Mr. Marquis in which she received an award of money. It was adjudicated that the Mexican divorce obtained by Mr. Marquis was null and void, and the marriage between defendants (Marquis and defendant here, Elvira T. Marquis) was of no force and effect. It was also adjudged that plaintiff Blanche was the "lawful wife of the defendant Leonard J. Marquis". Marquis and defendant then moved to California, returning to New York in 1941 at which time Mrs. Blanche Marquis brought an action seeking to enjoin defendant from using the name "Marquis" and Mr. Marquis from giving her money, gifts, etc. Injunctive relief was denied, Marquis v. Marquis and Elvira Trabert, 178 Misc. 702, 35 N.Y.S.2d 675, on the ground that plaintiff had shown no wrong done or threatened and no legal right to be protected. Defendant and Mr. Marquis returned to California where they

resided as husband and wife. In 1948, defendant sought legal advice from plaintiff concerning a divorce from Mr. Marquis and her rights in community property alleged to amount to some \$865,000. As a result of numerous conferences, telephone conversations and letters, an annulment suit was filed against Marquis by defendant herein. Mr. Marquis obtained counsel, and attorneys for both parties conferred on several occasions in order to work out a property settlement agreement which would meet with the approval of their clients. In the annulment action defendant here prayed for attorney's fees in the sum of \$25,000 and during the negotiations for a settlement, apparently attorney's fees were contemplated as a part thereof. On September 29, 1948, plaintiff, due to press of other business, deemed it advisable to associate other counsel in the Marquis matter, and took Mr. Marquis to the office of S. S. Hahn and others for that purpose. A substitution of attorneys bears this date, substituting Aaron Sapiro and Hahn, Ross, Goldstone and Saunders for Aaron Sapiro. Mr. Hahn was the controlling figure in the settlement negotiations, and the evidence shows that he informed Mr. Sapiro of the progress being made. In October, 1948, a dispute arose between plaintiff Sapiro and Mr. Hahn concerning the case and whether or not it should be dismissed because of threatened intervention therein by Mrs. Blanche Marquis. Plaintiff contends here that he was dismissed as an attorney in the case, which Hahn and defendant deny. They insist that he remained as one of defendant's attorneys in the case and entitled to receive his share of any amount received as attorneys' fees from Mr. Marquis under any settlement agreement reached by the parties. On November 5, 1948, the annulment action was dismissed without prejudice. On January 13, 1949, plaintiff rendered a statement in the sum of \$7,500 to defendant for legal services.

On August 28, 1948, plaintiff wrote to defendant as follows:

"It is customary in annulment matters for a retainer to be received by the attorney.

"In these cases the court may have discretion in granting fees; but occasionally this is denied by the judge, either because of the nature of the annulment or because of the details of the case.

"In the last case that came before the courts on this matter, the court denied fees to the lawyer; and the Appellate Court held that this was wholly within the discretion of the judge.

"Therefore, it has become customary in these matters to receive a retained.

"On this account, I suggest that you arrange to send in to this office a retainer of \$3,000.00.

"Will you take care of this at your early convenience?" Defendant paid nothing but on September 13, 1948, wrote to plaintiff, in part, as follows:

"Dear Aaron—

"I am loathe to trouble you while you are engaged in an important trial with my little case. But I am so very miserable and confused, I just have to get some of it off my chest.

"Aaron, I am sorry that we started this case of mine at a time when it was necessary for you to leave town for so long. You, as a man of singular mental strength may not be able to realize how great the emotional and psychological strain of my present living condition is. It is very difficult to bear up under it.

"Besides this, Lenny's lawyers have assured him with all positiveness that we—meaning you and me—have not a leg to stand on with our case, and that he will not have to give me a penny.—I wonder if you can imagine how I felt when I learned of this? Especially as you have never given me the least bit of assurance (wisely so, I believe) upon which I could lean now for some comfort and courage, that the outcome of the case will be favorable for me.

"And then, of course, I am terribly worried (and blame myself no end for not having discussed your fee matters clearly before hand) about the financial end of it all in the event we are fighting

a losing battle. Please do not misunderstand me dear Aaron, I am more than willing to recompense you for your services of course, and know that no one would give me a fairer deal than you, but I am just so upset about all this uncertainty, and not having you here now to discuss matters with is quite difficult." (Emphasis added.)

On the other hand, the record shows that Mr. Hahn testified that at the conference where he, plaintiff and defendant first discussed fees and the money sued for, the following conversation took place: "She [defendant] wanted to know whether, if I [Hahn] have to be paid to be a lawyer, something to that effect. And I replied, 'No, Mr. Sapiro and I are taking this case on the basis of fifty per cent, whatever we recover from your husband, and you are not to pay anything,' and I told her that is just the way I handle cases in the office, most cases for the wife, and I told Mr. Sapiro, and I said, 'That is a fact, is it not, we have agreed on that; that is the arrangement you have with me?' and he said, 'Yes.'" Apparently defendant then said "Well, all right, if I have to pay nobody, then go ahead". At the time of the dispute over the way the case was being handled, plaintiff said he was going to ask "right now for \$2500 for the work I did, and I am getting out of the case", but apparently calmed down thereafter. There was evidence that Hahn discussed the progress of the case with plaintiff subsequent to that time, that neither Hahn nor defendant considered that the latter was no longer associated. Plaintiff himself testified that he was never formally discharged, either orally or in writing.

[2] We are of the opinion that there was ample evidence to sustain the finding in question. While plaintiff may, at the time he requested the retainer fee, have looked to defendant for payment, there was evidence that she did not accede to his request, and that he later agreed, with Hahn, to look solely to Mr. Marquis for payment.

Although plaintiff's employment and the rendition of services implied an obligation to pay for the same there was evidence opposed to that implication. Defendant testified that she had no agreement with plaintiff to pay fees even if the efforts to collect from Mr. Marquis failed. Plaintiff testified in substance that he believed defendant told him that he could look to her for fees in that event. However, in a questionnaire filed upon the application for temporary support, attorney's fees and costs, defendant gave her worth at \$27,000 and her personal income at less than \$100 per month. She gave her husband's worth at \$750,000 and his income at from \$5,000 to \$10,000 per month. In answer to a question in the questionnaire "Have you personally arranged to pay your attorney's fees in this case", defendant answered "No." This questionnaire was a representation to the court that no arrangement whatever had been made under which plaintiff was to render services in the case upon the credit of Mrs. Marquis. The trial court in the present action could have inferred that it was the understanding of the parties that plaintiff's services were to be rendered for whatever compensation the court might order Mr. Marquis to pay.

Moreover, if, despite the statement in the affidavit that Mrs. Marquis had not obligated herself personally to pay fees, it should be believed in accordance with plaintiff's testimony that she had agreed to pay if nothing should be collected from Mr. Marquis, it appears without dispute that her efforts to obtain a settlement, including fees for her attorneys have not been abandoned. So far as shown by the record money may yet be obtained from Mr. Marquis as and for attorneys' fees for defendant's attorneys, including plaintiff herein. The court was justified in holding upon the evidence before it that defendant is not indebted to plaintiff for attorney's fees.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

101 Cal.App.2d 884

PIMENTEL v. HOUK.

Civ. 7808.

District Court of Appeal,
Third District, California.

Jan. 25, 1951.

Hearing Denied March 26, 1951.

George B. Pimentel brought an action against Loren C. Houk for collection of promissory notes and defendant filed a cross-complaint. The Superior Court, Merced County, H. S. Shaffer, J., sustained plaintiff's demurrer to the cross-complaint and the cross-complainant appealed. The District Court of Appeal, Adams, P. J., held that cross-complainant was not entitled to maintain action for abuse of process.

Judgment affirmed.

Attachment ⚡356**Process ⚡168**

Fact that plaintiff landlord in action to collect promissory notes might have had ulterior motive to destroy defendant financially by attaching defendant's assets which were necessary to conduct farming business on land rented by defendant from plaintiff did not render use of writ of attachment improper in regular conduct of proceedings and did not entitle defendant to maintain action by cross-complaint for abuse of process, particularly where impliedly defendant and plaintiff had contracted that, notwithstanding calamitous results, plaintiff would still have right to cause levy to be made.

C. Ray Robinson, Merced, for appellant.

Landram & Silveira, Merced, for respondent.

ADAMS, Presiding Justice.

Plaintiff sued defendant for the collection of two promissory notes. Defendant filed an amended answer and a "counterclaim and/or cross-complaint," the latter being in two counts. In the first count defendant sought damages against plaintiff, alleging that he was the lessee of certain lands and the owner of certain implements and farming equipment essential for the farming of his leased lands upon

which he had growing crops of beets, peas, onions and lettuce; that plaintiff, at the time of the filing of his action against defendant, caused a writ of attachment to issue, and, well knowing that defendant's farming equipment was necessary for the farming of his land, "because of that fact, and not for the purpose of collecting the alleged debt sued upon in said action, but for the sole, single and express purpose of financially destroying defendant and cross-complainant, did, wilfully, deliberately and maliciously cause said Writ of Attachment to be served and levied upon the said tractors, tillage implements and farming equipment hereinabove referred to"; and that "as the sole, direct and proximate result of the said wilful, deliberate and malicious serving and levying of said Writ of Attachment, this defendant and cross-complainant was deprived of the use and possession of said tractors, tillage and farming equipment," and "as the direct and proximate result of the wilful, deliberate and malicious levy" of the said writ there were lost and destroyed large acreages of sugar beets, peas, onions and lettuce, of varying values set forth, approximating a total of \$50,000.00.

In the second count it was alleged that plaintiff interfered with the conduct of defendant's farming business by wilfully, deliberately and maliciously filing his action against defendant; that plaintiff well knew that the tractors, etc., were essential to defendant's farming business and did wilfully, deliberately and maliciously cause the writ of attachment "to be issued and levied upon said tractors, tillage implements and farming equipment, all with the intent to injure and harass this defendant and cross-complainant, and for the sole, single and express purpose of destroying the said farming business, and financially injuring defendant and cross-complainant." It was also alleged that plaintiff knew that certain creditors of defendant held chattel mortgages upon some of defendant's equipment, and that he wilfully, maliciously and deliberately interfered with the conduct of defendant's business by personally urging creditors to repossess the mortgaged equip-

ment, all with the intent to injure and harass defendant, and for the sole and express purpose of destroying defendant's farming business, and injuring him financially. Resulting losses, such as were alleged in the first count, were then averred as results of the "levying of said Writ of Attachment."

Plaintiff demurred to the cross-complaint on the ground that it failed to state a cause of action in either count, and on the grounds of uncertainty, ambiguity and unintelligibility for failure to set forth the nature, location or extent of defendant's lands, or what were the alleged tractors, tillage implements and farming equipment, or the nature, location or extent of the crops of beets, peas, onions and lettuce.

The trial court sustained the demurrer without leave to amend, and dismissed the amended cross-complaint. From the latter judgment this appeal was taken.

Appellant makes no contention that plaintiff's action was one wherein a writ of attachment properly might not issue, nor does he contend that the cross-complaint states a cause of action for malicious prosecution. He concedes that the writ was regularly issued and served; but he urges that his cross-complaint is based upon an abuse of process. Quoting from 80 A.L.R. 580, 581, he urges that "an action for the abuse of attachment process may be maintained although the attachment has not been vacated"; and that the "gist of an action for abuse of process is the improper use of process after it has been issued." The question, then, is whether the process in this case was used for an improper purpose.

In Prosser on Torts, at pages 894-895, it is said: "The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even

though with bad intentions. * * * The ulterior motive may be inferred from the wrongful use made of the process, but the use itself may not be inferred from the motive."

In the case before us it may be conceded that the allegation that plaintiff caused the attachment to issue without any purpose of collecting the debt but solely for the purpose of destroying defendant financially, may constitute a sufficient allegation of an ulterior purpose; but we are of the opinion that defendant failed to allege use of the process for a purpose not proper in the regular conduct of the proceeding. It was entirely proper in the regular proceeding—to collect the notes sued upon—for plaintiff to resort to an attachment of defendant's assets. It is not alleged that said attachment covered property exempt from execution, that it covered an excessive amount of defendant's property, that the debt alleged to be owed by defendant was otherwise secured, or that defendant requested that the levy be made upon other property. On the face of the record plaintiff was fully within his rights in causing the writ of attachment to be issued and served; and the fact that he may have had an ulterior motive to destroy defendant financially did not render the use of the writ one improper in the regular conduct of the proceeding. Had plaintiff attached without malice, the effect would have been the same.

It is said in 1 Ruling Case Law, 103:

"The precise requisites of an action for abuse of process have not been very clearly pointed out. It would seem to be only where process is perverted, i. e., directed outside of its lawful course to the accomplishment of some object other than that for which it is provided, that one, acting upon probable and reasonable cause, may yet become liable for misusing the process as to be guilty of an abuse thereof. And to constitute such improper direction of process, the mere existence of an ulterior motive in doing an act proper in itself does not suffice, but there must be such a use of it as is in itself without the scope of the process and improper, from which

motive may perhaps be inferred. It would seem both from authority and reason that to sustain the action these two elements are essential: (1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first of these elements may, perhaps, be inferred from the second, but the existence of the first cannot, in reason, dispense with proof of the second; for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial. The test is probably whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do."

Also see 1 Am.Jur., pp. 178-179.

In *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276, 162 A.L.R. 793, it is said that abuse of process consists in the malicious misuse or misapplication of such process after issuance, to accomplish some purpose not warranted or commanded by the writ; that it is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attempted to be secured (citing 1 Am.Jur. 176 and numerous cases), and that evil purpose alone is not sufficient; that the bad intent must culminate in the abuse, for it is the latter which is the gist of the action; that regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.

The opinion in *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E.2d 268, 269, states that process must be used for something more than a proper use with a bad motive; that if a party uses it for the immediate use for which it was intended, he is ordinarily not liable, notwithstanding a vicious or vindictive motive; that if he uses the process of the court for its proper purpose, though there is malice in his heart, there is no abuse of process. And in *Docter v. Riedel*, 96 Wis. 158, 71 N.W. 119, 120, 37 L.R.A. 580, it is said that when one exercises a legal right his undisclosed motives are immaterial; and it was ordered that a demurrer to the complaint be sustained. Sa-

liem v. Glovsky, 132 Me. 402, 172 A. 4, 6, holds that to sustain an action for abuse of process two elements are essential: (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge; and that existence of the first cannot dispense with the proof of the second; for if the act of the prosecutor be in itself regular, the motive is immaterial; that regular use of process cannot constitute abuse even though the user was actuated by a wrongful purpose, motive or intent. To the same effect see *Bourisk v. Derry Lumber Co.*, 130 Me. 376, 156 A. 382.

In *Manufacturers and Jobbers Finance Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849, 853, it is said that the gist of an action for abuse of process is the improper use of the process after it has been issued, citing 1 Am.Jur., Abuse of Process, sec. 34, stating two elements necessary, as stated heretofore. It was also said that there is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint; that if the plaintiff has brought the action or instituted the process and prosecuted the same with malice and without probable cause, the complainant may have his full relief by an action for malicious prosecution. To the same effect is *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884, 885, where it was said that where the process has been lawfully issued and subsequently has wilfully been perverted so as to accomplish a result not commanded by it or lawfully obtainable under it, the action for abuse of process lies. In *Mullins v. Sanders*, 189 Va. 624, 54 S.E. 2d 116, 121, 1 Cooley on Torts, 3rd Ed., p. 335, is quoted, as well as 1 Am.Jur., Abuse of Process, sec. 2, p. 176, sec. 3, pp. 176, 177, sec. 6, pp. 178, 179. Also see *Priest v. Union Agency*, 174 Tenn. 304, 125 S.W.2d 142. Other cases might be cited, but the foregoing from various jurisdictions show the general trend of decisions.

Respondent relies upon *Tranchina v. Arcinas*, 78 Cal.App.2d 522, 178 P.2d 65, 68, but we think that case is distinguishable

on its facts. There the defendant, as actor in another proceeding, wilfully deceived the O.P.A. into giving him a certificate permitting an action to evict a tenant "solely for the purpose of occupancy by" a purchaser, when such was not his purpose. O.P.A. regulations provided that no tenant should be removed from any housing accommodation unless the landlord sought in good faith to recover possession of the accommodations for his immediate use and occupancy. The court observed that these regulations so modified the local law pro tanto as to prohibit the eviction of a tenant for other than the purposes or reasons authorized therein, and it followed, it said, that the law prohibited evicting the plaintiffs for any other purpose than the one stated in the certificate. Armed with this certificate, eviction proceedings were carried through, resulting in a writ of restitution, on the presentation of which by the sheriff the tenant moved out and later brought the action for abuse of process, succeeding in obtaining findings from the Superior Court in that action that the foregoing were the facts underlying the apparent legality of the proceedings. The opinion declared that, in view of the findings of the court, the defendants must be held to have procured a judgment in unlawful detainer for the purpose of evicting the tenants "for a purpose forbidden by law." This the court described as a perversion of the process. It seems clear that the tort in the cited case lay in the violation by the landlord of a legal duty he owed the tenant. When those two parties contracted they knew that the tenant could not be evicted except for certain purposes.

Cross-defendants in the case before us not only owed no legal duty to protect cross-complainant from injury incidental to the levy of attachment, but impliedly the parties had contracted that, notwithstanding calamitous results, cross-defendants would still have the right to cause the levy to be made. The reverse was true in *Tranchina v. Arcinas*, supra, for there, faced with the legal duty of permitting peaceful enjoyment of the demised premises, except upon certain conditions, the defendant, in violation of that duty, embarked upon

on a continuous, fraudulent and oppressive course of conduct by which he made the government agency and the state's courts the vehicle of tortious injury. The law did not do injury—the landlord did; here the defendant did no injury—the law did.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



102 Cal.App.2d 67

WEINGETZ v. CHEVERTON et al.

HIMES v. LINDERMAN.

No. 14353.

District Court of Appeal, First District,
Division 1, California.

Jan. 30, 1951.

Hearing Denied March 29, 1951.

Gregory A. Weingetz brought an interpleader action against George R. Cheverton, Charles J. Himes, Fred Linderman and others. The Superior Court in and for the city and county of San Francisco, Thomas M. Foley, J., rendered a judgment adverse to Charles J. Himes and rendered an order denying him a new trial, and he appealed, and was opposed on the appeal by Fred Linderman. The District Court of Appeal, Wood, J., held that evidence sustained finding that appellant, in purchasing mill from respondent, had assumed to pay all of respondent's debts, including labor claims, materialmen's claims, taxes, insurance premiums, and unpaid balances on machinery, except labor claims and withholding taxes incurred prior to certain fire, and that liability of appellant was not limited, as contended by him, to labor claims only incurred after fire.

Judgment affirmed, and appeal from order dismissed.

I. Witnesses §37(1)

The law does not require that result of observation of a witness be positive or absolute knowledge, since such a degree of certainty is not demanded of a witness.

2. Witnesses ⇨37(1)

Though a witness can testify only to facts which are within his knowledge, he is not required to testify with that certainty which excludes all doubt from his mind.

3. Evidence ⇨568(1)

Testimony of witness was evidence, though witness used such expressions as "he thought so" or "he was of the opinion" but that he was "not positive".

4. Trial ⇨105(2)

Even if certain testimony was vulnerable for lack of positiveness or as representing opinion instead of knowledge, it was evidence in the case, where it went in without objection, and no motion was made to strike any of it from the record, and such evidence was legally sufficient to establish a fact and to support a finding based thereon.

5. Evidence ⇨265(18)

Evidence sustained finding that testimony of party did not amount to judicial admissions but was merely a case of inconsistencies and uncertainties in testimony, reflecting faulty observation or both with confusion and perplexity.

6. Evidence ⇨211

Testimony given on the witness stand does not partake of the nature of a formal judicial admission.

7. Evidence ⇨265(10, 14)

A party who testifies in his own behalf does not do so at the peril of having every slip of his tongue taken as conclusively true, if his inadvertently used words cause him to appear to have made a statement which is not true, but is against his own interest in the case.

8. Interpleader ⇨29

In interpleader action by escrow holder of certain funds placed in his hands under contract for purchase of mill, wherein vendor contended that purchaser agreed to assume all debts of vendor, including labor claims, materialmen's claims, taxes, insurance premiums, and unpaid balances on machinery, except labor claims and withholding taxes incurred prior to fire, and wherein purchaser contended that he

agreed to assume labor claims incurred subsequent to fire, evidence sustained finding in favor of vendor.

9. Interpleader ⇨6

The plaintiff in an action of interpleader brings such an action when he holds property to which various persons are asserting conflicting claims and in which he has no interest other than that of stakeholder.

10. Interpleader ⇨21

If plaintiff in interpleader action makes a proper showing and delivers the property to such person as court may direct, court may discharge plaintiff from liability to all or any of the conflicting claimants, and action may proceed for determination of the rights of the various claimants to the property which is then in the custody of the court. Code Civ.Proc. § 386.

11. Appeal and error ⇨882(3)

Where counsel for appellant stated in trial court in interpleader action that he was asking for a complete adjudication as to all parties, and court then stated that there was no question but that it was entitled to settle all issues, and from that point on the trial was conducted by all participants on basis that all of the issues were to be settled in the action, appellant would not be permitted on appeal to say that such issues were not involved.

12. Appeal and error ⇨110, 782

Order denying new trial was a non-appealable order and appeal therefrom would be dismissed.

Frank S. Hamburger, San Francisco, for appellant.

Carroll Single, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant Charles J. Himes appeals from the judgment rendered against him and in favor of defendant Fred Linderman in an action in interpleader brought by Gregory A. Weingetz, as escrow holder of certain funds, against these defendants and certain creditors of Linderman and others,

to determine the rights of the several defendants in and to those funds. Himes also appeals from an order denying his motion for a new trial.

It appears that Linderman owned a lumber mill, which burned on June 1, 1945. He experienced some difficulty in financing the rebuilding of the mill. Debts for labor and materials piled up. To meet these, he sought to borrow \$15,000 from Bay Pacific Corporation. The negotiations resulted in the sale of the mill by Linderman to Bay Pacific Corporation, the purchaser to pay Linderman \$10,000 and assume and pay the mill creditors. Bay Pacific received and recorded a deed to the property but failed to perform its part of the agreement. Linderman served a notice of rescission and then entered into a contract with Himes for the sale of the mill to the latter.

By that contract Linderman agreed to sell his interest in the property to Himes and Himes agreed to pay Linderman \$10,000 and assume and pay certain debts which had been incurred in relation to the reconstruction and maintenance of the mill. The dispute between these parties, at the trial and upon this appeal, is in relation to the nature of the debts thus assumed by Himes. Linderman contends they comprehended all such debts, including labor claims, materialmen's claims, taxes, insurance premiums, and unpaid balances on machinery, except labor claims and withholding taxes incurred prior to the fire of June 1, 1945. Himes contends they comprehended labor claims only, incurred subsequent to the fire. The determination of that issue turns upon the answer to the question: Which of two certain agreements was signed by both parties and lodged with Weingetz prior to the closing of the escrow? Linderman contends it was an agreement dated January 10, 1946 (Ex. A). Himes contends it was an agreement dated January 16, 1946 (Ex. 4).

The escrow (Ex. 2), signed by Himes and Linderman, and delivered to, signed and accepted by Weingetz as escrow holder, read as follows:

"Herewith to Gregory A. Weingetz: 1. Executed deed 2. Two executed agree-

ments 3. Signed note, \$9,000.00, and 4. One check for \$1,000.00 Linderman, by signature, permits delivery through Weingetz to Himes of the above deed and one original agreement unless by 10:59 A. M., Wednesday, January 16, 1946, Himes has called off this deal. If not, Weingetz, escrow holder, will deliver deed and one copy of original agreement to Himes, and \$1,000.00 check and \$9,000.00 note to Linderman.

Fred Linderman
Charles J. Himes

I accept as escrow holder
Gregory Weingetz"

The trial court found that this escrow contract, executed by Linderman and Himes, was delivered by them to Weingetz as escrow holder on January 10, 1946; that the "Executed deed" mentioned in the escrow contract was a quitclaim deed of the mill property, by Linderman to Himes, notarized January 10, 1946; that the "Two executed agreements" mentioned in the escrow contract were duplicate originals of the agreement dated January 10, 1946 (Ex. A), each signed by Linderman and by Himes; that the expression "Signed note, \$9,000.00," as used in the escrow contract, referred to a note which was later changed by agreement of the parties to a note dated January 16, 1946, signed by Himes as maker, whereby Himes promised to pay to Linderman, or order, \$9,000, with interest at 5 per cent per annum, in amounts of not less than \$500 per month, payable on or before the 10th day of each month; that by action and agreement of Himes and Linderman the closing of the escrow was postponed to January 21, 1946, during which time various counter-proposals and changes in the agreements were discussed, leading to modifications and eventually to a final agreement (Ex. 1) which was mutually satisfactory to and executed by Linderman, Himes, and Weingetz, and delivered to Weingetz as escrow holder on January 21, 1946, an agreement which changed the date for commencement of interest and of installment payments on the note, and excepted from the mill indebtedness assumed by Himes all labor claims and withholding

taxes prior to the mill fire of June 1, 1945; that in and by said agreement dated January 16, 1946 (Ex. 1), the parties referred to the escrow contract and to the agreement dated January 10, 1946 (Ex. A), which was thereby ratified subject only to the changes expressed in said agreement of January 16, 1946 (Ex. 1); that thereupon, upon January 21, 1946, Himes paid, through escrow-holder Weingetz, to Fred Linderman the sum of \$1,000 agreed to in said escrow for "One check for \$1,000.00"; that there had been executed by Linderman, and delivered only to Weingetz as escrow holder, another proposed document (Ex. 4) also dated January 16, 1946, but prior in time to the aforesaid agreement of January 16, 1946 (Ex. 1), a document which had not been executed or accepted by Himes by January 21, 1946, the terms of which document were rejected and repudiated by Himes and were not a part of the final agreement of the parties.

The court's findings on the controversial issue are supported, principally, by the testimony of the witness Carroll Single, attorney for Linderman. He conducted the negotiations for Linderman, attended all the conferences, and prepared all of the documents in relation to this transaction. As to the agreement dated January 10, 1946 (Ex. A), after a fruitless demand for production of the original, respondent tendered proof by means of a carbon copy and oral testimony.

Single testified that at his office, on January 9, 1946, Weingetz, Himes, Frederick Henderson of Bay Pacific Corporation, Harry Henderson, attorney for Frederick Henderson, defendant Moore, Linderman, Porter, an associate of Linderman, and Single conferred and discussed an agreement which was later put to writing; that on the following day, January 10, there was another conference, attended by Weingetz, Himes, Moore, Single, Linderman and Freidenrich, then counsel for Himes; that at that time Single prepared the documents, which were submitted to Weingetz as escrow holder. Those documents, according to the witness, included the quitclaim deed from Linderman to Himes, notarized on

that date; the escrow agreement, calling for conclusion of escrow on the 16th of January, and the agreement dated January 10 (Ex. A) in the form of duplicate originals which were then and there handed to Weingetz and taken by him, as indicated in the escrow agreement and referred to therein as "Two executed agreements." In respect to execution of said agreement by Himes at that time, January 10, the following questions were asked of and answered by the witness Single:

"Q. Do you make any claim that the agreement was signed by both parties at that time? A. I do. But I will not state too definitely.

"Q. Was it signed in your presence by Mr. Himes? A. I think so, but I am not positive.

"Q. You are not positive? A. No.

"Q. In fact, according to your best recollection, your answer would be no, is that correct? A. No; on the contrary, I believe that the agreements were mutually signed at that time, as shown by the escrow, two executed agreements.

"Q. I am not asking about any outside letters and documents, Mr. Single. The Court can take that into consideration. You don't state—or you did not see Mr. Himes sign that agreement of the 10th, did you? A. I think I did, but I am not positive."

As to Exhibit 4, which at the time of the trial bore the signature of Himes as well as of Linderman, Single testified that he prepared the document; that in response to demand by Himes for modification of the original agreement for postponement of payment of principal and interest on the promissory note until 30 days after commencement of operation of the mill, and to confine Himes' undertaking in respect to labor claims to those which occurred after the fire at the mill, a document, signed by Linderman and lodged with Weingetz, through mistake referred to the date of the fire as of July 2 instead of June 1, 1945, which prompted a redrafting of documents; that Himes did not sign Exhibit 4 at any time in Linderman's presence or in Single's presence; Single did not know when Himes

put his signature on it, but did know that Himes did not sign it on January 16 or on January 21, and that in the witness' opinion it was never signed by Himes until some date after January 21, 1946, the day when the escrow was consummated and closed.

Appellant claims that this testimony is not evidence that Exhibit A was signed by Himes or that Exhibit 4 was not signed by Himes before the closing of the escrow, because the witness used such expressions as he thought so, he claimed, he was not positive, or he was of the opinion.

[1-3] Appellant is in error in this regard. The law does not require that the result of a witness' observation be positive or absolute knowledge. Such a degree of certainty is not demanded of a witness. In an early case, a witness, shown a deed of conveyance, testified: "I signed my name to this paper as subscribing witness. I don't know who signed the name of Thomas or McGarrity; think Irwin wrote them; don't know whether Irwin signed it in my presence, or not; don't know that Thomas or McGarrity made their marks in my presence; but to the best of my recollection they did." *McGarrity v. Byington*, 12 Cal. 426, 427. The deed was admitted in evidence over the objection of the opposite party. The Supreme Court held it was properly admitted, saying: "It is true the witness says it was signed in his presence, 'to the best of his recollection'; but this is enough." 12 Cal. at page 430. The applicable principle was well expressed in *People v. Rolfe*, 61 Cal. 540, at page 543, as follows: "The objection that the witnesses did not positively and beyond a doubt identify the defendant, can not be sustained. They expressed *the belief* that he was the person they had seen, and although their evidence was given with great caution, it was sufficiently certain respecting the identity of the defendant to go to the jury, and it was for the jury to say what weight it was entitled to." (Emphasis by the court.) In *People v. Soap*, 127 Cal. 408, 59 P. 771, it appeared that a witness qualified a portion of his testimony by the expression "I presume." A motion to strike was interposed. The trial judge asked the witness: "What

do you mean by saying you presume? That you are merely guessing at it, or that it was your best information?" The witness replied, "That was my best information." The judge denied the motion. Of this, the Supreme Court said: "There was no error in this. While a witness can testify only to facts which are within his knowledge, he is not required to testify with that certainty which excludes all doubt from his mind. The word 'presume,' as used by the witness, was nothing more than a statement of his best recollection." 127 Cal. at page 410, 59 P. at page 772. An objection that evidence is not positive goes to its weight rather than to its admissibility. *People v. Harlan*, 133 Cal. 16, 22, 65 P. 9. Concerning the testimony of a witness that "** * * I thought then I saw somebody lying on the sidewalk there opposite the vestibule of the saloon*", the court, in *People v. Schoon*, 177 Cal. 678, at page 682, 171 P. 680, at page 681, said: "The witness was simply stating the result of his personal observation. In substance, he said that looking at the place indicated it appeared to him that somebody was lying on the sidewalk there. He was not positive as to this, but it then seemed to him that such was the case. There is no legal objection to such testimony. Whatever objection there may be to the same goes purely to its weight, which is a question for the jury." In *People v. Waller*, 14 Cal.2d 693, 96 P.2d 344, the witness "Rohrscheib's identification was that while he would not say positively that the defendant was the man who attempted to rob him, that he 'looked like him',—that he 'resembled him'; and in this connection he was asked this question: 'Calling your attention to the defendant, Waller, you think now that the man that you saw there is similar or looks like Mr. Waller, is that right?' and he answered 'yes'. The fact, however, that he was not positive does not destroy the value of the identification." 14 Cal.2d at page 700, 96 P.2d at page 348.

[4] Even if some of this testimony were vulnerable for lack of positiveness or as representing opinion instead of knowledge, it is evidence in the case, for it went in without objection, and no motion was

made to strike any of it from the record. Such evidence is legally sufficient to establish a fact, and is likewise sufficient to support a finding based thereon. *Seaford v. Smith*, 86 Cal.App.2d 339, 344, 194 P.2d 792; *Fallon v. Fallon*, 86 Cal.App.2d 872, 873, 195 P.2d 878; *People v. One Ford V8 Coach*, 21 Cal.App.2d, 445, 448, 69 P.2d 473. See, also, cases cited in 2 Cal.Jur. 804, § 473.

Various circumstances support the testimony of Single and the finding based upon it. The court found, upon ample evidence, that the escrow contract was signed by Himes, Linderman and Weingetz and lodged with Weingetz on January 10, 1946. That contract recited delivery to Weingetz of an "Executed deed" and "Two executed agreements." The deed, which is in evidence, was a quitclaim deed from Linderman to Himes, dated and notarized on January 10, 1946. And, as of January 10, 1946, the only agreements which had been written and which could possibly answer the description "Two executed agreements" were the duplicate originals of the agreement dated January 10, Exhibit A. In addition, it appears without conflict in the evidence that defendant Moore, a general mill creditor, not a labor claimant, attended the conference of January 9 to present his claim as such creditor; that Frederick Henderson at that conference admitted Moore's claim, saying that Bay Pacific Corporation would pay it; that at the conclusion of the conference of January 10 Himes left with Moore to view the mill and to attend to obtaining a deed to himself from Bay Pacific Corporation, and on that occasion Himes admitted to Moore that the documents before Himes called for payment to Moore as a general creditor of the mill. Furthermore, upon the closing of the escrow, Single, on behalf of Linderman, wrote and transmitted to Himes all papers, documents and correspondence pertaining to the mill and the mill creditors which Linderman had not theretofore delivered to Himes. These pertained to general mill creditors and were not in any wise limited to claim for labor performed at the mill. Linderman never heard further from

Himes on the subject, nor did Himes deny that he received that letter and enclosures. These are corroborating circumstances tending to support the evidence and the finding that the "Two executed agreements," which the escrow contract declared were delivered to Weingetz, were duplicate originals of the agreement dated January 10, 1946 (Ex. A).

Appellant directs attention to certain portions of the testimony of respondent Linderman, referring to them as statements by a party indicative of nonexecution of Himes of Exhibit A and of execution by him of Exhibit 4 prior to the closing of the escrow. Unless those statements were tantamount to judicial admissions of a party, they amounted at most to conflicts in the evidence which the trial judge resolved against the appellant by the findings which he made.

As to execution of the agreement dated January 10, 1946 (Ex. A), Linderman's testimony, by question and answer, was as follows:

"Q. Is this a typewriter carbon copy of that agreement [Ex. A]? A. Yes.

"Q. Was it signed on the 10th of January? A. Yes. * * *

"Q. By whom was it signed? A. By Mr. Himes and myself.

"The Court: Q. Did you see Mr. Himes sign it? A. Yes. I think—

"Q. What? A. Yes, he signed it in our presence in Mr. Carroll Single's office.

"Mr. Single: Q. Exactly as stated on this escrow? A. Yes."

Upon cross-examination, the following questions were asked of this witness, and answers given by him, in relation to Exhibit A:

"Q. Now, isn't it a fact, Mr. Linderman, that Mr. Himes never signed that agreement? A. I am not sure.

"Q. You are not sure? A. No. That is not the original, is it?

"Q. No, that is not the original. But you are not sure whether or not he ever signed it? A. I know I signed it.

"Q. You know you signed it? A. Yes.

"Q. We don't question your signing it. A. No.

"Q. But you are not sure that Mr. Himes signed it, are you? A. I know he agreed to sign it.

"Q. But he did not sign it, according to your information and knowledge, did he? A. I don't think he did.

"Q. You don't think he did. Mr. Linderman, isn't it a further fact that on the 10th of the month Mr. Himes definitely refused to sign any such agreement until he went up and took a look at the mill in Weott, California? Isn't that correct? The Witness: "What was that?

"The Court: We will have the reporter read the question. (Question read by the reporter.) A. I don't remember that.

"Mr. Hamburger [attorney for appellant]: Q. You don't remember that? A. No. I remember he went and looked at the mill, but I don't remember that he refused to sign it."

As to the execution of the disputed document dated January 16, 1946 (Ex. 4), Linderman testified, by question and answer, upon direct examination, as follows:

"Q. On the 21st of January, when Mr. Himes signed the agreement [Ex. 1], did you see him sign two on the same date, or only one? * * * A. I think he signed the two. I saw him sign two. * * *

"Q. What was the actual date of the fire that burned down your mill? A. On June 1, 1945.

"Q. Was it July 2, 1945? A. No.

"Q. Had a mistake been made in that document [Ex. 4] signed by you? A. It had. * * *

"Q. And did you correct that date in the final agreement [Ex. 1] that was signed? A. Yes. * * *

"Q. Did Himes sign this agreement, Plaintiff's Exhibit No. 4 * * * in your presence at any time? A. Yes, I think he signed that."

Upon cross-examination, the witness gave the following answers to the questions stated:

"Q. Isn't it a fact that you, and Mr. Himes, and Mr. Weingetz, and Mr. Single, made and executed a new agreement on the 16th of January, 1946? A. Yes.

"Q. And isn't it a fact, Mr. Linderman, that this is the agreement that was finally presented by you to Mr. Himes for his approval, Plaintiff's Exhibit No. 4 (handing document to the witness)? A. You say that was the—that was signed on that date, yes.

"Q. That was signed on that date, but isn't that the agreement that was presented to Mr. Himes for his signature on the 16th following his return from Weott? A. It apparently was." (Other evidence is to the effect that Linderman did not attend the conference held January 16.)

"Q. Now, showing you those two agreements * * * —Plaintiff's Exhibits 1 and 4—I will ask you if those two agreements * * * were not signed by you and by Mr. Himes at one and the same time (handing documents to the witness)? A. I am not sure when Mr. Himes signed his; I know I signed it on the 16th.

"Q. When did you sign this one, Plaintiff's Exhibit No. 1? A. On the 16th.

"Q. In other words, you signed both of these on the same day? A. I did.

"Q. And when you signed both of these you realized one was to amend the other, did you not? A. As to the terms here.

"Q. In other words, the terms of Plaintiff's Exhibit No. 1, this letter written on the stationery of Single and Harrington, signed by you, were to amend this agreement also dated the 16th and also signed by Fred Linderman and by Charles Himes, that is correct, isn't it? A. Yes.

"Q. And furthermore, these two agreements were the agreements, were they not, that were delivered to Mr. Weingetz as the escrow agreement was put into effect, isn't that correct? A. Yes, I guess those were the two. I think they were. I am not sure."

Here, again, we have the element of uncertainty in the mind of a witness concerning what he observed and what he remem-

bered of what he had observed. Upon the production of Exhibit 4 by the escrow holder, at the trial, it did bear Himes' signature. The issue was whether Himes signed before or after the closing of the escrow on January 21, 1946. As we read the testimony of this witness, he exhibited considerable uncertainty on that question. Of significance in this connection are the following questions asked upon the cross-examination of Linderman's attorney, Single, and the testimony given by him in response thereto:

"Q. Well, isn't it a fact that after you, and Mr. Himes, and Mr. Weingetz, and Mr. Linderman, and perhaps, for all my knowledge goes, several other people, did have these conferences on the 16th of January in the absence of Mr. Freidenrich?

A. I am absolutely positive that Linderman did not go to Weingetz's office on the 16th of January, or at any time in that month, excepting on the 21st.

"Q. You did not answer my question. A. Pardon me?

"Q. The conference could have taken place in your office. In fact, in order to assist, and to refresh your memory on the matter, I call your attention to the fact that Mr. Linderman, your client, admitted that these conferences took place on the 16th of the month in your office. Does that refresh your memory any? A. It refreshes my memory, but Mr. Linderman was very mistaken in those and many other matters.

"Q. And you insist on saying that these conferences did not take place on the 16th, in spite of the fact that all of the documents are signed on the 16th, is that correct? A. I am positive, absolutely."

This testimony, elicited by appellant, was evidence in the case, evidence tending to show that the witness Linderman was not accurate in what he observed or in what he remembered, or both.

[5] It was the function of the trial judge, who observed and heard the witnesses, to determine, in reference to Linderman's testimony, whether it was simply the case of a witness who observed with lack of precision and had an indistinct

recollection, or the case of a party making a judicial admission. The findings which the trial judge made demonstrate that he viewed it as merely a case of inconsistencies and uncertainties in the testimony of a witness, reflecting faulty observation or memory or both, coupled perhaps with confusion and perplexity while on the witness stand; statements of a nature, and uttered under circumstances, which the trial judge impliedly found did not amount to judicial admissions. We do not consider it the function of an appellate court to undertake to overrule that finding, even were we disposed to differ with the trial judge. The typewritten record does not disclose to us all the varied factors which he had before him, and considered and weighed, when he made that finding.

[6,7] The law is clear on this point. Testimony given on the witness stand does not partake of the nature of a formal judicial admission, certainly should not be so treated in all cases, as a matter of law. The reason is well expressed by Wigmore in these words: "Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends upon a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself." (IX Wigmore on Evidence, 3rd ed., p. 601, § 2594a.) In *Frost v. Los Angeles Railway Co.*, 165 Cal. 365, 132 P. 442, our Supreme Court recognized this basic difference between statements occurring in the testimony of a party as a witness and formal judicial admissions made by him or on his behalf during the course of a judicial proceeding. In the trial of the case then before the court, the jury had been instructed that all statements made by a party as a witness which were against his interest, the jury must conclusively presume to be true. "This," said the Supreme Court, "was clearly wrong. A party who testifies

in his own behalf does not do so at the peril of having every slip of his tongue taken as conclusively true, if his inadvertently used words cause him to appear to have made a statement which is not true, but is against his own interest in the case. It is the province of the jury to observe the witness, note his manner of speech, and consider his testimony as a whole in connection with the other evidence, and it is for it to determine therefrom whether he stated the facts as he intended and understood them to be, or whether he unintentionally used words not expressing his real meaning in any particular utterances he may have made." 165 Cal. at page 371, 132 P. at page 445. See, also, *Richey v. Pederesen*, 100 Cal.App.2d 512, 224 P.2d 100. It is clear that in the instant case neither the trial judge's rejection of the questioned testimony of the respondent nor his implied finding that such testimony was not tantamount to a judicial admission can be disturbed.

[8] Appellant urges also that even if the agreement dated January 10, 1946 (Ex. A), was signed by Himes as well as Linderman, it was modified by the later agreement of January 16, 1946, identified as Exhibit 4. The answer to that is our conclusion that the trial court's finding that Exhibit 4 was not signed by Himes prior to the closing of the escrow is supported by the evidence and cannot be disturbed.

Finally, appellant presents a jurisdictional question as a basis for reversing the judgment. He asserts that the sole issue presented by the complaint in interpleader herein was the question, "Who was entitled to the personal property that was the subject of the escrow and deposited in court?" That property so deposited consisted of the \$9,000 promissory note and the sum of \$9,241.14, which Himes had paid on the note to plaintiff Weingetz as escrow holder. The court did go further than that and did determine the rights and liabilities of the parties arising out of the sale of the mill from Linderman to Himes, and the respective obligations of Linderman and Himes toward the mill creditors.

[9-11] It is true that the plaintiff in an action of interpleader brings such an action when he holds property to which various persons are asserting conflicting claims and in which he has no interest other than that of stakeholder. If the plaintiff makes a proper showing and delivers the property to such person as the court may direct, the court may discharge the plaintiff from liability to all or any of the conflicting claimants, and the action may proceed for the determination of the rights of the various claimants to the property which is then in the custody of the court. Code Civ.Proc., § 386. In the instant case that procedure was followed. In addition, it appeared that appellant in his answer (apparently asserting no claim to the fund itself) pleaded his version of the contract of sale from Linderman to him and alleged that as a result of the controversies between Himes and Linderman the escrow holder had been unable to distribute the moneys that had come into his possession, that various creditors had attached those moneys and placed clouds on the title to the mill purchased by Himes which endangered his right to and even his possession of the mill. He then prayed, among other things, that the court determine that Himes had faithfully performed the terms and conditions of the agreement of sale; that it determine what bills and obligations must be paid by Linderman and by Himes, respectively, by the terms of that agreement; and that it determine whether the claims of other defendants for part of the purchase price, as held in escrow, are valid, "in order that the rights of the respective litigants may be determined at one time in order that title to the mill may be cleared and further litigation of the same issues may be avoided." Respondent Linderman's answer similarly embraced issues beyond those presented by the complaint. During the course of the trial, the court asked whether or not the issue of Linderman's purported rescission of the agreement between him and Himes (which he had pleaded in his answer but later withdrew as an issue) could be tried in this action, and counsel for appellant said: "Yes. We have asked for a complete.

adjudication of all the parties. If we cannot decide that in this action, then we will have to leave the money in escrow until another action is filed, and try it." The court then said, "Well, there is no question I am entitled to settle all the issues," and from that point on the trial was conducted by all participants upon the basis that all of those issues were to be settled in this action. Under such circumstances, the law does not allow a party later, as upon an appeal, to say there were no such issues or that the findings thereon are not within the issues. See decisions cited in 2 Cal.Jur. 239, § 69.

[12] The judgment appealed from is affirmed. The appeal from the order denying a new trial, a nonappealable order, is dismissed.

PETERS, P. J., and BRAY, J., concur.



102 Cal.App.2d 8

AMERICAN DISTILLING CO. v. BELLOWS & CO., Inc.

Civ. 14539.

District Court of Appeal, First District,
Division 2, California.

Jan. 26, 1951.

Rehearing Denied Feb. 24, 1951.

Hearing Denied March 26, 1951.

Action by the American Distilling Company, a corporation, against Bellows & Company, Inc., a corporation, for declaratory relief. The Superior Court, in and for the City and County of San Francisco, Sylvain Lazarus, J., entered a judgment in favor of defendant and plaintiff appealed. The District Court of Appeal, Schottky, J., held that the evidence sustained findings of trial court that plaintiff's use of the trade-mark "Fellows" and the marks "A. J. Fellows" were colorable imitations and infringement of defendant's trade-mark "Bellows", that use of such trade-marks was likely to cause confusion or mistake and to deceive the public into purchasing goods bearing the trade marks and to believe that such goods be-

longed to defendants, and that continued use of the trade-marks "Fellows" and "A. J. Fellows" would result in unfair competition.

Affirmed.

1. Trade-marks and trade-names and unfair competition ⇨21

The registration of the name "Bellows" under the Act of 1905 gave name a trade-mark status, and name was entitled to be dealt within state as a trade-mark, although not registered within state, since as a validly registered trade-mark it had acquired secondary meaning prior to registration under the Act of 1905. 15 U.S.C.A. § 1052.

2. Trade-marks and trade-names and unfair competition ⇨59(1), 73(1)

Charge of infringement or unfair competition cannot be predicated upon bona fide and innocent use by one individual of his own name in his business, even though such use may incidentally interfere with or injure the business of another person or organization of same or a similar name.

3. Trade-marks and trade-names and unfair competition ⇨59(4)

A surname which is a colorable imitation of another surname which has become a trade-mark will be considered an infringement if used in trade-mark sense.

4. Trade-marks and trade-names and unfair competition ⇨59(1)

The similarity between a designation and a trade-mark or trade name which it is alleged to infringe, is not determined by comparing two in juxtaposition only, since it is effect upon prospective purchasers that is important, and conditions under which act must be considered, for purchasers do not always see the goods in juxtaposition but rely upon memory and vague impressions.

5. Trade-marks and trade-names and unfair competition ⇨70(3)

Similarity, not identity, is usual recourse when one party seeks to benefit himself by good name of another, and what similarity is sufficient to effect object has to be determined in each case by its own circumstances, for generally a similarity which would be likely to deceive or mis-

lead an ordinary unsuspecting customer is obnoxious to law.

6. Trade-marks and trade-names and unfair competition ⇨65, 75

Proof of actual confusion is not necessary in an action for trade-mark infringement or unfair competition when the facts are such that it can be concluded that confusion would result to ordinary purchaser.

7. Trade-marks and trade-names and unfair competition ⇨64

The fact that the true producer's name appears on his product does not justify a colorable imitation of another's trade-mark.

8. Trade-marks and trade-names and unfair competition ⇨59(1)

The fact that owner of a trade-mark uses it in association with other accessory symbols or words does not deprive him of right to trade-mark.

9. Trade-marks and trade-names and unfair competition ⇨93(3)

Evidence sustained findings of trial court that the trade-mark "Fellows" and "A. J. Fellows" were colorable imitations and infringements of trade-mark "Bellows", that use of such trade-marks were likely to cause confusion or mistake and to deceive the public into purchasing goods bearing trade-marks in belief that such goods were the products of Bellows, and that continued use of the trade-marks "Fellows" and "A. J. Fellows" would result in unfair competition.

Norman A. Eisner, San Francisco, for appellant.

Boyken, Mohler & Beckley, A. W. Boyken, and W. Bruce Beckley, all of San Francisco, Gerald J. Craugh, New York City, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in favor of defendant and cross-complainant and against plaintiff and cross-defendant denying appellant's complaint for declaratory relief and granting respondent an injunction against appellant.

Plaintiff and appellant, The American Distilling Company, and defendant and cross-complainant Bellows & Company, Inc., were both Maryland corporations doing business in California. The American Distilling Company filed a complaint for declaratory relief against Bellows & Company, Inc., seeking an adjudication to the effect that a trade-mark chosen by said company for a new blend of whiskey did not constitute an infringement of respondent's trade-mark or unfair competition against said respondent.

The complaint attached as exhibits photostats of labels used by appellant on its new brand of whiskey and that used by respondent on one of its brands. Bottles of the products bearing these labels were also introduced in evidence by plaintiff, while respondent introduced as exhibits bottles of seven different additional brands produced by it, all of which bore the trade-mark "Bellows."

The complaint alleged that defendant claimed and asserted ownership of a trade-mark consisting of the word "Bellows", and that after plaintiff began distribution of its new brand "Fellows", defendant claimed and asserted that plaintiff's brand and label was an infringement of defendant's brand and label and of its alleged trade-mark and threatened plaintiff with action by reason of the alleged infringement of trade-mark and unfair competition.

Defendant and respondent answered and filed a cross-complaint setting forth that the trade-mark "Bellows" is registered in the United States Patent Office as Registration No. 365,723, issued March 14, 1939, for use on whiskey, and that defendant and cross-complainant is the owner of said trade-mark and said registration; that the sale, distribution and advertising of whiskey and other alcoholic beverages bearing the trade-mark "Bellows" and the corporate name of Bellows & Company, Inc. have been very extensive throughout the United States and in California amounting to the sum of \$108,000,000 from January 1, 1942 to September 30, 1948, and that during that period more than \$1,980,000.00 was spent on advertising

liquor bearing said trade-mark; that due to the long and extensive use of said trade-mark and corporate name, whiskey and other alcoholic beverages have come to be widely and favorably known as defendant and cross-complainant's products and are identified by the public by said trade-mark and corporate name to defendant and cross-complainant's great benefit and profit. It alleged also that the word "Bellows" had acquired a secondary meaning in that to the trade and purchasing public whiskey and alcoholic beverages bearing the trade-mark "Bellows" had come to mean and still mean defendant and cross-complainant's products only. It further alleged that each and both of the designations "Fellows" and "A. J. Fellows" are colorable imitations of defendant and cross-complainant's trade-mark Bellows and the corporate name "Bellows & Company, Inc." with intent to deceive the trade and the public into purchasing plaintiff's whiskey bearing such designations in the belief that said whiskey is the product of defendant and cross-complainant; that the use by plaintiff of such designations infringes defendant and cross-complainant's trade-mark "Bellows" and corporate name "Bellows & Company, Inc." and constitutes unfair competition with defendant and cross-complainant. It was alleged that defendant and cross-complainant had notified plaintiff and cross-defendant that its use of the aforesaid designations infringed defendant's trade-mark and constituted unfair competition and demanded discontinuance of its use, whereupon plaintiff and cross-defendant notified cross-complainant that it had discontinued use of said designations, but threatened to resume their use if it is not judicially determined that it is violating defendant and cross-complainant's rights in using said designation. Cross-complainant asked that plaintiff's use of the designations "Fellows" and "A. J. Fellows" be adjudged infringement of cross-complainant's trade-mark "Bellows" and the name "Bellows & Company, Inc." and unfair competition; that plaintiff and cross-defendant be perpetually enjoined

from using the aforesaid designations; that plaintiff account to defendant for all profits from the sale of whiskey bearing such designations.

The testimony at the trial showed that the name Bellows had been used in the business of respondent and its predecessors since 1847 and is well known in connection with alcoholic beverages throughout the United States. It was found by the trial judge (and these findings are not questioned by appellant) that from January 1, 1943 to December 31, 1948, Bellows & Company, Inc., and its predecessors sold more than \$115,000,000 worth of whiskey and other alcoholic beverages bearing the trade-mark "Bellows" and the corporate name of "Bellows & Company, Inc.", and that from January 1, 1944 to December 31, 1948 said company and its predecessors in title sold to customers located in California about \$14,300,000 worth of whiskey and other alcoholic beverages bearing the Bellows trade-mark and corporate name; also that from January 1, 1942 to December 31, 1948, said company and its predecessors in title spent \$2,262,000 upon advertising its products, said trade-mark "Bellows" and said corporate name, of which \$172,000 was spent in California from January 1, 1945 to December 31, 1948.

The trial court found, and appellant does not dispute the finding, that the trade-mark "Bellows" was registered in the United States Patent Office under No. 365,723, issued March 14, 1939, for scotch whiskey, of which trade-mark and registration Bellows & Company, Inc. is the owner; that the word "Bellows", the surname of the founder of the business now operated by defendant, as used in the trade is an abbreviation of the corporate name Bellows & Company, Inc.

The record shows that appellant herein developed a new blend of straight whiskies in July 1948 which it wished to place on the market under a new brand name. Mr. Buck, Mr. Greenwood and Miss Bajuk, appellant's vice-president, assistant treasurer and sales manager, and assistant-secretary, respectively, jointly chose

the name "Fellows" because of its advertising potential. Miss Bajuk suggested the name Fellows, they stated, because it was the name of her sister, Mrs. Ann June Fellows. Mrs. Fellows was a widow, employed as a land bank clerk and had no connection with the liquor business. Both Mr. Buck and Mr. Greenwood had been familiar with respondent and its trade-mark for many years prior to the adoption by them of the name "Fellows". Since under the Business and Professions Code the name of a person cannot be registered as a trade-mark with the Secretary of State of California unless the name is written in some particular script or distinguishing manner (Bus. & Prof. Code, § 14242(d)) the facsimile signature "A. J. Fellows" was registered as a trade-mark for use in connection with straight whiskey. A label was designed and an advertising campaign developed. Shortly after appellant's new product reached the market appellant was advised by respondent that the name "Fellows" infringed its trade-mark "Bellows".

Bellows & Company put out many different brands of whiskey and other alcoholic beverages, each bearing in prominent letters in a single line near the top of the label the one word "Bellows". All the Bellows labels on the bottles of their various brands of whiskey introduced into evidence as exhibits have a white background. The word "Bellows" on the "Partners Choice" brand is in black and white lined letters producing a grayish effect. These letters are about $\frac{3}{8}$ " in height. Some of the other brands have a shade of red as well in the lettering of this word. On the label of the aforesaid brand, the words "Partners Choice" appear in black, rather ornate letters, below the word Bellows, and are somewhat smaller in size. Just beneath "Partners Choice" are the words "Whiskey—aBlend" in letters of about the same size as those in the line above them, but printed in a style similar to that of the word "Bellows". These letters are filled in with fine short black lines and dots. Below this appear three lines of black script. At the bottom of the label are the words "Distributed by" in script and "Bellows &

Company Inc." in rather ornate shaded letters about one-eighth of an inch in height. At the top of this particular label above the word "Bellows" is a device which appears to be a gold colored bee encircled by a black wreath of oak leaves, with "Est. 1830" printed within it.

Appellant's label, also on a white background, has near the top the word "Fellows" in large block letters approximately $\frac{5}{8}$ " in depth in red with a shading of gold. Below the word "Fellows" appears a circular emblem with a gold background containing white stars and a gold and white eagle. On one side of the emblem appears "est", on the other, "1892". Beneath this on two lines are the words

"A Blend of
Straight Whiskey"

in letters very similar in size and style to the words "Whiskey—A Blend" on respondent's label. Beneath this appear three lines of script similar in style to the three lines on respondent's label, although somewhat smaller in size, and through these lines is written diagonally in green the facsimile of the signature "A. J. Fellows". The capital F of this signature, although it is clear on close inspection that it is an F, could at a short distance be easily mistaken for a B, D, or P. At the bottom of the label in solid black letters one-sixteenth of an inch in height appear the words "Blended and Bottled By" and on the next line in black letters approximately one-eighth of an inch in height "The American Distilling Company." The general appearance of bottles in size and style are similar but appellant's bottle has on the sides and near the bottom below the label a pattern of indentations in squares which is quite apparent at close range. On the neck of the appellant's bottle which is sealed in black appears diagonally in yellow script "American Distilling Company," and on the neck of respondent's bottle sealed in white appears horizontally "Bellows & Company" in plain black print and their wreath-like emblem in black. On some of respondent's brands this printing and emblem is in red.

After notification by respondent that it deemed appellant's use of the word "Fel-

lows" an infringement, it discontinued its use and substituted the trade-mark "Frontier" for "Fellows". Less than 1000 cases had been sold under the name of "Fellows".

The trial court found that there was no evidence of actual confusion or deception of the purchasing public in respect to the use of the trade-mark "Fellows" and "A. J. Fellows" because the amount of whiskey that was sold bearing said trade-marks was so small and sold over such a short period of time that the opportunity therefor was lacking. It found further that: "Each and both of the trade-marks 'Fellows' and 'A. J. Fellows' are colorable imitations and infringements of the trade-mark 'Bellows' and the corporate name 'Bellows & Company, Inc.'; and the use of such trade-marks * * * is likely to cause confusion or mistake and to deceive the public into purchasing goods bearing said trade-marks in the belief that such goods are the goods of Bellows & Company, Inc., to the injury and damage of Bellows & Company, Inc.," and that "the continued use of the trade-marks 'Fellows' and 'A. J. Fellows' by The American Distilling Company would result in unfair competition with Bellows & Company, Inc."

Appellant argues that the trial court has found appellant guilty of infringement of trade-mark on the sole basis of what the court considered similarity of words; that there was no evidence or finding of fraudulent intent or intent to appropriate the good will of respondent; that there was no finding of any similarity in appearance in dress of the merchandise or of any attempt to make one package resemble the other. Therefore, contends appellant, the case of respondent must stand or fall on the basis of technical trade-mark infringement, which, appellant says, is supported by absolutely nothing other than the alleged similarity of the word "Fellows" to respondent's name Bellows.

Appellant contends that the court fell into error in finding trade-mark infringement because a technical trade-mark may not be obtained to a family surname, and argues that the fact that respondent obtained registration of the name "Bellows" in the United States Patent Office under

the ten year proviso of the Act of 1905, 15 U.S.C.A. § 85, now 15 U.S.C.A. § 1052, does not mean that the name is a valid technical trade-mark, that such registration establishes only that the name has been in use so long that it is presumed to have acquired a secondary meaning, but does not extend to the registrant any rights beyond those known to the common law.

At the outset, it must be determined then, whether respondents have a valid trade-mark in the word "Bellows". If it is a valid trade-mark under federal law, it will undoubtedly be recognized as such by the California courts. (§ 14270 Bus. & Prof. Code). Appellant cites authorities to the effect that a personal name is not susceptible of exclusive appropriation and even registration in the patent office cannot make it a valid trade-mark, *Borden Ice Cream Co. v. Borden's Condensed Milk*, 7 Cir., 201 F. 510 and that a personal name is not the subject of a technical trade-mark, *Chickering et al. v. Chickering & Sons*, 7 Cir., 215 F. 490, 495. The *Chickering* case, *supra*, does however go on to say "It may, however, by appropriation and actual exclusive use, in course of time come to denote, in the minds of the public, the product of some particular person or factory or business, and thus acquire a secondary signification. Such a secondary signification, when established, is the subject-matter of exclusive right * * *." The United States Supreme Court passed on the ten-year Proviso of the Act of 1905 under which respondent has registered in the case of *Thaddeus Davids Co. v. Davids*, 1915, 233 U.S. 461, 462, 34 S.Ct. 648, 651, 58 L.Ed. 1046. The above cases cited by appellant were decided prior to the *Davids* case. Because the *Davids* case was one involving registration of the surname "Davids" as a trade-mark and is the leading authority in regard to the effect in the federal courts of such registration we quote from it as follows:

"Having the right to register its mark, the complainant was entitled to its protection as a valid trademark under the statute. As defined in § 29, (33 Stat. 731) 'the term "trademark" includes any mark which is entitled to registration under the terms of

this act.' The defendants, however, insisted below, and urge here, that although the mark was registrable, it was not susceptible of ownership, and hence that the complainant could not maintain a suit for injunction, profits, and damages, as provided in the statute, for the reason that the remedies it affords are available only to 'owners' (§§ 16, 19). That is to say, that registration was expressly permitted, but that protection to the registrant was denied. This interpretation, of course, would render the ten-year proviso meaningless by stripping it of practical effect. It was not the intention of Congress thus to provide for a barren notice of an ineffectual claim, but to confer definite rights. The applicant who, by virtue of actual and exclusive use, is entitled to register his mark under this clause, becomes on due registration the 'owner' of a 'trademark' within the meaning of the act, and he is entitled to be protected in its use as such.

"The further argument is made that, assuming that the complainant has a valid registered trademark, still the protection is limited to its use when standing alone (as the complainant has used it on its labels), and that there can be no infringement unless it is used in this precise manner. The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation' is within the statute; otherwise, the trademark would be of little avail, as by shrewd simulation it could be appropriated with impunity. * * *

"But, while this is true, the inquiry as to the extent of the right thus secured by the statute, in the case of marks which are admitted to registration under the ten-year clause, is not completely answered. It is apparent that, with respect to names or terms coming within this class, there may be proper uses by others than the registrant, even in connection with trade in similar goods. It would seem to be clear, for example, that the registration for which the statute provides was not designed to confer a monopoly of the use of surnames, or of geographical names, as such. It is not to be supposed that Congress intended to prevent one from using *his own name* in trade, or from making appropriate refer-

ence to the town or city in which his place of business is located; and we do not find it necessary to consider the question of the validity of such an attempt if one were made. Congress has admitted to registration the names or terms belonging to the class under consideration simply because of their prior use as trademarks, although they had not been such in law. Their exclusive use as trademarks for the stated period was deemed in the judgment of Congress, a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received statutory recognition, and, on registration, became entitled to protection under the act. (Emphasis ours.)

"In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy, or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having *the same name* and using it *in his own business*, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and not those of the registrant. This is not to say that, in this view, the case becomes one simply of unfair competition, as that category has been defined in the law; for, whatever analogy may exist with respect to the scope of protection in this class of cases, still the right to be protected against an unwarranted use of the registered mark has been made a statutory right, and the courts of the United States have been vested with jurisdiction of suits for infringement, regardless of diversity of citizenship. Moreover, in view of this statutory right, it

could not be considered necessary that the complainant, in order to establish infringement, should show wrongful intent in fact on the part of the defendant, or facts justifying the inference of such an intent. *Lawrence Mfg. v. Tennessee Mfg. Co.*, 138 U.S. 537, 549, 11 S.Ct. 396, 34 L.Ed. 997; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 16 S.Ct. 1002, 41 L.Ed. 118; *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U.S. 665, 674, 21 S.Ct. 270, 45 L.Ed. 365, 379. Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures, and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark, and its secondary, as distinguished from its primary, significance." (Emphasis ours.)

[1] We believe that registration of the name "Bellows" under the Act of 1905 gave it trade-mark status, and that it is protected against infringement under both federal and state laws. As a validly registered trade-mark which had acquired a secondary meaning prior to such registration, it is entitled to be dealt with within this state as a trade-mark, although not registered here, for the court found that such trade-mark had been used by respondent and its predecessors in title in California and throughout the United States for many years prior to the commencement of the instant action.

There is another point of difference between the facts in this case and those in the *Borden*, *Chickering*, and *Dauids* cases that it is well to keep in mind. In those cases there was involved the right of a person to use *his own surname* in his business. In the instant case we have the borrowed surname of an individual who has no interest in appellant's business.

[2] The courts will go to some lengths to protect the right of an individual in *his own* surname, as noted above in the *Dauids* case. As stated in 52 Am.Jur. p. 547, § 64, "The rule is that while, as against persons bearing a different name, a person's right to the use of his own name as a trade-mark

or trade-name is absolute and exclusive, yet as against other persons bearing the same name no such exclusive right can be acquired." And the same article at pp. 608-609, § 133 states: "It follows that a charge of infringement or unfair competition cannot be predicated upon the bona fide and innocent use by one individual of his own name in his own business, even though such use may incidentally interfere with or injure the business of another person or organization of the same or a *similar name*." It must be kept in mind, therefore, that if appellant's own name were "Fellows" it would have a right in that name that the courts would protect to the greatest extent possible. Appellant here, however, had an unlimited choice, and he would be under a duty to choose a name that may not be considered a colorable imitation of another trade-mark. See 52 Am. Jur. p. 603, § 123.

As stated by the learned trial judge at the close of the trial: "It sounds somewhat fabulous that they should have struck on a name that happened to be so close to that of Bellows, the same except for the initial letter."

[3] It is clear that a surname which is a colorable imitation of another surname which has become a trade-mark will be considered an infringement if used in the trade-mark sense. In *Warner Bros. Co. v. Wiener*, 218 F. 635, 636, rehearing was granted following the decision in the *Dauids* case, *supra*, and the Circuit Court of Appeals (Second Circuit) there stated: "A majority of the court understand it [the *Dauids* case] to hold that the trade-mark granted in a surname under the fourth proviso of section 5 of the Trade-Mark Act of 1905 is in the name itself, irrespective of the way in which it is printed or displayed. The name in such a case is to be treated as if it were an arbitrary word, and is to be protected, not only against literal, but against colorable, imitation. So regarded, the word 'Wiener,' standing alone, is, in our opinion a colorable imitation of the word 'Warner,' and the defendant must be enjoined, although it is *his own* surname, from using it in the corset

business alone, or in any manner amounting to a colorable imitation of the word 'Warner.'"

Appellant cites *Excelsior Cereal Milling Co. v. Taylor Milling Co.*, 43 Cal.App. 591, 594, 186 p. 207, as authority that mere similarity in two names is not ground for declaring existence of infringement. In that case plaintiff's mark was "California Flapjack Flour" and defendant's marks were "Los Angeles Best Self-Rising Flapjack Flour" and "Taylor's Improved Flapjack Flour". It is not difficult to see why the court held the marks to be quite dissimilar. "Flapjack" was held to be an old and familiar word. Such a word could not be exclusively appropriated anymore than the word "flour". That case does, however, cite *Dunston v. Los Angeles Van & Storage Co.*, 165 Cal. 89, 131 P. 115, as being authority for the proposition that it is well settled that where the plaintiff has *no exclusive right by way of trade-mark* in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms to establish unfair competition. In the present case we do have a right by way of trade-mark to the name "Bellows" which as against anyone except a person of the same name can be considered exclusive. The case of *Howe Scale Co. of 1886 v. Wyckoff, Seamens and Benedict*, 198 U.S. 118, 25 S.Ct. 609, 49 L.Ed. 972, cited by appellant was decided long prior to the *Davids* case, *supra*.

Appellant contends that only if "Fellows" were a firm name, could it be argued that by virtue of "idem sonans" confusion might arise. To quote appellant, "Only if 'Bellows' were imitated by a name that also purported to be the name of a producer of whiskey, could any possibility as to confusion of origin arise. 'Fellows' does not purport to be the name of a producer or a firm name. It is not used in the same sense or in the same manner as the name 'Bellows'. It is an arbitrary word selected as a brand name of a product. It is a *simple common noun*, in the public domain which anyone has a right to use. It is used in its *primary sense*, and such usage may not be restricted on the ground that

the use of the word in its primary signification is an infringement of the secondary meaning acquired by the contraction of the corporate name of respondent." (Emphasis ours.)

It is rather surprising that appellant claims that the word "Fellows" is a simple common noun for such claim cannot be reconciled with appellant's registration of the word as a proper noun—the name of A. J. Fellows. Furthermore, the public would not understand it as anything but the name of some person, since the signature of A. J. Fellows is signed in green across the face of the label. Therefore, it is understandable that the trial judge could conclude as he did "that the use of such trade-marks 'Fellows' and 'A. J. Fellows' is likely to cause confusion or mistake and deceive the public into purchasing goods bearing said trade-marks in the belief that such goods are the goods of Bellows & Company, Inc.", having previously found that "Fellows" and "A. J. Fellows" are colorable imitations of the trade-mark "Bellows" and the corporate name "Bellows & Company, Inc." The prominence of the word Fellows at the top of the label, and the signature, could easily convey the meaning to the average customer that Fellows was the producer. The trial judge evidently was convinced that the words at the bottom of the label "Blended and Bottled by" in letters one-sixteenth of an inch in height, and "The American Distilling Company" in letters one-eighth inch in height, although clearly printed thereon, did not overcome the possibility of confusion.

[4] It is true as appellant says that Bellows Whiskeys, in addition to the trade-mark "Bellows" at the top of each label, also bear a brand name such as "Partners' Choice", "Club Special", "Private Stock", etc., whereas "Fellows" is the entire brand name in the case of appellant's whiskey. This would seem to present an argument for respondent. "Bellows" is the outstanding feature that all respondent's whiskeys have in common, "Bellows" is the word emphasized in advertising, the word most likely to be remembered. New customers who might be reached by Bellows' adver-

tising, and who would not be familiar with their various types of whiskeys, might easily believe that since there is just one brand of Fellows, that it was Fellows whiskey which they had seen or heard advertised. Since a large amount of such a product is sold by bars, the possibility of confusion in such cases is obvious. The protection that is extended is to the buying public, the casual, average purchaser, and not just to the wholesale buyer or the long established customer. (See 2 Nims, Unfair Competition and Trademarks (4th ed.) pp. 1019-1020.) The rule set forth in the Restatement of the Law of Torts, Vol. III, sec. 728, p. 591, is as follows: "The similarity between a designation and a trade-mark or trade name which it is alleged to infringe is not determined by comparing the two in juxtaposition only. Since it is the effect upon prospective purchasers that is important, the conditions under which they act must be considered. Purchasers do not always see the goods in juxtaposition. They rely upon memory and vague impressions." See *Albert Dickinson v. Mellos Peanut Co.*, 7 Cir., 179 F.2d 265. This is particularly significant where as in this case respondent has spent large sums in advertising throughout the United States of which several thousands of dollars have been spent within this state.

Appellant quotes the rule of a recent California case on the test of what constitutes an infringement of any trade-mark, whether a technical trade-mark or one which has acquired a secondary significance, as follows: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers buying with ordinary caution are likely to be misled." *Scudder Food Products v. Ginsberg*, 21 Cal.2d 596, 600, 134 P.2d 255, 258. Appellant states that the entire dress, the *tout ensemble*, of the packages must be compared, and that in the instant case they are entirely dissimilar. However, the bottles are of the same general size, shape and color. The back-

ground of the labels do not differ much in size or shape and both are white. Some of the printing on each label is similar in style and color, some is different. Both labels have emblems circular in design. The word "Fellows" which is probably the most striking feature of appellant's label is in red tinged with gold, and the word "Bellows" is in black and white on some of respondent's brands, on others it is in black and white with a shade of red. Clearly then, even if this is the true test, as appellant claims, there are points of similarity and points of difference, and the most striking similarity is between the words "Bellows" and "Fellows". Therefore, this court cannot say that as a matter of law the ordinary purchaser would not be deceived, or that there is not substantial evidence as a basis for the trial judge's decision.

The "ordinary purchaser" has undoubtedly been described in a variety of ways. In *Sun-Maid Raisin Growers of California v. Mosesian*, 84 Cal.App. 485, 495, 258 P. 630, 634, this court said:

"The test as to infringement against a trade-mark does not depend upon an exact similarity in every detail, but if the general appearance is such as to deceive a casual purchaser who exercises ordinary care in the selection of the article which he wishes to buy, its use may be enjoined. Nims on Trade-Marks, (2d Ed.) pp. 235, 585; *Canterbury Candy Makers v. Brecht Candy Co.*, 54 App.D.C. 82, 294 F. 1013; *Gehl v. Hebe Co.*, 8 Cir., 276 F. 271; *O. & W. Thum Co. v. Dickinson*, 46 App.D.C. 306; *National Biscuit Co. v. J. B. Carr Biscuit Co.*, 55 App.D.C. 146, 3 F.2d 87; *McLean v. Fleming*, 96 U.S. 245, 24 L.Ed. 828. [See, also, *Rose's U. S. Notes*]. In the last case cited it is said: 'What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution are likely to be misled. * * *

Much must depend, in every case, upon the appearance and special char-

acteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection.

* * *

"In *Spieker v. Lash*, 102 Cal. 38, 45, 36 P. 362, 363, in which a judgment for plaintiff was affirmed, it is said:

"The evidence shows that the defendants' labels, while differing in some respects from those of the plaintiff, are a colorable imitation of them, the resemblance being such as to justify the conclusion that they were intended and adapted to lead the public generally to the belief that the manufacture of the original 'Lash's Kidney and Liver Bitters,' had been superseded. * * *

"Numerous authorities show a like effort to use similar words conveying the same idea, sound, or appearance, by altering the spelling or disarranging the sequence of letters. Among these cases the following similar words have been held to constitute an infringement: *Coco-Cola*—*Extract of Coca & Kola*; *Coca-Cola*—*Take Kola*; *Holeproof*—*No-Hole*; *Lily White*—*White Lily*; *Unceda*—*Iwanta* (*National Biscuit Co. v. Baker*, C.C., 95 F. 135); *Sapolio*—*Sapono*; *Hostetter's Bitters*—*Host style Bitters*; *Cascarets*—*Castorets*; *Gold Bar*—*Gold Band*; *Silver Bar*—*Silver Band*; *Stove lustre*—*Stove laquer*; *Listerine*—*Lister septine*; *Celluloid*—*Cellonite*; *Cottolene*—*Cottoleo*; *Cottolene*—*Chefolene* (*N. K. Fairbanks Co. v. Ogden Packing & Provision Co.*, supra [D.C., 220 F. 1002]); *Gold Dust*—*Gold Drop* (*N. K. Fairbanks Co. v. Luckel, King & Cake Soap Co.*, 9 Cir., 102 F. 327); *Beats-All*—*Knoxall* (*American Lead Pencil Co. v. L. Gottlieb & Sons*, C.C., 181 F. 178); *Keepclean*—*Sta-Klean*; *Crisco*—*Esco* (*Proctor &*

Gamble Co. v. Eney Shortening Co., 50 App.D.C. 42, 267 F. 344)".

[5] In *Jackman v. Mau*, 78 Cal.App.2d 234, 239, 177 P.2d 599, 602, it was said that "it is not necessary as a prerequisite to obtaining equitable relief in cases of this character that the names be identical. It is sufficient if though not identical they are sufficiently similar as to cause confusion and injury. *Academy of Motion Picture Arts & Sciences v. Benson*, 15 Cal.2d 685, 692, 104 P.2d 650. In the case just cited, at page 692 of 15 Cal.2d, at page 653 of 104 P.2d the Supreme Court quotes with approval the following rule enunciated in the case of *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, C.C., 32 F. 94, at page 97: 'Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to affect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.'" (Emphasis ours.)

In the recent *Stork Club* case which arose in California when the New York Club sought to enjoin use of its name by a San Francisco establishment which was not connected in any way with the former, the Circuit Court of Appeals, declared that "It may well be true that a prudent and worldly-wise passerby would not be so deceived. The law, however, protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the ignorant, the inexperienced, and the gullible. * * * 'The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions.'" *Stork Restaurant, Inc. v. Sahati et al.*, 9 Cir., 166 F.2d 348, 359.

In *Macleay Duff (Distillers) Ltd. v. Frankfort Distilleries, Inc.*, 1942, 129 F.2d 695, 29 C.C.P.A., Patents, 1160, the court held the trade-mark *Duff's* for whiskey

confusingly similar to Duffy's for whiskey. In that opinion it was noted that the general public in the purchase of whiskey, not being connoisseurs, order the commodity simply according to name or brand. Since the difference in appearance and sound between the two words was so slight the court thought it reasonable to hold that their concurrent use on whiskey would be likely to confuse the mind of the public or deceive purchasers as to origin.

Appellant points, however, to the case of *Alexander Young Distilling Company v. National Distillers Products Corporation*, D.C., 40 F.Supp. 748, 757, in which the court held that the trade-mark "PM" for whiskey did not infringe the trade-mark "YPM". "PM" was an abbreviation of Penn.-Maryland, the name of defendant's subsidiary. The evidence showed that the trade-mark "YPM" had never been heard of by defendant when it chose the brand "PM". However the court noted that if the public was misled, the use would be enjoined regardless of intent. The court observed that plaintiff had two brands, Blue Label and Yellow Label, of different prices and qualities. Therefore they believed a customer would not be deceived by being given a "PM" whiskey when he ordered a "YPM". However the court also stated that there could be an element of confusion in such names as "P & G" and "B & G"; "Rinex" and "Pinex", but because the letter Y was missing from defendant's trade-mark no such element of confusion would exist "(regarding the names per se) as would justify injunctive relief." That case differs also from the present, in that there the defendants presented an abundance of evidence by purchasers that confusion had not resulted to the public.

It is noted in 52 Am.Jur. p. 603, § 129, "When prompt action is taken against the use of a similar name before the second comer has established himself, a greater distinction in name may reasonably be demanded." *Federal Securities Co. v. Federal Securities Corp.*, 129 Or. 375, 276 P. 1100, 66 A.L.R. 934. Since in the present case only about 1000 cases bearing the trade-mark "Fellows" had been sold evidence of possible confusion would not need

to be as impressive as it would in a case where the product had been on the market for a considerable period.

[6] Appellant admitted at the trial that proof of actual confusion is not necessary in an action for trade-mark infringement or unfair competition when the facts are such that it can be concluded that confusion would result to the ordinary purchaser. This seems to be well established in this state. In *Winfield v. Charles*, 77 Cal.App.2d 64, 70, 175 P.2d 69, 73, the court said that it was unnecessary "to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent." It was also held in *Sun-Maid Raisin Growers of California v. Mosesian*, 84 Cal.App. 485, 497, 258 P. 630, 635, that it is "not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be deceived by the imitation of a trade-mark. (Citing authorities.)" See also *California Prune etc. Ass'n v. H. R. Nicholson Co.*, 69 Cal.App.2d 207, 221-222, 158 P.2d 764; *Weatherford v. Eytchison*, 90 Cal.App.2d 379, 384, 202 P.2d 1040. In the case of *Hat Corporation of America v. D. L. Davis Corporation*, D.C., 4 F.Supp. 613, 618, where plaintiff had used the trade-mark "Dobbs" on hats for many years, William H. Dobbs, a son of plaintiff's founder, who had previously been connected with plaintiff, attempted to license to defendant his name "W. H. Dobbs" for use on hats, and the court said "its close similarity to the name 'Dobbs,' so long used by the plaintiff and its predecessors and so thoroughly established as indicating the plaintiff's product" clearly gave rise to an inference of fraud. See also *Dodge Stationery Company v. J. S. Dodge Company*, 145 Cal. 380, 78 P. 879.

Appellant has also contended that since "Bellows" is a trade-mark and "Fellows" is a brand name, there cannot be any possible confusion. However, the name "A. J. Fellows" was registered by appellant as a trade-mark with the Secretary of State. It is clear therefore that "Fellows" is used in a trade-mark sense.

[7] The fact that the true producer's name does appear on appellant's product does not justify a colorable imitation of respondent's trade-mark. In *Menendez v. Holt*, 128 U.S. 514, 521, 9 S.Ct. 143, 144, 32 L.Ed. 526, a case wherein plaintiff had a trade-mark in the words "La Favorita", it was held to be no answer by defendant that his own name appeared thereon instead of plaintiffs. The court said: "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor."

[8] There is also no merit in the argument that because respondent used other trade-marks or brands in addition to that of "Bellows" on its labels, that there can be no infringement by the word "Fellows" on appellant's label. It is well established that the fact "that the owner of a trade-mark uses in association with it accessory symbols or words does not deprive him of the right to it." *Layton Pure Food Co. v. Church & Dwight Co.*, 8 Cir., 182 F. 24, 29. Also see *General Shoe Corporation v. Rosen*, 4 Cir., 111 F.2d 95, 99; *Alfred Schneider Co., Inc. v. Bramson*, D.C., 16 F. Supp. 493, 494; *International Cheese Co. v. Phenix Cheese Co.*, 118 App.Div. 499, 103 N.Y.S. 362.

Appellant cites *Southern Calif. Fish Co. v. White Star Canning Co.*, 45 Cal.App. 426, 187 P. 981; *American Automobile Ass'n v. American Automobile Ass'n.*, 216 Cal. 125, 13 P.2d 707, 82 A.L.R. 699; *Purity Springs & Water Co. v. Redwood Ice Delivery*, 203 Cal. 286, 263 P. 810. These cases are all distinguishable from the instant case on their facts. And the case of *National Nu-Grape Co. v. Guest*, 10 Cir., 164 F.2d 874, also cited by appellant, is distinguishable in that there could be no infringement there because the trade-mark, though registered, was invalid as a mere descriptive term.

As hereinbefore quoted from *Scudder Food Products v. Ginsberg*, supra, "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases.

All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers buying with ordinary caution are likely to be misled." [21 Cal.2d 596, 134 P.2d 258.]

[9] The learned trial judge, who had the advantage of many years of business experience, as well as many years of service as a trial judge, heard all of the evidence and observed all labels, bottles and other exhibits. We believe that he was in a good position to determine whether the trade-mark adopted by appellant in the instant case so resembled that of respondent that ordinary purchasers buying with ordinary caution are likely to be deceived. Notwithstanding the earnest and able argument of counsel for appellant we are convinced that under the authorities hereinbefore referred to there was substantial evidence to support the findings of the trial court that: "Each and both of the trade mark 'Fellows' and 'A. J. Fellows' are colorable imitations and infringements of the trade-mark 'Bellows' and the corporate name 'Bellows & Company, Inc.;" that "the use of such trade-marks is likely to cause confusion or mistake and to deceive the public into purchasing goods bearing said trade-marks in the belief that such goods are the goods of Bellows & Company, Inc. to the injury and damage of Bellows & Company, Inc.;" and that "the continued use of the trade-mark 'Fellows' and 'A. J. Fellows' by defendant corporation would result in unfair competition with Bellows & Company, Inc." We are convinced by the record, including the exhibits, and by the findings of the court, that the use of the trade-mark "Fellows" and "A. J. Fellows" was, in the language of *Thaddeus Davids v. Davids*, supra, "such as is calculated to mislead the public with respect to the origin or ownership of the goods and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise" [233 U.S. 470, 34 S.Ct. 652] and that it constituted infringement.

It follows from the foregoing that the judgment enjoining appellant from using

the names "Fellows", and "A. J. Fellows" in the manufacture, sale, distribution and advertising of their whiskey and other alcoholic beverages should be, and the same is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



101 Cal.App.2d 763

ATCHISON, T. & S. F. RY. CO. v. ROLLAWAY WINDOW SCREEN CO.

(two cases).

Nos. 14485, 14491.

District Court of Appeal, First District,
Division 1, California.

Jan. 17, 1951.

Rehearing Denied Feb. 16, 1951.

The Atchison, Topeka and Santa Fe Railway Company brought two actions against the Rollaway Window Screen Company for freight charges. The Superior Court in and for the County of Alameda, Ralph E. Hoyt, J., entered judgments based on orders granting dismissal pursuant to Code Civil Procedure § 581a, and the plaintiff appealed. The District Court of Appeal, Bray, J., held that the rules for dismissal of action unless summons shall be served and return thereon made within three years as provided by state statute and by Federal Rules of Civil Procedure involves matters of procedure and not substantive law, and, hence, fact that actions in state court for freight charges were based on federal statute, if established, could not authorize application of the federal rule rather than state statute.

Judgments affirmed.

1. Dismissal and nonsuit ⇨57

The statute providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action is mandatory. Code Civ.Proc. § 581a.

2. Dismissal and nonsuit ⇨57

The statute providing for dismissal of action unless summons shall be served

and return thereon made within three years after commencement of action is not a "statute of limitations". Code Civ.Proc. § 581a.

See publication Words and Phrases, for other judicial constructions and definitions of "Statute of Limitations".

3. Dismissal and nonsuit ⇨57

The statute providing for dismissal of action unless summons shall be served and return thereon made within three years was adopted to secure expeditious and prompt disposition of litigation, and not for benefit and repose of individuals. Code Civ.Proc. § 581a.

4. Dismissal and nonsuit ⇨80 Judgment ⇨570(12)

A judgment of dismissal under statute providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action is not a judgment on the merits and is not res judicata, and unless barred by statute of limitations, the cause of action still persists. Code Civ.Proc. § 581a.

5. Dismissal and nonsuit ⇨57

The rules for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action as provided in California statute and in Federal Rules of Civil Procedure involves matters of procedure and not substantive law, and, hence, fact that action in state court for freight charges was based on a federal statute, if established, did not authorize application of Federal Rule rather than state statute. Code Civ.Proc. § 581a; Fed.Rules Civ.Proc. rule 41(b), 28 U.S.C.A.; 28 U.S.C.A. § 2072.

6. Dismissal and nonsuit ⇨57

The state court in action based on federal statute was not authorized to apply Federal Rule providing for dismissal for want of service rather than state statute relating to dismissal upon determining that application of Federal Rule would not work a hardship on trial court. Code Civ. Proc. § 581a; Fed.Rules Civ.Proc. rule 41(b), 28 U.S.C.A.; 28 U.S.C.A. § 2072.

7. Dismissal and nonsuit 57

The words "return thereon", as used in statute providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action, requires filing the returned summons and not merely the endorsement of service thereon. Code Civ. Proc. § 581a.

See publication Words and Phrases, for other judicial constructions and definitions of "Return Thereon".

Robert W. Walker, Louis M. Welsh, Los Angeles, for appellant.

Franklin C. Stark, Stanley E. Sparrowe, Oakland, for respondent.

BRAY, Justice.

Plaintiff appeals from judgments based on orders granting dismissal, pursuant to section 581a of the Code of Civil Procedure, of two actions for freight charges.

Questions Presented.

1. Is the dismissal of actions under section 581a of the Code of Civil Procedure a matter of substantive law, rather than of procedure, when applied to causes of actions based on a federal statute? 2. Does that section require that the summons be filed within three years after the commencement of an action?

Record.

In action No. 14491, the complaint for freight charges was filed February 21, 1946. Summons and complaint was not served until more than three years thereafter, on June 20, 1949. In action No. 14485, the complaint, also for freight charges, was filed July 17, 1946. Summons and complaint was served June 20, 1949, less than three years from the filing of the complaint. Affidavit of service was made on both summons on June 20. The summons in action No. 14485 was filed September 21, and in action No. 14491, on September 28, both more than three years

from the filing of the complaints. Defendants moved to dismiss action No. 14491 for failure to serve and return the summons within three years of the commencement of the action, and in No. 14485 for failure to return the summons within that period. On the hearing, plaintiff filed an affidavit to the effect that the delay in serving summons was at defendant's request (denied by defendant), and because of certain proceedings before the Interstate Commerce Commission involving the validity of the same freight charges upon which the complaints here are based. The court granted the motions to dismiss both actions.

1. Substantive Law or Procedure?

[1] Section 581a provides that actions "must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party * * * unless the summons shall be served and return thereon made within three years after the commencement of said action". This section is mandatory. *People v. Kings County Dev. Co.*, 48 Cal. App. 72, 74, 191 P. 1004.

[2, 3] Plaintiff contends that these actions to recover freight charges are based on a federal statute and that section 581a of the Code of Civil Procedure and Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C.A., lay down substantive law and that therefore the federal rule, which leaves the matter of dismissals in the discretion of the court, should be applied here rather than section 581a. Defendant concedes for the purpose of this appeal that the actions are based on a federal statute.¹ Defendant agrees, with reservations, that in an action in a state court based on a federal statute, the substantive law to be applied is the federal law. See *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96 [supra, footnote]; *Barnet v. New York Cent. & H. R. R. Co.*, 222, N.Y. 195, 118 N.E. 625; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed.

1. There may be a question of whether actions, as here, for alleged undercharges in freight, are based on contract or on a federal statute. See *Midstate Horti-*

cultural Co. v. Pennsylvania R. Co., 1943, 320 U.S. 356, 358, 64 S.Ct. 128, 88 L. Ed. 96.

239. Thus the main question before us is whether rules for dismissals of actions as provided in section 581a and in rule 41(b) are substantive or procedural. Plaintiff cites no authority, state or federal, holding that the time within which to serve summons and bring an action to trial is substantive, or that rule 41(b) has ever been held to be part of federal substantive law or section 581a of California substantive law. Plaintiff claims that an analogy exists between rules of dismissal for lack of prosecution on the one hand, and statutes of limitation, rules as to form of complaint, burden of proof, and evidence, which have been held to constitute substantive law, on the other hand. (See *Engel v. Davenport*, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813, as to statutes of limitation; *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 26, 94 L.Ed. 100, as to form of the complaint; *Barnet v. New York Cent. & H. R. R. Co.*, supra, *Garrett v. Moore-McCormick Co.*, supra, as to burden of proof; *Western & Atlantic R. R. v. Hughes*, 278 U.S. 496, 49 S.Ct. 231, 73 L.Ed. 473, as to rules of evidence.) There is no such analogy. "It has been expressly held that § 581a is not a statute of limitations." *Rio Del Mar Country Club v. Superior Court*, 84 Cal.App.2d 214, 220, 190 P.2d 295, 300. In *People v. Kings County Dev. Co.*, supra, 48 Cal.App. 72, at page 74, 191 P. 1004, 1005, it was contended that section 581a "is nothing more nor less than a statute of limitations * * *." In holding that the section was not a statute of limitations, the court stated, 48 Cal.App. at page 77, 191 P. at page 1006, that the provisions of the section "involve merely a matter of procedure—that is the regulation of the conduct of the parties plaintiff with respect to actions after the commencement thereof for the same reason or purpose which is at the bottom of many other provisions of the code as to procedure, to wit, to facilitate or bring about a final or as speedy a disposition of the litigation as possible or as is deemed by the Legislature to be consistent with the rights, not alone of the plaintiff, but also of the adversary party or parties, and also to clear court calendars

of cases as expeditiously as possible, thus and thereby preventing an accumulation upon such calendars of actions in which, by reason of long delays in their prosecution, it may become difficult, if not in some instances impossible, to adjudicate the issues according to the real merits or justice of such causes. * * * As we have above tried to show, we are here dealing, not with a statute of limitations in the strict legal sense in which such a statute is juridically understood, but with a statute whose main or central object is to require all litigants, after commencing actions against others to establish judicially some right to which they claim to be entitled as against those they have proceeded against, to press the actions to issue and trial with reasonable and proper diligence, and this because it is in the interest of justice to do so." 48 Cal.App. at page 83, 191 at page 1008. It "is nothing more than a rule of procedure". *Gonsalves v. Bank of America*, 16 Cal.2d 169, 172, 105 P.2d 118, 120. "We are further impressed that the portion of the statute here under consideration was adopted to secure expeditious and prompt disposition of litigation, and not for the benefit and repose of individuals." *Schultz v. Schultz*, 70 Cal.App.2d 293, 297, 161 P.2d 36, 38.

[4,5] The judgment of dismissal under section 581a is not a judgment on the merits and is not *res judicata*, and, unless barred by the statute of limitations, the cause of action still persists. See *Gonsalves v. Bank of America*, supra, 16 Cal. 2d 169, 105 P.2d 118. In view of this rule, it is difficult to see how the rules of dismissal could constitute anything more than matters of procedure. Restatement of the Conflict of Laws, p. 718, § 600, states: "The rationalization adopted * * * is to distinguish between conditions of the cause of action and conditions of maintaining suit. If the cause of action is conditional, the condition is a matter of substance; if the maintenance of a suit is conditional, the condition is a matter of procedure."

Plaintiff contends that a given rule may be procedural as applied to certain condi-

tions and substantive as applied to others. If this be true, the California cases above cited definitely hold that section 581a as applied to dismissal conditions set forth therein is procedural and not substantive.

The federal cases, without exception, denominate and apply the federal rules as procedural. See *United States v. Sherwood*, 312 U. S. 584, 61 S.Ct. 767, 85 L. Ed. 1058; *John R. Alley & Co. v. Federal Nat. Bank*, 10 Cir., 124 F.2d 995; *In re Stein*, D.C., 43 F.Supp. 845; *Gillson v. Vendome Petroleum Corp.*, D.C., 35 F. Supp. 815; *Wyker v. Willingham*, D.C., 55 F.Supp. 105. The adjective nature and objective of 41(b) was emphasized in *Barger v. Baltimore & O. R. Co.*, 75 U.S.App.D. C. 367, 130 F.2d 401: "* * * the obvious purpose" of rule 41(b) "is to prevent unnecessary harassment and delay in litigation * * *." 130 F.2d at page 402. Rule 41(b), as well as the other federal rules of procedure, were promulgated by the United States Supreme Court pursuant to the power granted it by Congress to prescribe by general rules "the practice and procedure of the district courts * * * Such rules shall not abridge, enlarge or modify any substantive right * * *." 28 U.S.C.A. § 2072.

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, is not in point. There an action was brought in a federal court on grounds of diversity of citizenship. The complaint was filed within the statute of limitations as prescribed by Kansas statute. However, the summons was not served within that period, and the Kansas courts had held that an action is not commenced until the summons is served. The federal rules provide that an action is commenced upon the filing of the complaint (as in California). The United States Supreme Court held that the defendant's motion to dismiss should have been granted because the Kansas law applied. From this, plaintiff argues that in our case the state court should apply the federal rule. The logic is a bit difficult to follow. The *Ragan* case merely holds that in considering the Kansas statute of limitations, a federal

court is bound to recognize that the period during which the statute is running does not end until the service of the summons; that the requirement of service within the statutory period was an integral part of that state's statute of limitations.

[6] Plaintiff contends that in cases of this kind the state court should determine whether applying the federal rule would work a hardship on the trial court, and if not, it should be applied. He has cited no case holding that this is, or should be, the test.

2. "Return Thereon Made."

[7] Section 581a provides that not only must the summons be served within, but "return thereon" must be made, within the three year period. Plaintiff contends that this does not require filing the returned summons but merely the endorsement of service thereon. This question is no longer an open one. In *Modoc Land & Live-Stock Co. v. Superior Court*, 128 Cal. 255, 60 P. 848, the action was filed on September 5, 1896. Summons was served August 7, 1899 (within the three year period). On August 10 the officer making the service delivered the original summons with certificate of service attached to plaintiff's attorney. September 11, 1899, defendant served on plaintiff notice of motion to dismiss. September 16, (after the expiration of the three year period) the summons with the certificate thereon was filed. The court pointed out that the summons was not "returned", 128 Cal. at page 256, 60 P. at page 848, until 11 days after the expiration of the three year period and then said, 128 Cal. at page 256, 60 P. at page 849: "* * * the statute imposes the penalty of dismissal in all cases where the return is made more than three years after the commencement of the action." In *Frohman v. Bonelli*, 91 Cal.App.2d 285, 204 P.2d 890 (1949; hearing denied by the Supreme Court), the action was commenced February 3, 1945. Summons was served January 26, 1948 (within the three year period). The affidavit of service was made on the summons on January 27. February 5, defendant filed notice of motion to dis-

miss, February 6, the summons was filed with the clerk. Just as plaintiff-appellant in our case does here, "Appellant says that 'return thereon made' as used in the statute 'refers to the evidence supplied by the person serving the summons as to his official acts pursuant to the summons,' * * *." 91 Cal.App.2d at page 287, 204 P.2d at page 891. The court pointed out that in *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 P. 470, "the action was properly dismissed because the summons had not been filed within three years after the commencement of the action." 91 Cal.App.2d at page 287, 204 P.2d at page 891. It then reviewed the *Modoc Land and Vrooman* cases, *supra*, *Bellingham Bay Lumber Co. v. Western A. Co.*, 35 Cal.App. 515, 170 P. 632, and *Pearson v. Superior Court*, 122 Cal.App. 571, 10 P.2d 489, in all of which the summons was not filed until after the expiration of the three year period, and stated that these cases were "decided upon the premise that by 'return thereon made' is meant the filing of the summons in the office of the clerk together with a statement of what was done in connection with the service thereof." It then quoted the definitions of "return" given in several dictionaries and many cases from other jurisdictions, all of which, in effect, included in the definition, the bringing back of the process to the tribunal or office which issued it, and then said, 91 Cal.App.2d at page 290, 204 P.2d at page 893: "A return is the evidence by which the court is informed that the defendant has been given notice to appear in court" and 91 Cal.2d at page 291, 204 P.2d at page 893. "We conclude that the phrase 'all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action,' as used in section 581a of the Code of Civil Procedure, means that an action must be dismissed unless the summons is served and filed with the clerk of the court together with the officer's certificate of service, if it was served by an officer, or the affidavit of service of the person who served it, if it was served by any other person, within the three year period."

Haggerty v. Sherburne Mercantile Co., 1947, 120 Mont. 386, 186 P.2d 884, and *State ex rel. Montgomery Ward & Co. v. District Court*, 115 Mont. 521, 146 P.2d 1012, in construing a Montana Statute similar to section 581a, hold that the words "return made" do not include the filing of the summons. This appears to be contrary to the weight of authority in other jurisdictions, and is directly contrary to the rule in California as set forth in the *Frohman* case, *supra*, 91 Cal.App.2d 285, 204 P.2d 890.

The judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



102 Cal.App.2d 126

IN RE FRANK'S ESTATE.

TROMLEY v. COX.

Civ. 17878.

District Court of Appeal, Second District,
Division 3, California.

Feb. 2, 1951.

Rehearing Denied Feb. 19, 1951.

Hearing Denied April 2, 1951.

Proceeding in the matter of the estate of Charles S. Frank, deceased, wherein Jane F. Cox filed a will for probate contested by Ruby K. Tromley, who filed for probate a prior holographic will. The Superior Court of Los Angeles County, Andrew B. Schottky, J., rendered judgment denying probate of the last will, and admitted the holographic will to probate and contestant appealed. The District Court, Vallée, J., held that evidence sustained finding that decedent lacked testamentary capacity to make the last will.

Judgment affirmed.

I. Appeal and error ¶996

When two or more inferences can be reasonably deduced from the facts, the reviewing court cannot substitute its deductions for those of the trial judge or jury.

2. Appeal and error Ⓒ930(1)

On appeal, conflicts in evidence must be resolved in favor of party for whom verdict was returned and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

3. Wills Ⓒ55(5)

In will contest, evidence supported findings of lack of testamentary capacity of the decedent who, at the time the will was executed, was in terminal stages of cancer.

4. Wills Ⓒ21

In determining the mental capacity of a person to execute a will, his condition of mind at the time of signing the will is important.

5. Wills Ⓒ53(2)

Evidence of testator's mental status, together with appearance, conduct, acts, habits, and conversation before and after execution of will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time the will was executed.

6. Wills Ⓒ384

In will contest, instruction that, if executed before witnesses who in writing probably have attested the soundness of mind of the testator, such witnesses may scarcely be presumed to be willing to stultify their former solemn declarations, was erroneous, but error was not reversible since instruction merely stated a commonplace matter within the general knowledge of the jury. Const. art. 6, § 4½.

7. Appeal and error Ⓒ109

An order denying the motion for judgment notwithstanding the verdict is not appealable. Probate Code, § 1240.

Joseph D. Taylor, Gilligan & Fratt, Los Angeles, for appellant.

Dudley Robinson, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by Jane F. Cox from (1) a judgment entered on a verdict of a jury denying probate of an alleged will of Charles

S. Frank, deceased, dated September 27, 1948, proffered by her, (2) an order admitting decedent's holographic will of July 26, 1946, to probate, proffered by respondent Ruby K. Tromley, and (3) an order denying her motion for a judgment notwithstanding the verdict.

On June 21, 1948, the decedent, Colonel Charles S. Frank, seriously ill with cancer, entered an army hospital. On August 5, 1948, he was operated upon but his condition became progressively worse as the cancer spread. On October 6, 1948, he died at the age of 76 years. He was a widower, with no surviving issue. Respondent was a close and trusted friend of decedent for some 15 or 16 years. Appellant was also a friend whom decedent had known for about the same length of time.

On October 8, 1948, appellant filed the will of September 27, 1948, for probate. By this will, a witnessed one, decedent bequeathed \$1,000 to respondent and the residue to appellant. It was contested by respondent, who, in turn, filed the holographic will of July 26, 1946, for probate, which left decedent's entire estate to her. The contest was tried upon the grounds, and the jury found, that decedent was of unsound mind and that the will was not executed in the manner and form required by law. The issue of unsoundness of mind was predicated upon decedent's alleged mental degeneration due to his advanced age and the ravages of the disease which ultimately caused his death.

Appellant challenges the sufficiency of the evidence to support the jury's findings, and complains of prejudicial error in the giving of an instruction.

[1-3] The function of an appellate court is no different on an appeal from a judgment denying probate of a will because of mental incompetency than in any other case. "All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury.

Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Estate of Teel, 25 Cal.2d 520, 154 P.2d 384." Estate of Trefren, 86 Cal.App.2d 139, 142, 194 P.2d 574, 575.

The evidence showed that from the time decedent entered the hospital until his death, he was in the terminal stages of cancer, which had spread throughout his entire system. The disease had paralyzed his vocal cords to such an extent that after his operation it became increasingly difficult for him to speak above a whisper for even a short period of time or to make himself understood. Several witnesses, all of whom were intimately acquainted with decedent, testified that during the last two or three weeks of his life his speech became so unintelligible that they were unable to understand him. The attending hospital physician testified that he had difficulty in understanding decedent at times and that in the last two or three weeks before his death he had difficulty in getting answers to such simple questions as the location of pain, what decedent had had to eat, and questions of similar import. Of these witnesses, four intimate friends and two close relatives testified to marked physical and mental changes they observed in decedent during his hospitalization and especially following his operation on August 5th. The changes specifically mentioned were decedent's inability to make himself understood shortly after September 1st and during the last two or three weeks of his life; his inability to intelligently carry on a conversation; his lack of interest in his surroundings and in those who visited him; his failure to recognize his close relatives; certain mental vagaries; and his inability to normally engage in even a simple business transaction, such as signing checks, which led one witness who had had dealings with decedent before and in the early days of his hospitalization, to conclude that it was impossible for decedent "to dictate a will or any other instrument either physically or mentally" after September 1st. A number of intimate acquaintances testified that decedent was not of sound and disposing mind during the last two or three weeks preceding his death and gave their reasons for their opin-

ions. The weight of their testimony was for the jury. Parenthetically, the disputed will was executed nine days before decedent's death.

The jury, by its verdict, and the trial judge, by his denial of the motion for judgment notwithstanding the verdict, were reasonably justified in concluding from the foregoing resumé of the evidence, as well as from other circumstances appearing in the record, that decedent was of unsound mind during the last two or three weeks of his life, and in inferring therefrom that such mental incompetency existed at the time of the execution of the will.

[4, 5] Appellant relies upon the presumption of testamentary capacity and upon the testimony of the witnesses present at the time of the execution of the will—the attorney who drew the will and the two subscribing witnesses—as conclusively establishing decedent's mental soundness at the time the will was executed. She argues that there was no evidence presented by contestant showing that decedent was not mentally competent at the very moment he executed the disputed will and, therefore, no evidence to support the jury's finding of mental incompetency. While it is true that the critical inquiry in determining the mental capacity of a person to execute a will is his condition of mind at the time of its signing, nevertheless, proof of the unsoundness of mind of a testator and of the facts upon which his state of mind depends is not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits and conversation, both before and after the execution of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time the will was executed. Estate of Dupont, 60 Cal. App.2d 276, 285, 140 P.2d 866; Estate of Miller, 16 Cal.App.2d 154, 165, 60 P.2d 498; Estate of Alexander, 111 Cal.App. 1, 7, 295, P. 53. It cannot be said that the testimony of contestant's witnesses did not indicate decedent's mental condition at the time of the execution of the will. The testimony of witnesses who were present at the time

of the execution of a will as to the soundness of mind of the testator is not conclusive against the testimony of other witnesses who saw the testator within a few days of the execution of the will and the other circumstances in the case. *Estate of Miller*, supra, 16 Cal.App.2d at page 165, 60 P.2d at page 503; *Estate of McDonald*, 191 Cal. 161, 167, 215 P. 545; *Estate of Harney*, 103 Cal.App. 349, 351, 284 P. 464. The presumption of testamentary capacity and the testimony of the witnesses present at the time the will was executed merely created a conflict which was resolved by the jury in favor of respondent.

By reason of the foregoing it is unnecessary to consider whether the finding that the will was not executed in the manner and form required by law is supported by the evidence.

[6] The challenged instruction,¹ which appellant argues was prejudicial, was requested by respondent. It should not have been given. That portion of the instruction to which appellant objects,—“If executed before witnesses who in writing probably have attested the soundness of mind of the testator, such witnesses may scarcely be presumed to be willing to stultify their former solemn declarations”—is argumentative, an invasion of the province

of the jury, and not a statement of law. However, the instruction merely told the jury a mere commonplace proposition within the general knowledge of the jurors—that when a person has once attested, in writing, to what may be deemed a “solemn” declaration, it is unlikely that he will at some later time repudiate such attested “solemn” declaration. It has frequently been held that the giving of an instruction, although erroneous, will not be held reversible error where, by it, the jury is instructed as to a mere commonplace matter within their general knowledge. See *Medlin v. Spazier*, 23 Cal.App. 242, 245–246, 137 P. 1078; *Egan v. Bishop*, 8 Cal.App.2d 119, 124, 47 P.2d 500; *Hirshfeld v. Dana*, 193 Cal. 142, 143, 160, 223 P. 451; *Estate of Keegan*, 139 Cal. 123, 127, 72 P. 828; *Davis v. McNear*, 101 Cal. 606, 609, 36 P. 105; *Whitaker v. California Door Co.*, 7 Cal. App. 757, 759, 95 P. 910; *Goss v. Steiger Terra Cotta & Pottery Wks.*, 148 Cal. 155, 156, 82 P. 681; *Estate of Nutt*, 181 Cal. 522, 529, 185 P. 393; 24 Cal.Jur. 840, 850, secs. 99, 107. While error, the giving of the instruction was harmless. We do not believe it was so prejudicially erroneous as to require a reversal of the judgment or that the verdict would have been different had it not been given. After an examination of the entire cause, including the evidence, we

1. “You are instructed that ordinarily, it may be said that on the contest of a will on the ground of unsoundness of mind of the testator the particular issue to be submitted for the determination of the jury is whether at the time of the execution of the will the testator was possessed of testamentary capacity. Naturally, the contestant of a will is rarely able to produce any evidence favoring his contention excepting that which relates to conditions surrounding the testator either before or after the will was executed. If executed before witnesses who in writing probably have attested the soundness of mind of the testator, such witnesses may scarcely be presumed to be willing to stultify their former solemn declarations. And so it happens that, in the nature of things, what transpired at the exact moment when the testator affixed his signature to the document and when the witnesses, if any, certified to the facts required by the statute are facts ordinarily extremely difficult of pro-

duction by the contestants, or, if such facts be within his ready power to produce, are quite in conflict with the other evidence by which the contestant may hope to sustain his theory of the case. Consequently for the support of his cause the contestant must rely upon a showing of conditions existing either preceding or following, or both preceding and following the precise moment when the testator signed his purported will.

“While the ultimate question always is whether at the very instant the will was executed, was the testator of sound mind, nevertheless testamentary capacity may be indicated by circumstances and conditions surrounding the testator both before and after the execution of the will, respectively, just as certainly, clearly, and unmistakably as by evidence of what was the general conduct and condition of the testator at the very instant that the testator affixed his name to the instrument.”

cannot say that the error complained of resulted in a miscarriage of justice. Const., Art. VI, sec. 4½.

[7] The judgment denying probate of the will of September 27, 1948, and the order admitting to probate the will of July 26, 1946, are, and each is, affirmed. The appeal from the order denying the motion for judgment notwithstanding the verdict is dismissed. This order is non-appealable. Prob. Code, sec. 1240; Estate of Hart, 92 Cal.App.2d 691, 696, 208 P.2d 59.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



100 Cal.App.2d Supp. 859

BALLARINI, In Behalf of LODGE 1327, INTERNATIONAL ASS'N OF MACHINISTS, PRODUCTION & AERONAUTICAL WORKERS v. SCHLAGE LOCK CO. et al.
No. 2074.

Appellate Department, Superior Court,
City and County of San Francisco,
California.

Nov. 17, 1950.

Anthony Ballarini, in behalf of Lodge 1327, International Association of Machinists, Production and Aeronautical Workers, and 48 assignor members thereof, sued the Schlage Lock Company and others to recover wages for time taken off by such members from their work as defendants' employees on a general election day. From a judgment of the Municipal Court of the city of San Francisco for plaintiff, defendants appealed. The Superior Court, Kaufman, J., held that the statute providing that voters may absent themselves from their employment for two consecutive hours between the opening and closing of the polls on election days without penalties or deductions from their wages is constitutional as valid exercise of state's police power and is a part of every employment contract.

Judgment reduced in amount and affirmed as reduced.

Cal.Rep.225-226 P.2d—50

1. Constitutional law ⇨81

The state may exercise its police power whenever public interests demand it.

2. Constitutional law ⇨81

In exercise of state's police power, large discretion is vested in legislature to determine, not only what public interests require, but what measures are necessary for protection of such interests.

3. Constitutional law ⇨81

To justify state in exercising its police power on public's behalf, interests of public generally, as distinguished from those of particular class, must appear to require such interference, and means for protection of such interests must appear to be reasonably necessary for accomplishment of that purpose and not unduly oppressive on individuals.

4. Elections ⇨5

The state may take measures to deal with its citizens' rights to exercise legislative franchise, which is primary act of sovereignty.

5. Elections ⇨5

Any law enacted for purpose of insuring full and free performance of right of elective franchise is proper exercise of state's police power as in public interest and tending to promote general welfare of all citizens of state.

6. Constitutional law ⇨48

There is a strong presumption that a statute is constitutional.

7. Constitutional law ⇨70(3), 81

Determination of need for mode of exercising state's police power is for legislative body, and courts will not hold enactments invalid, unless palpably unreasonable, arbitrary or capricious and having no tendency to promote public welfare, safety, morals or general welfare.

8. Constitutional law ⇨70(3)

Courts are not concerned with wisdom or policy of laws enacted under police power and cannot substitute their judgment for that of legislative body.

9. Constitutional law ⇨48

A law must be upheld, if different minds may differ as to reasonableness of regulation imposed thereby.

10. Constitutional law Ⓒ81, 117

The state's police power, being continuous, must ever be reposed somewhere and cannot be barred or suspended by contract or irrevocable law.

11. Constitutional law Ⓒ117

Parties are presumed to contract in contemplation of state's inherent right to exercise police power reserved to sovereign for protection of peace, safety, health and morals, and its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.

12. Contracts Ⓒ167

All applicable laws in existence when agreement is made enter into and form part of it as fully as if expressly referred to and incorporated in its terms.

13. Contracts Ⓒ167

The settled law of land when contract is made becomes part of it and must be read into it.

14. Elections Ⓒ311

The Elections Code section providing that voters may absent themselves from their employment for two consecutive hours between opening and closing of polls on election days, without penalties or deductions from their wages, is constitutional as valid exercise of state's police power in public interest and promoting public welfare. Elections Code, § 5699.

15. Master and servant Ⓒ3(2)

The Elections Code section providing that voters may absent themselves from their employment for two consecutive hours between opening and closing of polls on election days, without penalties or deductions from their wages, is as much a part of every employment contract, entered into and to be performed in state, as if expressly incorporated therein. Elections Code, § 5699.

16. Appeal and error Ⓒ115(2)

The amount of judgment for plaintiff in action by employees' assignee to recover wages for time taken off by assignors from their work on election day, as authorized by statute, must be reduced on appeal by amount allowed for wages of assignors

who failed to appear on trial and were not shown to have taken any time off for purpose of voting on such day. Elections Code, § 5699.

Littler, Coakley & Lauritzen, San Francisco, for appellants.

Elmer P. Delany, San Francisco, for respondent.

KAUFMAN, Judge.

This is an appeal from a judgment of the Municipal Court in favor of plaintiff and respondent upholding the validity and constitutionality of Section 5699 of the Elections Code of the State of California.

Said Elections Code Section reads as follows: "Every voter shall, on the day of every general, direct primary or presidential primary election at which he is entitled to vote, be entitled to absent himself from any service or employment in which he is then engaged for two consecutive hours between the time of opening and the time of closing the polls. The voter shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages."

The record before us shows that plaintiff is a member of Lodge 1327 Association of Machinists, and prosecutes this action as an assignee and on behalf of forty-eight assignor members of the Association who took time off (two hours) on November 8, 1948, a general election day falling within the provisions of Elections Code, § 5699. This action is to recover their wages for the time taken off pursuant to the provisions of Elections Code, § 5699.

Appellants, who are the employers of the forty-eight members of the Machinists Association contend that Elections Code, § 5699 is void and unconstitutional in so far as it provides that no deduction shall be made on account of the worker's absence on election day from his salary or wages.

Similar election code provisions contained in the laws of sister states have been passed upon by the courts of those

states and such provisions have been upheld in some states and declared void in others.

Our Elections Code Section 5699 was first adopted by the Legislature in 1891, and has been on our statute books ever since. It has never until now been under attack before our courts.

[1,2] In considering the validity of such a statute it is well to note that the state may exercise its police power whenever the public interests demand it, and in this particular, a large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. See *Barrett v. State*, 220 N. Y. 423, 116 N.E. 99, L.R.A.1918C, 400; *People v. Ford Motor Co.*, 271 App.Div. 141, 63 N.Y.S.2d 697, 698.

[3] To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of that purpose, and not unduly oppressive upon individuals. See *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

[4,5] The State of California is, of course, entitled to take measures to deal with the rights of its citizens to exercise the legislative franchise, a subject matter which, under our form of Government, is all important and is itself a primary act of sovereignty. Surely, any law that has for its purpose the insuring of a full and free performance of the right of elective franchise is in the public interest and tends to promote the general welfare of all of the citizens of the State. Such a law would be a proper exercise of the State's police power.

[6] In passing on the validity of the statute here involved we must have in mind that there is a strong presumption that the statute is constitutional.

[7-9] In *Justesen's Food Stores v. City of Tulare*, 43 Cal.App.2d 616, 111 P.2d 424, the Court held:

"A legislative body, in exercise of its police power, has a broad discretion to determine the measures necessary for protection of public interests. The determination of a need for a mode of exercising the power is for the legislative body, and courts will not hold enactments invalid unless they are palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare. Every presumption is in favor of reasonableness of the law and its validity.

"Courts are not concerned with the wisdom or policy of laws enacted under police power and cannot substitute their judgment for that of a legislative body. If different minds might differ as to the reasonableness of a regulation, the law must be upheld."

Bearing in mind that the statute here under consideration has been on the books since 1891, can it not be said that all employment contracts, either oral or written, express or implied, are entered into subject to said statute and in effect incorporating the terms of said statute.

[10-12] In *Mott v. Cline*, 200 Cal. 434, 253 P. 718, it was held:

"The police power of the state, being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or irrevocable law; and it is to be presumed that parties contract in contemplation of the inherent right of the state to exercise the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals, and its effect cannot be nullified in advance by making contracts inconsistent with its enforcement."

"All applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms".

See *Wing v. Forest Lawn Cemetery Ass'n*, 15 Cal.2d 472, 101 P.2d 1099, 1101, 130 A.L.R. 120.

[13] The settled law of the land at the time a contract is made becomes a part of it and must be read into it.

See *Weinrich Estate Co. v. A. J. Johnston Co.*, 28 Cal.App. 144, 151 P. 667; Cal. Jr. 10 year Supp. Vol. 4, p. 186.

In *Brown v. Ferdon*, 5 Cal.2d 226, 231, 54 P.2d 712, 714 the Court said: "It is settled that all the laws of a state existing at the time a contract is made, which effect the rights of the parties to the contract, enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract."

In *Gardner v. Rich Mfg. Co.*, 68 Cal. App.2d 725, 730, 158 P.2d 23, the Court held: Orders of the Railroad Commission establishing and fixing schedules of minimum rates, rules and regulations become a part of every contract between a highway contract carrier and the shipper.

In *Keating v. Preston*, 42 Cal.App.2d 110, 111, 108 P.2d 479, the Court held, in construing a lease: "Penal Code, section 337a, relating to pool selling, bookmaking, etc., is deemed to constitute a part of a lease of premises for use in the restaurant business."

[14, 15] It is, therefore, our considered opinion that Elections Code, Section 5699 is valid and constitutional because:

1. It is a valid exercise of the state's police power as being in the public interest and promoting the public welfare and,

2. Said Election Code is as much a part of every employment contract entered into and to be performed in the State of California as though expressly incorporated in said employment contract.

[16] Appellant makes the additional contention that on the trial in the Court below some fourteen of plaintiff's assignors failed to appear and that the record is barren of any evidence as to whether they took any time off for the purpose of voting on election day. With this contention we agree, and we find from the record that these assignors were allowed \$18.67 in the lower court's judgment. The judgment must, therefore, be reduced by this amount.

In view of the foregoing the judgment of the lower Court is reduced to the sum of \$80.02, and as so reduced it must be, and it is hereby affirmed.

GRIFFIN, P. J., and MURPHY, J., concur.



